S. Hrg. 100-1011, Pt. 1

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 16, 17, 18, 19, 21, 22, 23,
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CONTENTS

Page

Hearing Dates IV

Chronological List of Witnesses, Questioning and Materials Submitted IV

Post-Hearing Correspondence Between Judge Bork and the Committee .... XXI, 3896

Additional Submissions for the Record .... XXII, 3959

Alphabetical Index of Witnesses, Questioning and Materials Submitted for the Record XXVIII

Appendix: Report of the Committee 6180

Witness List 6501

HEARING DATES

Page

Tuesday, September 15, 1987 1
Wednesday, September 16, 1987 193
Thursday, September 17, 1987 319
Friday, September 18, 1987 445
Saturday, September 19, 1987 795
Monday, September 21, 1987 865
Tuesday, September 22, 1987 1263
Wednesday, September 23, 1987 2095
Friday, September 25, 1987 2241
Monday, September 28, 1987 2759
Tuesday, September 29, 1987 3023
Wednesday, September 30, 1987 3349

CHRONOLOGICAL LIST OF WITNESSES, QUESTIONING AND MATERIALS SUBMITTED

Tuesday, September 15, 1987

Presenters

Ford, Honorable Gerald R., former President of the United States 3
  Questioning by Senator DeConcini 11

Dole, Honorable Bob, United States Senator from the State of Kansas 12

Danforth, Honorable John C., United States Senator from the State of Missouri 17

Fish, Honorable Hamilton, Jr., Representative in Congress from the State of New York 21

Opening Statements of Committee Members

Biden, Honorable Joseph R., Jr 94
Thurmond, Honorable Strom 29
Kennedy, Honorable Edward M 32
Hatch, Honorable Orrin G 35
Metzenbaum, Honorable Howard M 44
Simpson, Honorable Alan K 47
DeConcini, Honorable Dennis 51
Grassley, Honorable Charles E 59
Leahy, Honorable Patrick J 66
Specter, Honorable Arlen 75
Heflin, Honorable Howell T 77
Humphrey, Honorable Gordon J 85
Simon, Honorable Paul 92
Byrd, Honorable Robert C 121

Witness

Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit, to be Associate Justice of the Supreme Court of the United States 103
Opening Statement 103
  Questioning by:
    Chairman Biden 112, 127

Page
Senator Byrd 126
Senator Thurmond 128
Senator Kennedy 149
Senator Hatch 176

Prepared Statements

Ford, Honorable Gerald R 6
Dole, Honorable Bob 14
Danforth, Honorable John C 19
Fish, Honorable Hamilton, Jr 24
Hatch, Honorable Orrin G 39
Metzenbaum, Honorable Howard 45
DeConcini, Honorable Dennis 54
Grassley, Honorable Charles E 63
Leahy, Honorable Patrick J 70
Heflin, Honorable Howell T 80
Humphrey, Honorable Gordon J 89
Biden, Honorable Joseph R., Jr 99
Bork, Judge Robert H 106

Materials Submitted for the Record

Letter from Judge James F. Gordon to Chairman Biden, August 24, 1987 136
Memorandum from Judge Bork to Judge Roger Robb, October 1, 1982 139
Memorandum from Judge Robb to Judges Bork and Gordon, October 5, 1982 140
Memorandum from Judge Bork to Judges Robb and Gordon, October 8, 1982 141
Letter from Judge Gordon to Judge Bork, December 17, 1982 143
Memorandum from Judge Robb to Judges Bork and Gordon, March 19, 1982 144
Memorandum from Judge Bork to Judges Robb and Gordon, September 17, 1982 145
Letter from Judge Bork to Judge Gordon, September 24, 1982 146
Speech by Robert Bork at the Mayflower Hotel, May 1974 163
Memorandum from Robert Bork to the Attorney General regarding pocket vetoes, January 26, 1976 177

Wednesday, September 16, 1987

Witness

Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit 193
Questioning by:
- Senator Metzenbaum 193, 235
- Chairman Biden 232, 241, 258, 264
- Senator Kennedy 235
- Senator Simpson 236, 242
- Senator DeConcini 248
- Senator Grassley 259, 264
- Senator Leahy 267
- Senator Specter 277
- Senator Heflin 288
- Senator Humphrey 296
- Senator Simon 307

Materials Submitted for the Record

Memorandum from Alexander M. Haig, Jr. to President Nixon, August 2, 1973 198
Letter from Robert Bork to Alexander Haig, July 31, 1973 199
Letter from Charles L. Black, Jr. to *The New York Times*, July 25, 1973 200
Memorandum from Patrick Buchanan to Alexander Haig, August 3, 1973, with copy of Charles L. Black, Jr., "Mr. Nixon, the Tapes, and Common Sense," *The New York Times*, undated 202
Memorandum from Alexander Haig to President Nixon, August 8, 1973 204
Excerpt from the *Congressional Record*, August 1, 1973, with letter from Charles L. Black, Jr. to Congressman Bob Eckhardt, July 30, 1973 205
Letter from Robert Bork to Alexander Haig, August 3, 1973, and *Congressional Record* excerpt, August 1, 1973 212

Page
Letter from Robert Bork to Leonard Garment, August 3, 1973 215
Telephone Memorandum, The White House, August 3, 1973 216
Letter from Senator Kennedy to Robert Bork, November 16, 1973 218
Letter from Robert Bork to Senator Kennedy, undated 223
Newspaper article by Lloyd N. Cutler, "Judge Bork: Well Within the Mainstream," *The Washington Post,* September 16, 1987 247
Letter from Warren I. Cikins to *The Washington Post,* July 28, 1987 310
Letter to the editor from Joshua O. Haberman, *The Washington Post,* August 6, 1987 311

Thursday, September 17, 1987

Witness

Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit 319
  Questioning by:
    Chairman Biden 319, 405
    Senator Thurmond 329
    Senator Kennedy 336
    Senator Hatch 345
    Senator Metzenbaum 360
    Senator Simpson 380
    Senator DeConcini 391
    Senator Grassley 400, 406
    Senator Leahy 416, 427
    Senator Humphrey 426, 427
    Senator Specter 427
    Senator Simon 438

Materials Submitted for the Record

List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities," submitted by Judge Bork 354
List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women," submitted by Judge Bork 357
Compilation of "Bork on Bork—The World According to Robert Bork," prepared by Senator Kennedy, September 17, 1987 370
Letter from James T. Halverson and other previous chairmen of the Section of Antitrust Law of the American Bar Association to *The Washingon Post,* August 7, 1987 388
List of "100 Selected Law Professors Favoring the Confirmation of Robert H. Bork as an Associate Justice of the United States Supreme Court" 408

Friday, September 18, 1987

Witness

Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit 445
  Questioning by:
    Senator Heflin 445
    Chairman Biden 452, 593, 642, 664, 676, 679, 696
    Senator Humphrey 453, 736
    Senator Thurmond 464
    Senator Metzenbaum 467, 678
    Senator Hatch 471, 594, 643
    Senator Kennedy 646, 666
    Senator Simpson 669, 677
    Senator DeConcini 676, 722
    Senator Byrd 679
    Senator Grassley 689
    Senator Specter 713
    Senator Leahy 746

Materials Submitted for the Record

Newspaper article by Stuart A. Smith, "Bork Deserves to be a Justice," *The New York Times,* September 16, 1987 455

Page

List of "Substantive Pro-Minority and Pro-Women Appellate Court Decisions by Judge Bork," prepared by Senator Hatch, with copies of decisions 472
List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women," submitted by Senator Hatch 583
List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities," submitted by Senator Hatch 584
Transcript of Department of Justice "Press Conference of Honorable Robert H. Bork, Acting Attorney General of the United States," with attachments, October 24, 1973 595
Newspaper article, "Senate Democrats Ask Independent Special Prosecutor," *The Washington Post,* October 24, 1973 632
Newspaper article, "Nixon Plan on Prosecutor is Opposed by Mansfield," *The New York Times,* October 28, 1973 634
Newspaper article, "Nixon and Bork Reported Split on Prosecutor's Role," *The New York Times,* October 29, 1973 636
Newspaper article, "A Retraction on Bork," *The Washington Post,* November 22, 1973 638
Excerpt from *Stonewall. The Real Story of the Watergate Prosecution,* by Richard Ben-Veniste and George Frampton, Jr. (Simon and Schuster 1977)... 639
Article by Robert Bork, "The Struggle Over the Role of the Court," *National Review,* September 17, 1982 650
Speech by Robert Bork, "The Crisis in Constitutional Theory: Back to the Future," The Philadelphia Society, April 3, 1987 653
Letter from Paul Marcus to Senator DeConcini, September 17, 1987 725
Newspaper article, "UA's Dean Marcus Calls for Bork's Confirmation," *Arizona Daily Star,* August 29, 1987 726
Compilation of "Statistics Concerning Judge Bork's Record on Appeal In Cases Where He Wrote or Joined the Majority Opinion," prepared by Senator Humphrey 737
Compilation of "Statistics Concerning Subsequent History with Respect to Judge Bork's Dissenting Opinions," prepared by Senator Humphrey 740
Passage from the 1967 hearing on the nomination of Justice Thurgood Marshall, submitted by Senator Humphrey 744
Letter from Judge Bork to Chairman Biden regarding *Vander Jagt* v. *O'Neill,* October 1, 1987 756
Memorandum from Judge Robb to Judges Bork and Gordon, March 19, 1982 ... 761
Memorandum from Judge Bork to Judges Robb and Gordon, September 17, 1982 762
Letter from Judge Bork to Judge Gordon, September 24, 1982 763
Memorandum from Judge Bork to Judge Robb, October 1, 1982 764
Memorandum from Judge Robb to Judges Bork and Gordon, October 5, 1982 ... 765
Memorandum from Judge Bork to Judges Robb and Gordon, October 8, 1982 ... 766
Letter from Judge Gordon to Judge Bork, December 17, 1982 768
Declaration of Paul Larkin, September 25, 1987 769
Declaration of John Harrison, September 28, 1987 772
Affidavit of Ruth Luff, September 25, 1987 775
Letter from Senator Simpson to Joan E. Bertin, September 30, 1987 779
Press release of the American Civil Liberties Union, September 29, 1987 781
Letter from Joan E. Bertin to Chairman Biden, September 29, 1987 782
"Memorandum and Analysis: *OCAW* v. *American Cyanamid Co.,*" prepared by the American Civil Liberties Union 783
Letter from Joan E. Bertin to Senator Simpson, September 23, 1987 785
Letter from Betty J. Riggs to Senators, September 28, 1987 788

Saturday, September 19, 1987

Witness

Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit 795
  Questioning by:
    Senator Heflin 795
    Senator Specter 815
    Senator Kennedy 842
    Senator Hatch 845
    Senator Simpson 850

Closing Statements

Page
- Bork, Robert H., United States Circuit Court Judge for the District of Columbia Circuit 855
- Simpson, Honorable Alan K 855
- Hatch, Honorable Orrin G 857
- Biden, Honorable Joseph R., Jr 860

Materials Submitted for the Record

- Speech by Robert Bork, "The Crisis in Constitutional Theory: Back to the Future," The Philadelphia Society, April 3, 1987 797
- Letter from Judge James Gordon to Chairman Biden, August 24, 1987 808
- Compilation of "Unanimous Pro-Labor Law Cases," prepared by Senator Hatch 846

Monday, September 21, 1987

Witnesses

- Coleman, William T., O'Melveny & Myers, Washington, D.C 867
  - Questioning by:
    - Senator Thurmond 954, 964
    - Senator Hatch 955, 964
    - Chairman Biden 962, 992, 1001
    - Senator Metzenbaum 963, 966
    - Senator Simpson 968
    - Senator Heflin 983
    - Senator Grassley 984
    - Senator Specter 988, 992
    - Senator Humphrey 993
    - Senator Kennedy 999
- Jordan, Barbara, professor, University of Texas, Austin 1004
  - Questioning by:
    - Senator Kennedy 1046
    - Senator Specter 1046
    - Senator Metzenbaum 1049
    - Senator Humphrey 1051, 1064
    - Chairman Biden 1053
- Young, Andrew, Mayor, Atlanta, Georgia 1067
  - Questioning by:
    - Chairman Biden 1078
    - Senator Kennedy 1078
    - Senator Specter 1080
    - Senator Metzenbaum 1082
    - Senator Humphrey 1083
    - Senator Leahy 1084
- Marshall, Burke, professor, Yale University Law School 1087
  - Questioning by:
    - Chairman Biden 1099
    - Senator Metzenbaum 1101
    - Senator Hatch 1102
    - Senator Grassley 1103
    - Senator Specter 1104
    - Senator Humphrey 1109
- Levi, Edward H., professor, University of Chicago Law School 1111
  - Questioning by:
    - Senator Thurmond 1120
    - Senator Hatch 1120
    - Senator Specter 1121
- Smith, William French, Gibson, Dunn & Crutcher, Los Angeles, California 1124
  - Questioning by:
    - Senator Thurmond 1132
    - Senator Leahy 1132
    - Senator Grassley 1133
    - Senator Metzenbaum 1135
    - Chairman Biden 1136
    - Senator Specter 1137

Page

- Senator Humphrey ... 1140
- Senator Simpson ... 1142

Katzenbach, Nicholas deB., Riker, Danzig, Scherer, Hyland & Perretti, Morristown, New Jersey ... 1146

- Questioning by:
  - Senator Thurmond ... 1148
  - Senator Leahy ... 1149
  - Senator Hatch ... 1150
  - Senator Heflin ... 1151
  - Senator Simpson ... 1152
  - Senator Grassley ... 1154
  - Senator Specter ... 1155

Rogers, William P., Rogers & Wells, New York, New York ... 1160

- Questioning by:
  - Senator Thurmond ... 1169
  - Senator Hatch ... 1171
  - Senator Metzenbaum ... 1172, 1175
  - Chairman Biden ... 1174
  - Senator Simpson ... 1176
  - Senator Specter ... 1178
  - Senator Humphrey ... 1180

Panel:

- Tyler, Harold R., Jr., chairman, Standing Committee on Federal Judiciary of the American Bar Association ... 1184
- Fiske, Robert, former chairman, Standing Committee on Federal Judiciary of the American Bar Association ... 1184
- Questioning by:
  - Chairman Biden ... 1185, 1227, 1247
  - Senator Thurmond ... 1189, 1247
  - Senator Leahy ... 1193
  - Senator Hatch ... 1196
  - Senator Metzenbaum ... 1201
  - Senator Simpson ... 1205
  - Senator Heflin ... 1208
  - Senator Grassley ... 1210
  - Senator Humphrey ... 1213

Prepared Statements

Coleman, William T. ... 874

Young, Andrew ... 1071

Marshall, Burke ... 1090

Levi, Edward H ... 1115

Smith, William French ... 1128

Rogers, William ... 1165

Brownell, Herbert ... 1261

Materials Submitted for the Record

List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities," submitted by Senator Simpson ... 975

List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women," submitted by Senator Simpson ... 978

Written questions submitted by Senator Simpson in connection with William Coleman's testimony ... 979

Article by Charles L. Black, Jr., "A Note on Senatorial Consideration of Supreme Court Nominees," 79 *Yale Law Journal* 657 (1970) ... 1007

Supreme Court decision in *Olmstead* v. *United States,* 277 U.S. 438 (1928) ... 1015

Speech by Robert Bork at the Mayflower Hotel, May 1974 ... 1054

Letter from the American Bar Association to then-Chairman Strom Thurmond regarding the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States, August 5, 1987 ... 1218

Letter from the American Bar Association to then-Chairman Strom Thurmond regarding the nomination of William Hubbs Rehnquist to be Associate Justice of the Supreme Court of the United States, July 29, 1986 ... 1223

Letter from the American Bar Association to Chairman Joseph R. Biden, Jr. regarding the nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, September 21, 1987 ... 1228

Page
American Bar Association reprint, "Standing Committee on the Federal Judiciary, How it Works" 1235
Minutes of the American Bar Association's meeting with Judge Bork (1987 nomination) 1250
Letter from Harold Tyler to Senator Metzenbaum, September 4, 1987 1255
Letter from Senator Metzenbaum to Harold Tyler, August 26, 1987 1256
Excerpts from William Coleman's Memorandum on Robert Bork for the 1982 American Bar Association Report 1258
Telegram from Herbert Brownell to Chairman Biden, September 20, 1987 1260

Tuesday, September 22, 1987

Witnesses

Tribe, Laurence H., professor, Harvard Law School 1267
  Questioning by:
    Chairman Biden 1297
    Senator Thurmond 1299
    Senator Kennedy 1300
    Senator Hatch 1303
    Senator Metzenbaum 1307
    Senator Simpson 1310
    Senator DeConcini 1315
    Senator Grassley 1318
    Senator Leahy 1321
    Senator Specter 1324
    Senator Heflin 1328
    Senator Humphrey 1330
Panel:
  Hills, Carla A., Weil, Gotshal & Manges, Washington, D.C 1347
  McConnell, Michael, professor, University of Chicago Law School 1354
  Born, Gary, adjunct professor, University of Arizona Law School 1364
  Campbell, Thomas, professor, Stanford Law School 1367
  Stewart, Richard, professor, Harvard Law School 1369
  Questioning by:
    Chairman Biden 1371
    Senator Hatch 1373
    Senator Kennedy 1393
    Senator Specter 1394
    Senator DeConcini 1398
    Senator Grassley 1401
    Senator Metzenbaum 1402
    Senator Humphrey 1405
    Senator Leahy 1408
    Senator Thurmond 1985
Panel:
  Bollinger, Lee, dean, University of Michigan Law School 1987
  Styron, William, author 1989
  Rauschenberg, Robert, artist 1998
  Questioning by:
    Senator Kennedy 2003
    Senator Metzenbaum 2004
    Senator Specter 2004
    Chairman Biden 2006
    Senator Simpson 2007
    Senator Humphrey 2011
    Senator Leahy 2013
Panel:
  Baldwin, Donald, executive director, National Law Enforcement Council 2016
  Stokes, Dewey, president, Fraternal Order of Police 2023
  Vaughn, Jerald R., executive director, International Association of Chiefs of Police 2038
  Fuesel, Robert, national president, Federal Criminal Investigators Association 2047
  Bellizzi, John J., executive director, International Narcotics Association of Police Organizations 2052
  Hughes, John L., director, National Troopers Coalition 2061

Page
Carrington, Frank, executive director, Victims' Assistance Legal Organization 2068
Bittick, L. Cary, executive director, National Sheriffs' Association 2078
Questioning by:
  Senator Thurmond 2091
  Senator Simpson 2092

Prepared Statements

Tribe, Laurence H 1272
Hills, Carla 1350
McConnell, Michael 1358
Styron, William 1992
Rauschenberg, Robert 2000
Baldwin, Donald 2019
Stokes, Dewey 2026
Vaughn, Jerald R 2040
Fuesel, Robert 2049
Bellizzi, John J 2055
Hughes, John L 2063
Carrington, Frank 2069
Bittick, L. Cary 2079

Materials Submitted for the Record

Letter to Chairman Biden and Senator Thurmond from 100 law professors opposing Judge Bork's confirmation as Associate Justice of the Supreme Court, September 22, 1987 1335
Letter to Chairman Biden and Senator Thurmond from 32 law school deans opposing Judge Bork's confirmation as Associate Justice of the Supreme Court, September 22, 1987 1342
Statement by Senator Hatch regarding *Katzenbach* v. *Morgan* 1375
Report of the Subcommittee on Separation of Powers on the Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981) 1376
Essays on Judge Bork's views submitted by Carla Hills 1412
  Carla Hills, "Take the Trouble to Understand" 1415
  Michael W. McConnell, "The First Amendment Jurisprudence of Judge Robert Bork" 1419
  Mary Ann Glendon, "The Probable Significance of the Bork Appointment for Issues of Concern to Women" 1440
  Thomas J. Campbell, "Analysis of Judge Bork's Labor Law Opinions" 1450
  Daniel D. Polsby, "Analysis of Judge Robert Bork's Opinions on Standing" 1470
  Gary B. Born, "Robert H. Bork's Civil Rights Record" 1485
  Richard B. Stewart, "The Judicial Performance of Robert Bork in Administrative and Regulatory Law" 1520
  Robert A. Anthony, "Judge Bork's Decisions in Which He Wrote No Opinion: An Analysis of the Regulatory and Benefit Cases" 1548
  Gary Lawson, "Judge Bork, Separation of Powers and Special Prosecutor Bills" 1566
  Bernard M. Meltzer, "The ACLU's Evaluation of Judge Bork's Employment Decisions" 1579
  Joseph D. Grano, "The 'Response to White House Analysis of Judge Bork's Record:' A Critical Appraisal" 1596
"Response Prepared to White House Analysis of Judge Bork's Record," September 3, 1987 1630
Public Citizen Litigation Group book, *The Judicial Record of Judge Robert H. Bork*, August 1987 1725
AFL-CIO Executive Council statement, "Opposition to the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States," with supporting memoranda, August 17, 1987 1880
Magazine article by Renata Adler, "Coup at the Court," *The New Republic*, September 14 and 21, 1987 1932
American Civil Liberties Union "Report on the Civil Liberties Record of Judge Robert H. Bork," September 9, 1987 1936
Statement of Ordway P. Burden, president, Law Enforcement Assistance Foundation 2085

Page

Letter to Chairman Biden from Alan Nelson, president, National Association of Federal Investigators, and accompanying resolution, September 10, 1987 .. 2089

Wednesday, September 23, 1987

Witnesses

Burger, Honorable Warren E., former Chief Justice of the United States Supreme Court 2096
  Questioning by:
    Chairman Biden 2098
    Senator Thurmond 2100
    Senator Kennedy 2103
    Senator Hatch 2103
    Senator Metzenbaum 2105
    Senator Simpson 2106
    Senator DeConcini 2107
    Senator Grassley 2108
    Senator Leahy 2110
    Senator Specter 2111
    Senator Heflin 2113
    Senator Humphrey 2114
Panel:
  Franklin, John Hope, professor, Duke University 2118
  Leuchtenburg, William, professor, University of North Carolina 2128
  Dellinger, Walter, professor, Duke University Law School 2136
  Questioning by:
    Chairman Biden 2138
    Senator Kennedy 2140
    Senator Hatch 2141
    Senator Leahy 2145
    Senator Simpson 2147
    Senator Specter 2152
    Senator Humphrey 2156
Cutler, Lloyd N., Wilmer, Cutler & Pickering, Washington, D.C. 2158
  Questioning by:
    Chairman Biden 2176, 2181, 2188, 2199
    Senator Thurmond 2177
    Senator Kennedy 2178
    Senator Hatch 2182
    Senator Metzenbaum 2184
    Senator Simpson 2186
    Senator Leahy 2188
    Senator Grassley 2191
    Senator Heflin 2192
    Senator Specter 2194
    Senator Humphrey 2197
Panel:
  Thompson, James, Governor of Illinois 2202
  Frank, John P., Lewis & Roca, Phoenix, Arizona 2204
  Foreman, Fred L., District Attorney of Lake County, Illinois 2221
  Questioning by:
    Senator Thurmond 2225
    Senator Metzenbaum 2226
    Senator DeConcini 2228
    Senator Simpson 2230, 2238
    Senator Leahy 2234
    Senator Humphrey 2236

Prepared Statements

Franklin, John Hope 2122
Leuchtenburg, William 2132
Cutler, Lloyd N 2161
Frank, John P 2208
Foreman, Fred L 2222

Materials Submitted for the Record

Page

Newspaper article by Lloyd N. Cutler, "Saving Bork from Both Friends and Enemies," *The New York Times*, July 16, 1987 2171
Newspaper article by Lloyd N. Cutler, "Opinion: The Battle Over Bork," *The American Lawyer*, September 1987 2173
Newspaper article by Lloyd N. Cutler, "Judge Bork: Well Within the Mainstream," *The Washington Post*, September 16, 1987 2175
Letter to the editor from Leonard Belter, *The Washington Post*, September 22, 1987 2233

Friday, September 25, 1987

Witnesses

Panel:
- Smith, Chesterfield, Holland & Knight, Miami, Florida 2243
- Meserve, Robert W., Palmer & Dodge, Boston, Massachusetts 2244
- Kaufman, Robert, President, and Birnbaum, Sheila, Vice President, The Bar Association of the City of New York 2259
- Questioning by:
  - Chairman Biden 2265
  - Senator Simpson 2267
  - Senator Kennedy 2281
  - Senator Specter 2284
  - Senator Metzenbaum 2286
  - Senator Humphrey 2288
  - Senator Leahy 2291
  - Senator Hatch 2292
  - Senator Grassley 2302

Sowell, Thomas, fellow, Hoover Institute 2310
- Questioning by:
  - Senator DeConcini 2312
  - Senator Thurmond 2315
  - Senator Leahy 2316
  - Senator Hatch 2317
  - Chairman Biden 2320
  - Senator Specter 2323
  - Senator Heflin 2325
  - Senator Humphrey 2327

Panel:
- Hufstedler, Shirley M., Hufstedler, Miller, Carlson & Beardsley, Los Angeles, California 2331
- Babcock, Barbara, professor, Stanford Law School 2344
- Law, Sylvia, professor, New York University Law School 2354
- Williams, Wendy, professor, Georgetown University Law Center 2369
- Questioning by:
  - Chairman Biden 2332, 2392
  - Senator Heflin 2387
  - Senator Simpson 2389
  - Senator Hatch 2395
  - Senator Kennedy 2399
  - Senator Grassley 2402
  - Senator DeConcini 2404
  - Senator Specter 2405
  - Senator Leahy 2407
  - Senator Humphrey 2409

Panel:
- McDonald, Forrest, professor, University of Alabama 2412
- Meador, Daniel, professor, University of Virginia Law School 2420
- Priest, George, professor, Yale University Law School 2435
- Simon, John G., professor, Yale University Law School 2445
- Rotunda, Ronald, professor, University of Illinois Law School 2454
- Questioning by:
  - Senator Heflin 2478
  - Senator Thurmond 2479
  - Senator Simpson 2480
  - Senator Specter 2482

Page

- Senator Leahy 2485
- Senator Humphrey 2486
- Chairman Biden 2488

Panel:

- Fiss, Owen, professor, Yale University Law School 2491
- Grey, Thomas, professor, Stanford University Law School 2514
- Resnik, Judith, professor, University of Southern California Law School 2528
- Gewirtz, Paul, professor, Yale University Law School 2555
- Bennett, Robert, dean, Northwestern University Law School 2595
- Questioning by:
  - Senator Thurmond 2613
  - Senator Hatch 2615
  - Senator Simpson 2716
  - Senator Humphrey 2719

Panel:

- Rhyne, Charles S., Rhyne & Brown, Washington, D.C 2724
- Shepherd, John C., Shepherd, Sandberg & Phoenix, St. Louis, Missouri 2735
- Riley, Wallace O., Riley and Roumell, Detroit, Michigan 2748
- Bland, Jr., James T., president, Federal Bar Association 2754
- Questioning by:
  - Senator Thurmond 2755
  - Chairman Biden 2756

Prepared Statements

Meserve, Robert W 2248
Kaufman, Robert 2261
Hufstedler, Shirley 2336
Babcock, Barbara 2348
Law, Sylvia 2358
Williams, Wendy 2373
McDonald, Forrest 2415
Meador, Daniel 2423
Priest, George L 2439
Simon, John G 2448
Rotunda, Ronald D 2457
Fiss, Owen M 2495
Grey, Thomas C 2515
Resnik, Judith 2532
Gewirtz, Paul 2558
Bennett, Robert W 2597
Rhyne, Charles S 2727
Riley, Wallace D 2750

Materials Submitted for the Record

Letter from John W. Barnum to Senator Simpson, September 22, 1987 2269
Letter from John W. Barnum to Robert Kaufman, September 22, 1987 2270
"Statement by Members of the Association of the Bar of the City of New York Repudiating the Unauthorized Action of its Executive Committee in Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States," September 22, 1987 2271
Letter from Kenneth Volk to Senator Simpson, September 24, 1987 2275
Letter from James T. Halverson and other previous chairmen of the Section of Antitrust Law of the American Bar Association to Chairman Biden, August 7, 1987 2276
Newspaper article, "New York Bar Association Split Over Stand on Bork," *The New York Times*, September 24, 1987 2295
Newspaper article, "Bork's Credentials Beyond Challenge; Opponents Use Political Standards," *New York Law Journal*, September 28, 1987 2296
Letter from Diane C. Leibe to Senator Grassley, September 18, 1987 2304
Letter from Diane C. Leibe to committee members, undated 2305
Letter from Robert M. Kaufman to Chairman Biden, September 28, 1987 2308
Article by Paul Gewirtz, "Senators Should Use Activist Approach in Judging Nominees," *Legal Times*, August 10, 1987 2591
Letter from Emma C. Jordan, president of the Society of American Law Teachers, to Chairman Biden, September 22, 1987 2607

Page

- Society of American Law Teachers, list of "Law Professors Who Subscribe to the Society of American Law Teachers' Letter of Opposition to the Nomination of Judge Robert H. Bork to the United States Supreme Court" ... 2608
- Letter from Clark Byse to Senator Hatch, September 17, 1987 ... 2616
- Letter from attorneys who worked with Robert Bork in the Office of the Solicitor General to Chairman Biden, September 17, 1987 ... 2619
- Letter from Charles M. Williamson to Senator Hatch, with attachments, September 21, 1987 ... 2624
- Letter from William W. Falsgraf to Chairman Biden, September 18, 1987 ... 2737
- Letter from S. Shepherd Tate to Chairman Biden, September 18, 1987 ... 2738
- Letter from Leonard S. Janofsky to Chairman Biden, September 18, 1987 ... 2739
- Letter from Earl F. Morris to Chairman Biden, September 18, 1987 ... 2740
- Letter from James D. Fellers to John C. Shepherd, September 18, 1987 ... 2741
- Telegram from Charles S. Rhyne to President Reagan, September 13, 1987 ... 2742
- Article by John C. Shepherd, "In Support of Bork," *National Law Journal*, September 21, 1987 ... 2744

Monday, September 28, 1987

Witnesses

- Panel:
  - Eagleton, Senator Thomas, professor, Washington University ... 2760
  - Sunstein, Cass, professor, University of Chicago Law School ... 2765
  - Questioning by:
    - Chairman Biden ... 2788, 2791
    - Senator Thurmond ... 2789
    - Senator Kennedy ... 2791
    - Senator Specter ... 2793
    - Senator Leahy ... 2794
    - Senator Heflin ... 2796
    - Senator Hatch ... 2797
    - Senator DeConcini ... 2800
    - Senator Simpson ... 2802
- Bell, Griffin B., King & Spalding, Atlanta, Georgia ... 2805
  - Questioning by:
    - Chairman Biden ... 2808, 2815
    - Senator Thurmond ... 2810
    - Senator Kennedy ... 2811
    - Senator Hatch ... 2813
    - Senator DeConcini ... 2816
    - Senator Simpson ... 2818
    - Senator Leahy ... 2820
    - Senator Specter ... 2822
    - Senator Heflin ... 2824
    - Senator Humphrey ... 2826
- Kurland, Philip B., professor, University of Chicago Law School ... 2831
  - Questioning by:
    - Chairman Biden ... 2849
    - Senator Kennedy ... 2850
    - Senator Simpson ... 2852
    - Senator Specter ... 2853
    - Senator Hatch ... 2855
    - Senator Humphrey ... 2857
- Panel:
  - Thornburgh, Richard, director, John F. Kennedy Institute of Politics ... 2863
  - Randolph, A. Raymond, Pepper, Hamilton & Scheetz, Washington, D.C ... 2868
  - LaFontant, Jewel S., Vedder, Price, Kaufman & Kammholz, Chicago, Illinois ... 2884
  - Smith, Stuart A., Shea & Gould, New York, New York ... 2892
  - Questioning by:
    - Senator Specter ... 2899
    - Senator Humphrey ... 2901
- Panel:
  - Bator, Paul, professor, University of Chicago Law School ... 2910
  - Monaghan, Henry, professor, Columbia University Law School ... 2926
  - BeVier, Lillian Riemer, professor, University of Virginia Law School ... 2927
  - Levin, A. Leo, professor, University of Pennsylvania Law School ... 2935

Page

- Oaks, Dallin H., former professor, University of Chicago Law School 2941
  - Questioning by:
    - Senator Simpson 2949
    - Senator Leahy 2951
    - Senator Hatch 2952, 2958, 2963
    - Senator Heflin 2954
    - Senator Specter 2956
    - Senator DeConcini 2962, 2975
    - Senator Humphrey 2973
    - Senator Thurmond 2974
- Panel:
  - Krane, Howard G., Kirkland & Ellis, Chicago, Illinois 2980
  - Carlock, George Reed, Ryley, Carlock & Applewhite, Phoenix, Arizona 2986
  - Questioning by:
    - Senator Thurmond 2994
- Dean, Kenneth, pastor, First Baptist Church, Rochester, New York 2995
  - Questioning by:
    - Senator Specter 3011
    - Senator Humphrey 3015
    - Senator Thurmond 3019

Prepared Statements

- Eagleton, Thomas 2762
- Sunstein, Cass R 2767
- Kurland, Philip B 2835
- Thornburgh, Richard 2865
- Randolph, A. Raymond 2870
- LaFontant, Jewel 2887
- Smith, Stuart 2895
- Bator, Paul M 2912
- BeVier, Lillian Riemer 2930
- Levin, A. Leo 2936
- Oaks, Dallin H 2944
- Krane, Howard 2981
- Carlock, George Reed 2989
- Dean, Rev. Kenneth R 2999

Materials Submitted for the Record

- Resume of Jewel S. LaFontant 2902
- Letter from Edith-Marie Dolan to Senator Hatch, September 28, 1987 2968
- Telegram from Professor Lucinda Finley, Yale Law School, to Chairman Biden, September 24, 1987 2977
- Telegram from Professor Carol Gilligan, Harvard University Graduate School of Education, September 24, 1987 2978
- Letter from Warren I. Cikins to *The Washington Post*, July 28, 1987 3017
- Letter to the Editor from Joshua O. Haberman, *The Washington Post*, August 6, 1987 3018

Tuesday, September 29, 1987

Witnesses

- Panel:
  - Kay, Herma Hill, professor, Boalt School of Law, University of California, Berkeley 3025
  - Richards, David, A.J., professor, New York University Law School 3047
  - Sullivan, Kathleen, professor, Harvard Law School 3070
  - Questioning by:
    - Chairman Biden 3080, 3086
    - Senator Kennedy 3082
    - Senator Simpson 3084, 3087
    - Senator Metzenbaum 3088
    - Senator Grassley 3097
    - Senator DeConcini 3099
    - Senator Specter 3102
    - Senator Leahy 3104

Page
Senator Humphrey 3106
Senator Heflin 3108
Richardson, Elliot L., Milbank, Tweed, Hadley & McCloy, New York, New York 3112
Questioning by:
Senator Thurmond 3121
Senator Kennedy 3121
Senator Specter 3131
Senator Heflin 3132
Senator Hatch 3133
Chairman Biden 3148, 3158, 3160
Senator Leahy 3149
Senator Simpson 3151
Senator Grassley 3156
Senator Humphrey 3157, 3158
Panel:
Dymally, Honorable Mervyn, U.S. Congressman, State of California 3162
Conyers, Honorable John, Jr., U.S. Congressman, State of Michigan 3166
Fauntroy, Honorable Walter E., Delegate, District of Columbia 3175
Questioning by:
Chairman Biden 3187
Senator Kennedy 3188
Panel:
Ruth, Henry, counsel, Unisys 3192
Frampton, George, president, The Wilderness Society 3194
Questioning by:
Senator Kennedy 3204, 3209
Senator Thurmond 3205
Senator Hatch 3207, 3213
Senator Metzenbaum 3211
Senator Leahy 3232, 3238
Senator Simpson 3234
Senator Humphrey 3237
Panel:
Casper, Gerhard, former dean, University of Chicago Law School 3240
Davenport, Ronald, former dean, Duquesne Law School 3250
Frankino, Steven, dean, Villanova University Law School 3252
Holland, Maurice, dean, University of Oregon Law School 3257
Morgan, Thomas, dean, Emory University Law School 3269
Rostow, Eugene, professor emeritus, former dean, Yale University Law School 3279
Sandalow, Terrance, former dean, University of Michigan Law School 3289
Questioning by:
Chairman Biden 3270, 3308
Senator Thurmond 3305
Senator Humphrey 3306
Senator Specter 3309
Panel:
Areeda, Phillip, professor, Harvard Law School 3313
Baker, Donald I., Sutherland, Asbill & Brennan, Washington, D.C 3314
Halverson, James T., Shearman & Sterling, New York, New York 3328
Kauper, Thomas, professor, University of Michigan Law School 3338
Questioning by:
Chairman Biden 3345
Senator Thurmond 3347

Prepared Statements

Kay, Herma Hill 3027
Richards, David A.J 3050
Sullivan, Kathleen M 3072
Richardson, Elliot L 3116
Dymally, Mervyn M 3163
Conyers, John 3168
Fauntroy, Walter E 3179
Frampton, George T., Jr 3197
Casper, Gerhard 3247
Davenport, Ronald 3251

Page

- Frankino, Steven P 3254
- Holland, Maurice J 3261
- Morgan, Thomas D 3273
- Rostow, Eugene V 3282
- Sandalow, Terrance 3292
- Baker, Donald I 3317
- Halverson, James T 3331
- Kauper, Thomas E 3340

Materials Submitted for the Record

- Letter from Laurence Gold of the AFL–CIO to Senator Metzenbaum, September 28, 1987 3090
- AFL–CIO "Memorandum on Judge Bork's Opinion and Testimony Concerning the American Cyanamid Case" 3091
- Federal regulations pertaining to the creation of the Watergate Special Prosecution Force, May 31, 1973 3125
- Hearings before the Committee on the Judiciary, *Nomination of Elliot Richardson to be Attorney General*, 93d Cong., 1st Sess., May 9, 10, 14, 15, 21 and 22, 1973, p. 185 3128
- Memorandum, "67 Flaws of the Bork Ad," submitted by Senator Hatch 3135
- Memorandum from Morton Halperin and Jerry Berman, ACLU, to Senator Simpson, September 28, 1987 3154
- Letter from Morton Halperin and Jerry Berman, ACLU, to the Editor, *City Paper*, September 28, 1987 3155
- Federal regulation pertaining to the abolition of the Office of the Watergate Special Prosecution Force, October 23, 1973 3210
- Statement of Philip A. Lacovara, September 1987 3214
- Statement of Henry E. Peterson, September 22, 1987 3222
- Affidavit of Ralph K. Winter, September 25, 1987 3225
- Letter from Gerhard Casper and Robert Mundheim to Chairman Biden, August 25, 1987 3241
- Letter to the Editor from Eugene V. Rostow, *The New York Times*, August 3, 1987 (published and unpublished) 3287
- Article by Donald I. Baker, "The Lawyer's Bookshelf: Review of *The Antitrust Paradox*," *New York Law Journal*, July 7, 1978 3288

Wednesday, September 30, 1987

Witnesses

- Panel:
  - Abrams, Robert, Attorney General of the State of New York 3414
  - Brown, Charles, Attorney General of the State of West Virginia 3430
  - Pitofsky, Robert, dean, Georgetown University Law Center 3441
  - Questioning by:
    - Chairman Biden 3442, 3509, 3515, 3521
    - Senator Thurmond 3510, 3516
    - Senator Kennedy 3513
    - Senator Simpson 3517
    - Senator Metzenbaum 3521, 3523
    - Senator Grassley 3523, 3529
    - Senator DeConcini 3524
    - Senator Specter 3525
    - Senator Leahy 3528
    - Senator Hatch 3534
    - Senator Heflin 3535
- LaHaye, Beverly, Concerned Women of America 3537
  - Questioning by:
    - Senator DeConcini 3541
    - Senator Humphrey 3542
    - Senator Hatch 3544, 3552
    - Senator Thurmond 3551
    - Chairman Biden 3552
    - Senator Specter 3574
- Martinez, Vilma S., Munger, Tolles & Olsen, Los Angeles, California 3576
  - Questioning by:
    - Senator Kennedy 3615

Page
Senator Simpson 3616
Senator Heflin 3618
Senator Specter 3619
Chairman Biden 3621
Senator Grassley 3622
Handler, William, Rabbi, Union of Orthodox Rabbis of the United States and Canada 3626
Questioning by:
Chairman Biden 3629, 3634
Senator Thurmond 3630
Senator Leahy 3631
Senator Simpson 3633, 3635
Senator Specter 3636
Senator Grassley 3638
Senator Humphrey 3639
Panel:
Clay, John, John C. Roberts, and John Boley, Lawyers for the Judiciary 3688
Questioning by:
Senator Thurmond 3786
Senator Simon 3787
Senator Specter 3788
Senator Heflin 3790
Innis, Roy, Congress of Racial Equality 3792
Questioning by:
Senator Specter 3804
Senator Metzenbaum 3804, 3806
Senator Thurmond 3805
Panel:
Daskal, Dmitri G., counsel, Service Station Dealers of America; The Pocketbook Coalition 3809
Foer, Albert A., president, Melart Jewelers 3824
Brownell, Herbert, Lord, Day & Lord, New York, New York 3838
Questioning by:
Senator Thurmond 3841
Senator Simpson 3842
Senator Grassley 3842
Panel:
Kliesmet, Robert, International Union of Police Associations 3850
Hampton, Ronald, National Black Police Association 3860
Johnson, Harold, National Organization of Black Law Enforcement Executives 3863
Questioning by:
Senator Thurmond 3869
Senator Metzenbaum 3871
Senator Simpson 3872

Closing Statements

Kennedy, Honorable Edward M 3873
Heflin, Honorable Howell T 3893
Thurmond, Honorable Strom 3893
Biden, Honorable Joseph R., Jr 3894

Prepared Statements

Abrams, Robert 3417
Brown, Charles G 3432
Pitofsky, Robert 3443
LaHaye, Beverly 3539
Martinez, Vilma S 3580
Lawyers for the Judiciary 3692
Innis, Roy 3794
Daskal, Dimitri G 3811
Foer, Albert A 3826
Brownell, Herbert 3839
Kliesmet, Robert B 3853
Hampton, Ronald 3862
Johnson, Harold 3865

Materials Submitted for the Record

	Page
List of "Law Schools at Which Law Professors Signed Letters In Opposition to Robert Bork's Nomination to the Supreme Court"	3351
List of "Law Professors Who Signed Letters in Opposition to Robert Bork's Nomination to the Supreme Court"	3355
Statement of Maxwell M. Blecher	3465
Statement of Lawrence A. Sullivan, September 1987	3479
Statement of Herman Schwartz, September 29, 1987	3491
Article by Herman Schwartz, "The Frantic Reflagging of Bork," *The Nation*, September 19, 1987	3504
Article by Jamie Kalven, "Bork v. The First," *The Nation*, September 19, 1987	3507
Excerpt from Robert Bork's book, *The Antitrust Paradox*, p. 407	3520
Hearings Before the Committee on the Judiciary, "The Selection and Confirmation of Federal Judges," 97th Cong., 2nd Sess., January 27, February 12, 26 and March 11, 24, 31, p. 2091-92	3531
Transcript of Proceedings, Subcommittee on Antitrust, Monopolies and Business Rights, S. 567, Malt Beverage Interbrand Competition Act, August 4, 1987, p. 57	3533
Harris Survey, "Public Opposes Bork Nomination by 59-27%," September 28, 1987	3547
"Response to the Statement of John P. Frank," prepared by Senator Hatch	3554
Materials submitted by Rabbi Handler	3642
Telegram from Herbert Brownell to Chairman Biden, September 20, 1987	3839
Letter from Professor Stephen J. Schulhofer to Chairman Biden, September 28, 1987	3844
"Response to Submission by John P. Frank," prepared by Senator Humphrey	3876
List of majority and minority staff members who assisted with the hearings	3894

POST-HEARING CORRESPONDENCE BETWEEN JUDGE BORK AND THE COMMITTEE

Page

Letter from Judge Bork to Chairman Biden regarding equal protection and right to privacy, October 1, 1987 3896

Letter from Judge Bork to Chairman Biden regarding *Vander Jagt* v. *O'Neill*, with attachments, October 1, 1987 3911

Letter from Judge Bork to Chairman Biden in response to Senator Weicker's inquiry regarding the religion clauses, October 1, 1987, with letter from Senator Weicker, September 11, 1987 3933

Letter from Judge Bork to Chairman Biden in response to Senator Leahy's inquiry regarding timely filings, October 2, 1987, with attachments and with letter from Senator Leahy, September 23, 1987 3937

Letter from Judge Bork to Chairman Biden in response to Senator Byrd's inquiry regarding campaign finance, October 5, 1987 3948

Letter from Judge Bork to Chairman Biden in response to Senator Simon's inquiry regarding the televising of Supreme Court proceedings, October 5, 1987, with letters from Senator Simon 3954

Letter from Judge Bork to Chairman Biden regarding unfair advertising, October 5, 1987 3957

Letter from Judge Bork to Chairman Biden in response to Senator Metzenbaum's inquiry regarding the Second Amendment, October 5, 1987 3958

ADDITIONAL SUBMISSIONS FOR THE RECORD

Page
Ad Hoc Committee for Principled Discussions of Constitutional Issues:
  Letter from Sidney Hook to Chairman Biden, September 28, 1987 3959
  Statement, September 28, 1987 3960
Agudath Israel of America:
  Memorandum, September 21, 1987 3964
Allegaert, Winthrop J.:
  Letter to Chairman Biden, September 22, 1987 3973
  "Statement by Members of the Association of the Bar of the City of New York Repudiating the Unauthorized Action of its Executive Committee in Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States," September 22, 1987 3974
Alliance for Justice:
  Statement 3978
American-Arab Anti-Discrimination Committee:
  Statement of Albert Mokhiber, October 5, 1987 3987
American Association of University Women:
  Statement of Sarah Harder, October 1, 1987 3990
American Civil Liberties Union:
  Statement, October 5, 1987 3995
  "Report on the Civil Liberties Record of Judge Robert H. Bork", September 9, 1987 4003
  "The Essential Judge Bork. A Report on the Testimony of Judge Robert H. Bork Before the Senate Judiciary Committee and an Analysis of His Constitutional Doctrine," October 2, 1987 4053
American Jewish Congress:
  Statement of Marvin Frankel, September 30, 1987 4103
American Medical Student Association:
  Statement of Drs. P. Preston Reynolds and Grace Heitsch, September 30, 1987 4130
Americans for Democratic Action:
  Statement of Joseph Rauh, October 1987 4134
Americans for Religious Liberty:
  Statement of Ed Doerr, September 30, 1987 4147
Antitrust Law & Economics Review:
  Letter from Charles E. Mueller to Senator Kennedy, August 13, 1987 4151
  Editorial, "Foreword: Antitrust, the Supreme Court, and the Bork Factor" 4152
Antitrust professors in opposition to the nomination:
  Letter to Chairman Biden, September 29, 1987 4166
Asian American Bar Association of the Greater Bay Area:
  Letter from Hon Chew, September 15, 1987 4170
Attorneys in opposition to the nomination:
  Statement, October 2, 1987 4173
Attorneys in Washington, D.C. in opposition to the nomination:
  Letter to Chairman Biden, October 5, 1987 4178
Avins, Alfred:
  Statement 4182
Becker, Mary:
  Letter to Chairman Biden, September 23, 1987 4184
Berkeley Commission on Peace and Justice:
  Memorandum, with attachments, September 30, 1987 4185
B'nai B'rith Women:
  Statement, September 1987 4204
Bolton, John:
  Letter to Judge Bork, September 28, 1987 4208

Page

Bork, Judge Robert H.:
- Letter to Chairman Biden, September 28, 1987 4209
- Letter to Judge Tyler, September 28, 1987 4210

Brigham Young University, J. Reuben Clark Law School:
- Letter from faculty members, September 28, 1987 4211

Broderick, Albert:
- "Blind Spot for Blacks—and Women" 4212

Brown, Harold:
- "Controversy Over Bork's Nomination No Surprise," *Massachusetts Lawyers Weekly*, September 7, 1987 4224

Business and Professional Women's Clubs/USA:
- Letter from Linda Colvard Dorian to Chairman Biden, October 2, 1987 4227
- Statement 4229

Carter, Honorable Jimmy:
- Letter to Chairman Biden, September 29, 1987 4249

Chicago Council of Lawyers:
- Letter to Senator Simon, September 11, 1987 4251
- Report, September 11, 1987 4252

Children's Defense Fund:
- Statement of Marian Wright Edelman, September 28, 1987 4264

Childs, Marjorie:
- Statement 4281

Christofferson, Clyde:
- Letter to the Editor, *The Wall Street Journal*, September 26, 1987 4287

Citizens' Advisory Committee, The District of Columbia Bar:
- Letter from Chauncey Fortt to Chairman Biden, October 2, 1987 4292

Citizens Against Bork:
- Tape transcription 4294

Citizens for Decency Through Law, Inc.:
- Statement 4302

Citizens for God & Country:
- Statement, with attachments, September 21, 1987 4312

Clinton, Governor Bill:
- Statement 4320

Collins, Cardiss:
- Statement 4328

Committee for a Fair Confirmation Process:
- "A Response to the Majority Report in the Senate Confirmation Proceedings of Judge Robert H. Bork," November 2, 1987 4332

Common Cause:
- "Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court," September 1987 4457

Community Free Democrats:
- Letter to Chairman Biden, September 30, 1987 4472

Conover, Bev and Elton M., Jr.:
- Letter to committee members, September 29, 1987 4473

Crown, Joseph:
- Letter to the Editor, *The Mexico City News*, August 28, 1987 4479
- "The Supreme Court Crisis: The Bork Nomination," August 30, 1987 4480

Davidow, Robert P.:
- Statement 4483

Denominational Ministry Strategy:
- Letter from Rev. D. Douglas Dove and Rev. Daniel N. Solberg to Diana Huffman, September 15, 1987 4491
- Letter from Rev. D. Douglas Dove, Rev. Daniel N. Solberg and Charles Honeywell to Diana Huffman, October 7, 1987 4493

District of Columbia Democratic State Committee:
- Letter from James M. Christian to Chairman Biden, September 18, 1987 4495
- Resolution 4496

Drach, Mitchell R.:
- Letter to Chairman Biden, October 2, 1987 4498

Dunn, James, et al.:
- Letter to Senator Simon, September 30, 1987 4499
- Dean, Rev. Kenneth, "Bork Thrives on Confrontation, Lives for the Spotlight," *Rochester Times-Union*, August 14, 1987 4500

Executive Leadership Council:
- Statement, October 9, 1987 4501

Page

Federal regulations (OSHA) pertaining to occupational exposure to lead, November 14 and 21, 1987 4510

Federation of Women Lawyers Judicial Screening Panel, Women's Legal Defense Fund, NOW Legal Defense and Education Fund, Equal Rights Advocates:
  Statement, October 19, 1987 4531

Feeney, Floyd and Mahoney, Barry:
  Letter to Chairman Biden, October 5, 1987 4552
  "The Lawfulness of Robert Bork's Firing of the Watergate Special Prosecutor," October 6, 1987 4554

Feinberg, Margo A.:
  Letter to Chairman Biden regarding views of local California bar associations, September 22, 1987 4592

Flynn, John J.:
  Statement 4595

Foster, Byron C.:
  Letter to Chairman Biden, September 21, 1987 4624

Freedman, Monroe H.:
  Letter to Chairman Biden, September 29, 1987 4626

Goldstein, Joseph:
  "That Was the Real Bork Who Testified," *The New York Times*, September 27, 1987 4627

Gordon, Judge James F.:
  Affidavit, October 2, 1987 4628

Hazard, Geoffrey C., Jr.:
  Letter to Chairman Biden, September 16, 1987 4633

Hispanic National Bar Association:
  Statement of John Martinez 4639

Hufstedler, Shirley M.:
  Letter to Senator Kennedy, October 3, 1987 4648
  Letter to Senator Kennedy, October 6, 1987 4655

Lawyers' Committee for Civil Rights Under Law:
  Letter from Conrad K. Harper and Stuart J. Land to Chairman Biden, September 30, 1987 4661
  Statement of Conrad K. Harper, for Individual Members of the Lawyers' Committee for Civil Rights Under Law, and Individual Members of Local Lawyers' Committees, September 29, 1987 4663
  "On the Nomination of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court" 4680
  Letter from Conrad K. Harper and Stuart J. Land to Chairman Biden, September 14, 1987 4692
  "Memorandum on the Nomination of Judge Robert H. Bork as an Associate Justice to the United States Supreme Court" 4693

Leadershp Conference on Civil Rights:
  Statement of Benjamin Hooks, October 1987 4739
  Statement, September 17, 1987 4743
  "Bork v. Bork," with supplement 4745
  "The Bork Record on Labor" 4752
  "Summary of Some of the Major Arguments Against the Nomination of Robert Bork" 4757

Lebron, Michael:
  Letter to Diana Huffman, September 19, 1987 4761

Lee, Joseph D.:
  Affidavit, with attachments, October 2, 1987 4762

Licht, Richard A.:
  Statement 4771
  "Brief in Opposition to the Nomination of Judge Bork to the Supreme Court" 4776

Lipshutz, Robert J.:
  Letter to Chairman Biden, September 29, 1987 4791

Maryland Association of Equal Opportunity Personnel:
  Statement of Yvonne A. Edwards 4792

McAninch, William S.:
  Letter to Chairman Biden, September 21, 1987 4796

McLaughlin, Francis X.:
  Statement, with attachments 4797

Mental Health Law Project:
- Letter from Norman S. Rosenberg to Chairman Biden, September 15, 1987 ..... Page 4806
- "Judge Bork and the Rights of Disabled People" 4807
- Letter from Leonard S. Rubenstein to Diana Huffman, October 2, 1987 4818
- Statement of Leonard S. Rubenstein, October 5, 1987 4822

Mexican American Legal Defense and Educational Fund:
- Statement of Antonia Hernandez, October 5, 1987 4838

Minnesota Coalition of 372,000 to Stop Bork:
- Letter of Rev. Lee S. Wiskochil to Chairman Biden, September 25, 1987 4852
- Attachments 4853

Minnick, John B.:
- Letter to Chairman Biden, September 22, 1987 4885
- Letter to Senator Hatch, September 22, 1987 4886
- Letter to Senator Hatch, with attachments, August 19, 1987 4887

Minority Business Enterprise Legal Defense and Education Fund, Inc.:
- Statement 4896

NAACP Legal Defense and Educational Fund, Inc.:
- "*Bork v. Bork*. A Comparison of Judge Bork's Confirmation Testimony with His Previous Speeches and Articles," with People for the American Way Action Fund, September 1987 4908
- Letter from Elaine R. Jones and Eric Schnapper to Chairman Biden, October 5, 1987 4972
- "Most Recent Date of Bork Criticism of Supreme Court Constitutional Precedents," with attachments, October 5, 1987 4974
- Statement of Julius L. Chambers, October 5, 1987 5042
- Statement of James M. Nabrit, III, October 8, 1987 5055

Nader, Ralph:
- Letter to Chairman Biden, October 12, 1987, with attachments 5059

Nation Institute:
- Letter from Emily Sack to Chairman Biden, October 1, 1987 5083
- "The Bork Report. The Supreme Court Watch Project's Analysis of the Record of Judge Robert H. Bork" 5084

National Abortion Rights Action League:
- "The Opposition to Bork: The Case for Women's Liberty" 5266
- "Bork as 'Confirmation-day Moderate,' " September 16, 1987 5307

National Association for the Advancement of Colored People:
- Statement of Althea T.L. Simmons, September 1987 5309
- Nathaniel R. Jones, "The Desegregation of Urban Schools Thirty Years After Brown," 55 *Colorado Law Review* 4, Summer 1984, 525, 537-541 5338
- Olive Taylor, "Two Hundred Years, An Issue: Ideology in the Nomination and Confirmed Process of Justices to the Supreme Court of the United States," September 1987 5382
- J. Clay Smith, Jr., "A Response to Professor Robert Bork's 'Giving Meaning to the Constitution: Competing Visions of Judicial Review,' " June 12, 1987 5482
- J. Clay Smith, Jr., "Toward Pure Legal Existence: Blacks and the Constitution," June 18, 1987 5490
- Letter from Howard University School of Law faculty members to Chairman Biden and Senator Thurmond, September 17, 1987 5511

National Association of Criminal Defense Lawyers:
- Statement of Joseph Tydings 5514

National Association of Evangelicals:
- Statement of Robert P. Dugan, Jr., October 2, 1987 5526

National Bar Association:
- Letter from Walter L. Sutton, Jr. to Chairman Biden, September 29, 1987 5532

National Black Caucus of State Legislators:
- Statement of Hon. David P. Richardson, Jr., September 1987 5533

National Coalition for Women and Girls in Education:
- Letter from Jill Miller to Chairman Biden, September 25, 1987 5538

National Conference of Black Lawyers and Medgar Evers College for Law and Social Justice:
- Statement 5541

National Council of the Churches of Christ:
- Letter from Bishop Philip R. Cousin and Dr. Arie R. Brouwer to Chairman Biden, October 1, 1987 5549
- Letter from James A. Hamilton to Chairman Biden, October 1, 1987 5550

Page
"Resolution Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States" ... 5551
National Conference of Women's Bar Associations:
- Statement, September 17, 1987 ... 5571

National Council of Jewish Women:
- Statement ... 5575

National Education Association:
- Letter from Kenneth F. Melley to Chairman Biden, October 1, 1987 ... 5577
- Statement, October 1, 1987 ... 5578

National Family Planning and Reproductive Health Association, Inc.:
- Statement of Scott R. Swirling, October 5, 1987 ... 5585

National Lawyers Guild:
- Statement of Haywood Burns, with attachments ... 5588

National Press Inc.:
- Statement of Joel D. Joseph, October 3, 1987 ... 5600

National Urban League, Inc.:
- Statement of Douglas G. Glasgow, October 5, 1987 ... 5605

National Women's Law Center:
- Statement of Marcia D. Greenberger, Suzanne E. Meeker and Ellen J. Vargyas, with attachment, October 5, 1987 ... 5611

National Women's Political Caucus:
- Statement of Irene Natividad, October 5, 1987 ... 5663

Natural Resources Defense Council:
- Letter from Adrian W. DeWind to Chairman Biden, September 22, 1987 ... 5670
- Memorandum, September 22, 1987 ... 5673

New York State Defenders Association, Inc.:
- Letter from Wilfred R. O'Connor to Chairman Biden, September 16, 1987 ... 5683

Nolan, Robert L.:
- Letter to Chairman Biden, September 21, 1987 ... 5684

Patriotic Majority:
- "The Case of Bork Versus the American Revolution" ... 5685

Pearce, Jack:
- Letter to Chairman Biden, August 17, 1987 ... 5688
- "Recommendation that Judge Robert Bork Not be Confirmed as an Associate Justice of the United States Supreme Court on the Basis of Deficiencies in His Approach to Interpretation of the Antitrust Laws" ... 5692

People for the American Way Action Fund:
- Statement of John R. Buchanan, October 1987 ... 5701
- "Judge Bork's Views Regarding Supreme Court Constitutional Precedent," with the NAACP Legal Defense and Educational Fund, Inc., September 1987 ... 5742

Physicians Forum, Inc.:
- Statement, September 14, 1987 ... 5888

Pilpel, Harriet F.:
- Letter to Chairman Biden, September 16, 1987 ... 5892

Planned Parenthood Federation of America:
- Statement of Faye Wattleton, October 5, 1987 ... 5893

Popeo, Daniel J. and Kamenar, Paul D.:
- "The Questionable Role of the ABA in the Judicial Selection Process" ... 5898

Public Citizen Litigation Group:
- Statement, October 5, 1987 ... 5913
- "Judge Bork's Civil Rights Record on the Court of Appeals" ... 5931
- "Statistics Lie: Response to Statistics Frequently Cited by the White House to Support Nomination of Judge Bork" ... 5939
- "Statement of Alan B. Morrison Concerning *Nader* v. *Bork* and the Nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States," October 5, 1987 ... 5941

Puerto Rican Legal Defense and Education Fund, Inc.:
- Statement, October 2, 1987 ... 6003

Roberts, John C.:
- "Judge Bork's Legal Philosophy" ... 6008

San Francisco Lawyers' Committee for Urban Affairs:
- Letter from Mark N. Aaronson to Chairman Biden, October 1, 1987 ... 6016
- "Resolution of the Executive Committee in Opposition to the Nomination of Robert H. Bork to the Supreme Court of the United States" ... 6017

Schauer, Frederick:
- Letter to Chairman Biden, September 22, 1987 ... 6018

Page
Schwartz, Louis B.:
    Letter to Senator Leahy, September 10, 1987 6022
    "Bork: Why Conservatives Should Oppose Him" 6023
    "Moderate Bork? Defender of the First Amendment?" 6027
Simon, John G.:
    Letter to Chairman Biden, September 29, 1987 6029
Sinclair, I.B.:
    Memorandum, with attachments, October 6, 1987 6032
Strong, Jerome A.:
    Statement 6049
Suffolk University Law School:
    "Report on the 'Judge Bork Survey' of Constitutional Law Professors," October 5, 1987 6058
Tachau, David Brandeis:
    Affidavit, October 1, 1987 6062
United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, International Union:
    Statement, September 1987 6066
    Statement of Owen Bieber, September 1987 6078
United States Justice Foundation:
    Statement of Gary G. Kreep 6085
University of Akron:
    Letters from faculty members to Senator Metzenbaum 6086
University of California, Berkeley, School of Law:
    Letter from faculty members to Chairman Biden and Senator Thurmond, with attachments, September 15, 1987 6090
University of California, Davis, School of Law:
    Letter from faculty members to Chairman Biden, September 16, 1987 6092
University of California, Santa Barbara:
    Letter from members of the Chicano/Latino Faculty Caucus to Chairman Biden, September 24, 1987 6095
University of Texas at Austin Law School:
    Letter from faculty members to Chairman Biden and Senator Thurmond, September 1, 1987 6099
University of Wisconsin Law School:
    Letter from faculty members to committee members, September 16, 1987 6104
Volk, Kenneth H.:
    Letter to Senator Hatch, September 24, 1987 6106
Vorenberg, James:
    Letter to Chairman Biden, September 28, 1987 6107
Washington Council of Lawyers:
    Letter from Dennis A. Henigan to Chairman Biden, September 18, 1987 6108
Washington Legal Foundation:
    Statement, September 23, 1987 6111
Weiss, Congressman Ted:
    Statement, September 29, 1987 6117
Wilken, Madeleine:
    Letter to Chairman Biden and Senator Thurmond, September 9, 1987 6122
Wilkey, Malcolm:
    Letter to Chairman Biden and Senator Thurmond, September 24, 1987 6124
Women's Bar Association of the State of New York:
    Statement of Committee to Review the Nomination of Judge Robert H. Bork, September 1987 6127
Yale Law School students:
    Record of opposition to Judge Bork's confirmation, September 11, 1987 6144
Youth for Democratic Action:
    Statement of Daniel Press, October 1987 6145
Zebley, John:
    Letter to Chairman Biden, September 13, 1987 6150

ALPHABETICAL INDEX OF WITNESSES, QUESTIONING AND MATERIALS SUBMITTED FOR THE RECORD

Page

- Abrams, Robert:
  - Prepared Statement 3417
  - Testimony 3414
- Ad Hoc Committee for Principled Discussions of Constitutional Issues:
  - Letter from Sidney Hook to Chairman Biden, September 28, 1987 3959
  - Statement, September 28, 1987 3960
- Adler, Renata:
  - "Coup at the Court," *The New Republic*, September 14 and 21, 1987 1932
- AFL-CIO:
  - Letter from Laurence Gold to Senator Metzenbaum, September 28, 1987 ... 3090
  - "Memorandum on Judge Bork's Opinion and Testimony Concerning the *American Cyanamid* Case" 3091
  - "Opposition to the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States," with supporting memoranda, August 17, 1987 1880
- Agudath Israel of America:
  - Memorandum, September 21, 1987 3964
- Allegaert, Winthrop J.:
  - Letter to Chairman Biden, September 22, 1987 3973
- Alliance for Justice:
  - Statement 3978
- American-Arab Anti-Discrimination Committee:
  - Statement of Albert Mokhiber, October 5, 1987 3987
- American Association of University Women:
  - Statement of Sarah Harder, October 1, 1987 3990
- American Bar Association:
  - Testimony of Harold R. Tyler, Jr 1184
  - Letter from Harold R. Tyler, Jr. to Chairman Biden regarding the nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, September 21, 1987 1228
  - Excerpts from William T. Coleman's Memorandum on Robert Bork for the 1982 Report 1258
  - Letter from Harold R. Tyler, Jr. to Senator Metzenbaum, September 4, 1987 1255
  - Letter from Robert B. Fiske, Jr. to then-Chairman Thurmond regarding the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States, August 5, 1987 1218
  - Letter from Robert B. Fiske, Jr. to then-Chairman Thurmond regarding the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States, July 29, 1987 1223
  - Minutes of meeting with Judge Bork (1987 nomination) 1250
  - "Standing Committee on the Federal Judiciary, How it Works" 1235
- American Civil Liberties Union:
  - "The Essential Judge Bork. A Report on the Testimony of Judge Robert H. Bork Before the Senate Judiciary Committee and an Analysis of His Constitutional Doctrine", October 2, 1987 4053
  - Letter from Joan E. Bertin to Chairman Biden, September 29, 1987 782
  - Letter from Joan E. Bertin to Senator Simpson, September 23, 1987 785
  - Letter from Morton Halperin and Jerry Berman to the Editor, *City Paper*, September 28, 1987 3155
  - "Memorandum and Analysis: *OCAW v. American Cyanamid Co.*" 783
  - Memorandum from Morton Halperin and Jerry Berman to Senator Simpson, September 28, 1987 3154
  - Press release, September 29, 1987 781

Page
"Report on the Civil Liberties Record of Judge Robert H. Bork," September 9, 1987 ..... 1936, 4003
Statement, October 5, 1987 3995
American Jewish Congress:
Statement of Marvin Frankel, September 30, 1987 4103
American Medical Student Association:
Statement of Drs. P. Preston Reynolds and Grace Heitsch, September 30, 1987 4130
Americans for Democratic Action:
Statement of Joseph Rauh, October 1987 4134
Americans for Religious Liberty:
Statement of Ed Doerr, September 30, 1987 4147
Anthony, Robert A.:
Essay, "Judge Bork's Decisions in Which He Wrote No Opinion: Analysis of the Regulatory and Benefit Cases" 1548
Antitrust Law and Economics Review:
Editorial, "Foreword: Antitrust, the Supreme Court, and the Bork Factor" 4152
Letter from Charles E. Mueller to Senator Kennedy, August 13, 1987 4151
Antitrust professors in opposition to the nomination:
Letter to Chairman Biden, September 29, 1987 4166
Areeda, Phillip:
Testimony 3313
Asian American Bar Association of the Greater Bay Area:
Letter from Hon Chew to Chairman Biden, September 15, 1987 4170
Association of the Bar of the City of New York:
Prepared Statement 2261
Testimony of Robert Kaufman and Sheila Birnbaum 2259
Letter from John W. Barnum to Senator Simpson, September 22, 1987 2269
Letter from John W. Barnum to Robert Kaufman, September 22, 1987 2270
Letter from Kenneth Volk to Senator Hatch, September 24, 1987 6106
Letter from Kenneth Volk to Senator Simpson, September 24, 1987 2275
Letter from Robert Kaufman to Chairman Biden, September 28, 1987 2308
Letter from Winthrop J. Allegaert to Chairman Biden, September 22, 1987 3973
"New York Bar Association Split Over Stand on Bork," *The New York Times*, undated 2295
Paul J. Curran, "Bork's Credentials Beyond Challenge; Opponents Use Political Standards," *New York Law Journal*, September 28, 1987 2296
"Statement by Members of the Association of the Bar of the City of New York Repudiating the Unauthorized Action of its Executive Committee in Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States," September 22, 1987 2271
Attorneys in opposition to the nomination:
Statement, October 2, 1987 4173
Attorneys in Washington, D.C. in opposition to the nomination:
Letter to Chairman Biden, October 5, 1987 4178
Attorneys who worked with Robert Bork in the Office of the Solicitor General:
Letter to Chairman Biden, September 17, 1987 2619
Avins, Alfred:
Statement 4182
Babcock, Barbara:
Prepared Statement 2348
Testimony 2344
Baker, Donald:
Prepared Statement 3317
Testimony 3314
"The Lawyer's Bookshelf: Review of *The Antitrust Paradox,*" *New York Law Journal*, July 7, 1978 3288
Baldwin, Donald:
Prepared Statement 2019
Testimony 2016
Barnum, John W.:
Letter to Robert Kaufman, September 22, 1987 2270
Letter to Senator Simpson, September 22, 1987 2269
Bator, Paul:
Prepared Statement 2912
Testimony 2910

Page

Becker, Mary:
  Letter to Chairman Biden, September 23, 1987 4184
Bell, Griffin:
  Testimony 2805
Bellizi, John J.:
  Prepared Statement 2055
  Testimony 2052
Belter, Leonard W.:
  Letter to the Editor, *The Washington Post,* September 22, 1987 2233
Bennett, Robert:
  Prepared Statement 2597
  Testimony 2595
Ben-Veniste, Richard and Frampton, George Jr.:
  Stonewall: The Real Story of the Watergate Prosecution (Simon and Schuster 1977), p. 142 639
Berkeley Commission on Peace and Justice:
  Memorandum, with attachments, September 30, 1987 4185
Berman, Jerry:
  Letter with Morton Halperin to *City Paper,* September 28, 1987 3155
  Memorandum with Morton Halperin to Senator Simpson, September 28, 1987 3154
Bertin, Joan E.:
  Letter to Chairman Biden, September 29, 1987 782
  Letter to Senator Simpson, September 23, 1987 785
BeVier, Lillian Riemer:
  Prepared Statement 2930
  Testimony 2927
Biden, Chairman Joseph R.:
  Opening Statement 94
  Prepared Statement 99
  Closing Statements 860, 3894
  Questioning of:
    Judge Bork 112, 127, 232, 241, 258, 264, 319, 405, 452, 593, 642, 664, 676, 679, 696
    William Coleman 962, 992, 1001
    Barbara Jordan 1053
    Andrew Young 1078
    Burke Marshall 1099
    William French Smith 1136
    William Rogers 1174
    Harold R. Tyler, Jr. 1185, 1227, 1247
    Laurence H. Tribe 1297
    Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1371
    Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2006
    Honorable Warren E. Burger 2098
    Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger 2138
    Lloyd N. Cutler 2176, 2181, 2188, 2199
    Panel of Chesterfield Smith, Robert W. Meserve and Robert Kaufman 2265
    Thomas Sowell 2320
    Panel of Shirley M. Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2332, 2392
    Panel of Forrest McDonald, Daniel Meador, George Priest, John G. Simon and Ronald Rotunda 2488
    Panel of Charles S. Rhyne, John C. Shepherd, Wallace D. Riley and James T. Bland, Jr 2756
    Panel of Thomas Eagleton and Cass Sunstein 2788, 2791
    Griffin Bell 2808, 2815
    Philip Kurland 2849
    Panel of Herma Hill Kay, Kathleen Sullivan, David Richards 3025
    Elliot Richardson 3148, 3158, 3160
    Panel of Mervyn Dymally, John Conyers, Jr. and Walter E. Fauntroy 3187

Page
    Panel of Terrance Sandalow, Steven Frankino, Maurice Holland, Ronald Davenport, Eugene Rostow, Thomas Morgan and Gerhard Casper 3270, 3308
    Panel of Phillip Areeda, Thomas Kauper, Donald I. Baker and James T. Halverson 3345
    Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3442, 3509, 3515, 3521
    Beverly LaHaye 3552
    Vilma Martinez 3621
    Rabbi William Handler 3629, 3634
Birnbaum, Sheila:
    Testimony 2259
Bittick, L. Cary:
    Prepared Statement 2079
    Testimony 2078
Black, Charles L., Jr.:
    "A Note on Senatorial Consideration of Supreme Court Nominees," 79 *Yale Law Journal* 657 (1970) 1007
    Letter to *The New York Times*, July 25, 1973 200
    Letter to Congressman Bob Eckhardt, July 30, 1973 205
    "Mr. Nixon, the Tapes, and Common Sense," *The New York Times*, undated 203, 205
Bland, James T., Jr.:
    Testimony 2754
Blecher, Maxwell M.:
    Statement 3465
B'nai B'rith Women:
    Statement, September 1987 4204
Boley, John:
    Testimony 3688
Bollinger, Lee:
    Testimony 1987
Bolton, John:
    Letter to Judge Bork, September 28, 1987 4208
Bork, Judge Robert H.:
    Opening Statement 103
    Prepared Statement 106
    Testimony 103, 193, 319, 445, 795
    Closing Statement 855
    The Antitrust Paradox (1978), p. 407 3520
    "The Crisis in Constitutional Theory: Back to the Future," The Philadelphia Society, April 3, 1987 ..... 653, 797
    Letter to Alexander Haig, July 31, 1973 199
    Letter to Alexander Haig, August 3, 1973 212
    Letter to Chairman Biden regarding equal protection and right to privacy, October 1, 1987 3896
    Letter to Chairman Biden regarding *Vander Jagt* v. *O'Neill*, with attachments, October 1, 1987 ..... 756, 3911
    Letter to Chairman Biden in response to Senator Weicker's inquiry regarding the religion clauses, October 1, 1987 3933
    Letter to Chairman Biden in response to Senator Leahy's inquiry regarding timely filings, with attachments, October 2, 1987 3937
    Letter to Chairman Biden in response to Senator Byrd's inquiry regarding campaign finance, October 5, 1987 3948
    Letter to Chairman Biden in response to Senator Simon's inquiry regarding the televising of Supreme Court proceedings, October 5, 1987 3954
    Letter to Chairman Biden regarding unfair advertising, October 5, 1987 3957
    Letter to Chairman Biden in response to Senator Metzenbaum's inquiry regarding the Second Amendment, October 5, 1987 3958
    Letter to Chairman Biden, September 28, 1987 4209
    Letter to Harold Tyler, September 28, 1987 4210
    Letter to Judge Gordon, September 24, 1982 ..... 146, 763, 3918
    Letter to Leonard Garment, August 3, 1973 215
    Letter to Senator Kennedy in response to the Senator's November 16, 1973 letter, undated 223
    List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities" 354

Page
  List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women" 357
  Mayflower Hotel Speech, May 1974 .... 163, 1054
  Memorandum to the Attorney General Regarding Pocket Vetoes, January 26, 1976 177
  Memorandum to Judge Robb, October 1, 1982 .... 139, 764, 3919
  Memorandum to Judges Robb and Gordon, September 17, 1982 .... 145, 762, 3917
  Memorandum to Judges Robb and Gordon, October 8, 1982 .... 141, 766, 3921
  "The Struggle Over the Role of the Court," *National Review*, September 17, 1982 650
  Transcript of Department of Justice "Press Conference of Honorable Robert H. Bork, Acting Attorney General of the United States," with attachments, October 24, 1973 595
"Bork on Bork—The World According to Robert Bork," September 17, 1987 370
Born, Gary:
  Testimony 1364
  Essay, "Robert Bork's Civil Rights Record" 1485
Brigham Young University, J. Reuben Clark Law School:
  Letter from faculty members, September 28, 1987 4211
Broderick, Albert:
  "Blind Spot for Blacks—and Women" 4212
Brown, Charles:
  Prepared Statement 3432
  Testimony 3430
Brown, Harold:
  "Controversy Over Bork's Nomination No Surprise," *Massachusetts Lawyers Weekly*, September 7, 1987 4224
Brownell, Herbert:
  Prepared Statement 1261
  Testimony 3838
  Telegram to Chairman Biden, September 20, 1987 .... 1260, 3839
Buchanan, Patrick:
  Memorandum to Alexander Haig, August 3, 1973 202
Burden, Ordway P.:
  Statement 2085
Burger, Honorable Warren E.:
  Testimony 2096
Business and Professional Women's Clubs/USA:
  Letter from Linda Colvard Dorian to Chairman Biden, October 2, 1987 4227
  Statement 4229
Byrd, Senator Robert C.:
  Opening Statement 121
  Questioning of Judge Bork 126, 679
Byse, Clark:
  Letter to Senator Hatch, September 17, 1987 2616
Campbell, Thomas:
  Testimony 1367
  Essay, "Analysis of Judge Bork's Labor Opinions" 1450
Carlock, George Reed:
  Prepared Statement 2989
  Testimony 2986
Carrington, Frank:
  Prepared Statement 2069
  Testimony 2068
Carter, Honorable Jimmy:
  Letter to Chairman Biden, September 29, 1987 4249
Casper, Gerhard:
  Prepared Statement 3247
  Testimony 3240
  Letter with Robert Mundheim to Chairman Biden, August 25, 1987 3241
Chicago Council of Lawyers:
  Letter to Senator Simon, September 11, 1987 4251
  Report, September 11, 1987 4252
Children's Defense Fund:
  Statement of Marian Wright Edelman, September 28, 1987 4264
Childs, Marjorie:
  Statement 4281

Page

Christian, James M.:
  Letter to Chairman Biden, September 18, 1987 ... 4495
Christofferson, Clyde:
  Letter to the Editor, *The Wall Street Journal*, September 26, 1987 ... 4287
Cikins, Warren I.:
  Letter to *The Washington Post*, July 28, 1987 ... 310, 3017
Citizens' Advisory Committee, The District of Columbia Bar:
  Letter from Chauncey Fortt to Chairman Biden, October 2, 1987 ... 4292
Citizens Against Bork:
  Tape transcription ... 4294
Citizens for Decency Through Law, Inc.:
  Statement ... 4302
Citizens for God and Country:
  Statement, September 21, 1987 ... 4312
Clay, John:
  Testimony ... 3688
Clinton, Governor Bill:
  Statement ... 4320
Coleman, William T.:
  Prepared Statement ... 874
  Testimony ... 867
  Excerpts from Memorandum on Robert Bork for the 1982 ABA Report ... 1258
Collins, Cardiss:
  Statement ... 4328
Committee for a Fair Confirmation Process:
  "A Response to the Majority Report in the Senate Confirmation Proceedings of Judge Robert H. Bork," November 2, 1987 ... 4332
Common Cause:
  "Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court," September 1987 ... 4457
Community Free Democrats:
  Letter to Chairman Biden, September 30, 1987 ... 4472
Congressional Record:
  Excerpt on "Obtaining the White House Tapes," August 1, 1973 ... 205, 212
Conover, Bev and Elton M., Jr.:
  Letter to committee members, September 29, 1987 ... 4473
Conyers, Congressman John:
  Prepared Statement ... 3168
  Testimony ... 3166
Curran, Paul J.:
  "Bork's Credentials Beyond Challenge; Opponents Use Political Standards," *New York Law Journal*, September 28, 1987 ... 2296
Crown, Joseph:
  Letter to the Editor, *The Mexico City News*, August 28, 1987 ... 4479
  "The Supreme Court Crisis: The Bork Nomination," August 30, 1987 ... 4480
Cutler, Lloyd N.:
  Prepared Statement ... 2161
  Testimony ... 2158
  "Judge Bork: Well Within the Mainstream," *The Washington Post*, September 16, 1987 ... 247, 2175
  "Opinion: The Battle Over Bork," *The American Lawyer*, September 1987 ... 2173
  "Saving Bork from Both Friends and Enemies," *The New York Times*, July 16, 1987 ... 2171
Danforth, Senator John:
  Prepared Statement ... 19
  Testimony ... 17
Daskal, Dimitri G.:
  Prepared Statement ... 3811
  Testimony ... 3809
Davenport, Ronald:
  Prepared Statement ... 3251
  Testimony ... 3250
Davidow, Robert P.:
  Statement ... 4483
Dean, Rev. Kenneth:
  Prepared Statement ... 2999
  Testimony ... 2995

Page
"Bork Thrives on Confrontation," *Rochester Times-Union*, August 14, 1987 ... 4500
DeConcini, Senator Dennis:
  Opening Statement ... 51
  Prepared Statement ... 54
  Questioning of:
    Honorable Gerald Ford ... 11
    Judge Bork ... 248, 391, 676, 722
    Laurence H. Tribe ... 1315
    Panel of Carla A. Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born ... 1398
    Honorable Warren E. Burger ... 2107
    Panel of James Thompson, John P. Frank and Fred L. Foreman ... 2228
    Thomas Sowell ... 2312
    Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams ... 2404
    Panel of Thomas Eagleton and Cass Sunstein ... 2800
    Griffin Bell ... 2816
    Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks ... 2962, 2975
    Panel of Herma Hill Kay, Kathleen Sullivan and David Richards ... 3099
    Panel of Robert Abrams, Charles Brown and Robert Pitofsky ... 3524
    Beverly LaHaye ... 3541
Dellinger, Walter:
  Testimony ... 2136
Denominational Ministry Strategy:
  Letter from Rev. D. Douglas Roth and Rev. Daniel N. Solberg to Diana Huffman, September 15, 1987 ... 4491
  Letter from Rev. D. Douglas Roth, Rev. Daniel N. Solberg and Charles L. Honeywell to Diana Huffman, October 7, 1987 ... 4493
District of Columbia Democratic State Committee:
  Letter from James M. Christian to Chairman Biden, September 18, 1987 ... 4495
  Resolution, September 18, 1987 ... 4496
Dolan, Edith-Marie:
  Letter to Senator Hatch, September 28, 1987 ... 2968
Dole, Senator Bob:
  Prepared Statement ... 14
  Testimony ... 12
Drach, Mitchell R.:
  Letter to Chairman Biden, October 2, 1987 ... 4498
Dunn, James, et al.:
  Letter to Senator Simon ... 4499
Dymally, Congressman Mervyn:
  Prepared Statement ... 3163
  Testimony ... 3162
Eagleton, Senator Thomas:
  Prepared Statement ... 2762
  Testimony ... 2760
Equal Rights Advocates, with Federation of Women Lawyers Judicial Screening Panel, Women's Legal Defense Fund, NOW Legal Defense and Education Fund:
  Statement, October 19, 1987 ... 4531
Executive Leadership Council:
  Statement, October 9, 1987 ... 4501
Falsgraf, William W.:
  Letter to Chairman Biden, September 18, 1987 ... 2737
Fauntroy, Delegate Walter E.:
  Prepared Statement ... 3179
  Testimony ... 3175
Federal regulations (OSHA) relating to occupational exposure to lead, November 14 and 21, 1978 ... 4510
Federal regulations relating to the Watergate Special Prosecution Force:
  Creation of WSPF, May 31, 1973 ... 3125
  Abolition of WSPF, October 23, 1973 ... 3210
Federation of Women Lawyers Judicial Screening Panel, with Women's Legal Defense Fund, NOW Legal Defense and Education Fund, Equal Rights Advocates:
  Statement, October 19, 1987 ... 4531

Page
Feeney, Floyd and Mahoney, Barry:
  Letter to Chairman Biden, October 5, 1987 4552
  "The Lawfulness of Robert Bork's Firing of the Watergate Special Prosecutor," October 6, 1987 4554
Feinberg, Margo:
  Letter to Chairman Biden regarding views of local California bar associations, September 22, 1987 4592
Fellers, James D.:
  Letter to John C. Shepherd, September 18, 1987 2741
Finley, Lucinda:
  Telegram to Chairman Biden, September 24, 1987 2977
Fish, Congressman Hamilton:
  Prepared Statement 24
  Testimony 21
Fiske, Robert:
  Testimony 1184
  Letter to then-Chairman Thurmond regarding the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States, August 5, 1987 1218
  Letter to then-Chairman Thurmond regarding the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States, July 29, 1987 1223
Fiss, Owen:
  Prepared Statement 2495
  Testimony 2491
Flynn, John J.:
  Statement 4595
Foer, Albert A.:
  Prepared Statement 3826
  Testimony 3824
Ford, Honorable Gerald:
  Prepared Statement 6
  Testimony 3
Foreman, Fred:
  Prepared Statement 2222
  Testimony 2221
Foster, Byron C.:
  Letter to Chairman Biden, September 21, 1987 4624
Frampton, George:
  Prepared Statement 3197
  Testimony 3194
  Stonewall: The Real Story of the Watergate Prosecution, with Richard Ben-Veniste (Simon and Schuster 1977), p. 142 639
Frank, John:
  Prepared Statement 2208
  Testimony 2204
Frankino, Steven:
  Prepared Statement 3254
  Testimony 3252
Franklin, John Hope:
  Prepared Statement 2122
  Testimony 2118
Freedman, Monroe H.:
  Letter to Chairman Biden, September 29, 1987 4626
Fuesel, Robert:
  Prepared Statement 2049
  Testimony 2047
Full committee employees staffing the hearing, list of 3894
Gewirtz, Paul:
  Prepared Statement 2558
  Testimony 2555
  "Senators Should Use Activist Approach in Judging Nominees," *Legal Times,* August 10, 1987 2591
Gilligan, Carol:
  Telegram to Chairman Biden, September 27, 1987 2978
Glendon, Mary Ann:
  Essay, "The Probable Significance of the Bork Appointment for Issues of Particular Concern to Women" 1440

Page

- Gold, Laurence:
  - Letter to Senator Metzenbaum, September 28, 1987 3090
- Goldstein, Joseph:
  - "That Was the Real Bork Who Testified," *The New York Times*, September 27, 1987 4627
- Gordon, Judge James F.:
  - Affidavit, October 2, 1987 4628
  - Letter to Chairman Biden, August 24, 1987 .... 136, 808
  - Letter to Judge Bork, December 17, 1982 .... 143, 768, 3923
- Grano, Joseph D.:
  - Essay, "The 'Response Prepared to White House Analysis of Judge Bork's Record': A Critical Appraisal" 1596
- Grassley, Senator Charles E.:
  - Opening Statement 59
  - Prepared Statement 63
  - Questioning of:
    - Judge Bork 259, 264, 400, 406, 689
    - William Coleman 984
    - Burke Marshall 1103
    - William French Smith 1133
    - Nicholas deB. Katzenbach 1154
    - Harold R. Tyler, Jr 1210
    - Laurence H. Tribe 1318
    - Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1401
    - Honorable Warren E. Burger 2108
    - Lloyd N. Cutler 2191
    - Panel of Chesterfield Smith, Robert W. Meserve and Robert Kaufman 2302
    - Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2402
    - Panel of Herma Hill Kay, Kathleen Sullivan, and David Richards 3097
    - Elliot Richardson 3151
    - Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3523, 3529
    - Vilma Martinez 3622
    - Rabbi William Handler 3638
    - Herbert Brownell 3842
- Grey, Thomas:
  - Prepared Statement 2515
  - Testimony 2514
- Haberman, Joshua O.:
  - Letter to the Editor, *The Washington Post*, August 6, 1987 .... 311, 3018
- Haig, Alexander M.:
  - Memorandum to President Nixon, August 2, 1973 198
  - Memorandum to President Nixon, August 8, 1973 204
- Halperin, Morton:
  - Letter with Jerry Berman to *City Paper*, September 28, 1987 3155
  - Memorandum with Jerry Berman to Senator Simpson, September 28, 1987 3154
- Halverson, James T.:
  - Prepared Statement 3331
  - Testimony 3328
  - Letter with other previous chairmen of the Section of Antitrust Law of the American Bar Association to *The Washington Post*, August 7, 1987 .... 388, 2276
- Hampton, Ronald:
  - Prepared Statement 3862
  - Testimony 3860
- Handler, Rabbi William:
  - Testimony 3626
  - Materials submitted 3642
- Harris Survey, "Public Opposes Bork Nomination by 59–27%," September 28, 1987 3547
- Harrison, John:
  - Declaration regarding *Vander Jagt* v. *O'Neill*, September 28, 1987 .... 772, 3927
- Hatch, Senator Orrin G.:
  - Opening Statement 35
  - Prepared Statement 39
  - Closing Statement 857

Page

Questioning of:
  Judge Bork ... 176, 345, 471, 594, 643, 845
  William Coleman ... 955, 964
  Burke Marshall ... 1102
  Edward Levi ... 1120
  Nicholas Katzenbach ... 1150
  William Rogers ... 1171
  Harold R. Tyler, Jr ... 1196
  Laurence H. Tribe ... 1303
  Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born ... 1373
  Honorable Warren E. Burger ... 2103
  Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger ... 2141
  Lloyd N. Cutler ... 2182
  Panel of Chesterfield Smith, Robert W. Meserve and Robert Kaufman ... 2292
  Thomas Sowell ... 2317
  Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams ... 2395
  Panel of Robert Bennett, Paul Gewirtz, Owen Fiss, Thomas Grey and Judith Resnick ... 2615
  Panel of Thomas Eagleton and Cass Sunstein ... 2797
  Griffin Bell ... 2813
  Philip Kurland ... 2855
  Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks ... 2952, 2958, 2963
  Elliot Richardson ... 3133
  Panel of Henry Ruth and George Frampton ... 3207, 3213
  Panel of Robert Abrams, Charles Brown and Robert Pitofsky ... 3534
  Beverly LaHaye ... 3544, 3552
List of "Substantive Pro-Minority and Pro-Women Appellate Court Decisions by Judge Bork", with copies of decisions ... 472
List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women ... 583
List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities ... 584
List of "Unanimous Pro-Labor Cases" ... 846
Memorandum, "67 Flaws of the Bork Ad," submitted by Senator Hatch ... 3135
"Response to the Statement of John P. Frank" ... 3554
Statement regarding *Katzenbach* v. *Morgan* ... 1375

Hazard, Geoffrey C., Jr.:
  Letter to Chairman Biden, September 16, 1987 ... 4633

Hearings Before the Committee on the Judiciary, "Nomination of Elliot Richardson to be Attorney General," 93rd Cong., 1st Sess., May 9, 10, 14, 15, 21 and 22, 1973, p. 185 ... 3128

Hearings Before the Committee on the Judiciary, "The Selection and Confirmation of Federal Judges," 97th Cong., 2nd Sess., January 27, February 12, 26 and March 11, 24, 31, 1982, pp. 2091-2092 ... 3531

Heflin, Senator Howell:
  Opening Statement ... 77
  Prepared Statement ... 80
  Closing Statement ... 3893
  Questioning of:
    Judge Bork ... 288, 445, 795
    William Coleman ... 983
    Nicholas deB. Katzenbach ... 1151
    Harold R. Tyler, Jr ... 1208
    Laurence H. Tribe ... 1328
    Honorable Warren E. Burger ... 2113
    Lloyd N. Cutler ... 2192
    Thomas Sowell ... 2325
    Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams ... 2387
    Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda ... 2478
    Panel of Thomas Eagleton and Cass Sunstein ... 2796

Page

    - Griffin Bell 2824
    - Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks 2954
    - Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3108
    - Elliot Richardson 3132
    - Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3535
    - Vilma Martinez 3618
    - Panel of John Clay, John C. Roberts and John Boley 3790
- Hills, Carla:
  - Prepared Statement 1350
  - Testimony 1347
  - "Take the Trouble To Understand" 1415
- Hispanic National Bar Association:
  - Statement of John Martinez 4639
- Holland, Maurice:
  - Prepared Statement 3261
  - Testimony 3257
- Human Life Bill, Report of the Subcommittee on Separation of Powers, S.158, 97th Cong., 1st Sess. (1981) 1376
- Hufstedler, Shirley M.:
  - Prepared Statement 2336
  - Testimony 2331
  - Letter to Senator Kennedy, October 3, 1987 4648
  - Letter to Senator Kennedy, October 6, 1987 4655
- Hughes, John L.:
  - Prepared Statement 2063
  - Testimony 2061
- Humphrey, Senator Gordon J.:
  - Opening Statement 85
  - Prepared Statement 89
  - Questioning of:
    - Judge Bork 296, 426, 427, 453, 736
    - William Coleman 993
    - Barbara Jordan 1051, 1064
    - Andrew Young 1083
    - Burke Marshall 1109
    - William French Smith 1140
    - William Rogers 1180
    - Harold R. Tyler, Jr 1213
    - Laurence H. Tribe 1330
    - Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1405
    - Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2011
    - Honorable Warren E. Burger 2114
    - Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger 2156
    - Lloyd N. Cutler 2197
    - Panel of James Thompson, John Frank and Fred Foreman 2236
    - Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2288
    - Thomas Sowell 2327
    - Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2409
    - Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda 2486
    - Panel of Robert Bennett, Paul Gewirtz, Owen Fiss, Thomas Grey and Judith Resnick 2719
    - Griffin Bell 2826
    - Philip Kurland 2857
    - Panel of Richard Thornburgh, A. Randolph Raymond, Stuart A. Smith and Jewel S. LaFontant 2901
    - Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks 2973
    - Rev. Kenneth Dean 3015
    - Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3106
    - Elliot Richardson 3157, 3158
    - Panel of Henry Ruth and George Frampton 3237

Page

- Panel of Terrance Sandalow, Steven Frankino, Maurice Holland, Ronald Davenport, Eugene Rostow, Thomas Morgan and Gerhard Casper 3306
- Beverly LaHaye 3542
- Rabbi William Handler 3639
- "Response to Submission by John P. Frank" 3876
- "Statistics Concerning Judge Bork's Record on Appeal in Cases Where He Wrote or Joined the Majority Opinion" 737
- "Statistics Concerning Subsequent History with Respect to Judge Bork's Dissenting Opinions" 740

Innis, Roy:
- Prepared Statement 3794
- Testimony 3792

Janofsky, Leonard S.:
- Letter to Chairman Biden, September 18, 1987 2739

Johnson, Harold:
- Prepared Statement 3865
- Testimony 3863

Jordan, Barbara:
- Testimony 1004

Kalven, Jamie:
- "Bork v. The First," *The Nation*, September 19, 1987 3507

Kamenar, Paul D. and Popeo, David J.:
- "The Questionable Role of the ABA in the Judicial Selection Process" 5898

Katzenbach, Nicholas deB.:
- Testimony 1146

Kaufman, Robert:
- Prepared Statement 2261
- Testimony 2259
- Letter to Chairman Biden, September 28, 1987 2308

Kauper, Thomas:
- Prepared Statement 3340
- Testimony 3338

Kay, Herma Hill:
- Prepared Statement 3027
- Testimony 3025

Kennedy, Senator Edward M.:
- Opening Statement 32
- Closing Statement 3873
- Questioning of:
  - Judge Bork 149, 235, 336, 646, 666, 842
  - William Coleman 999
  - Barbara Jordan 1046
  - Andrew Young 1078
  - Laurence H. Tribe 1300
  - Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1393
  - Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2003
  - Honorable Warren E. Burger 2103
  - Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger 2140
  - Lloyd N. Cutler 2178
  - Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2281
  - Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2399
  - Panel of Thomas Eagleton and Cass Sunstein 2791
  - Griffin Bell 2811
  - Philip Kurland 2850
  - Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3082
  - Elliot Richardson 3121
  - Panel of Mervyn Dymally, John Conyers Jr. and Walter E. Fauntroy 3188
  - Panel of Henry Ruth and George Frampton 3204, 3209
  - Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3513
  - Vilma Martinez 3615
- "Bork on Bork—The World According to Robert Bork," September 17, 1987 370
- Letter to Robert Bork, November 16, 1973 218

Page

- Kliesmet, Robert B.:
  - Prepared Statement 3853
  - Testimony 3850
- Krane, Howard:
  - Prepared Statement 2981
  - Testimony 2980
- Kurland, Philip:
  - Prepared Statement 2835
  - Testimony 2831
- Lacovara, Philip:
  - Statement, September 1987 3214
- LaFontant, Jewel S.:
  - Prepared Statement 2887
  - Testimony 2884
  - Résumé 2902
- LaHaye, Beverly:
  - Prepared Statement 3539
  - Testimony 3537
- Larkin, Paul:
  - Declaration regarding *Vander Jagt* v. *O'Neill*, September 25, 1987 .... 769, 3924
- Law, Sylvia:
  - Prepared Statement 2358
  - Testimony 2354
- Law deans, letter from 32 opposing Judge Bork's confirmation as Associate Justice of the Supreme Court to Chairman Biden and Senator Thurmond, September 22, 1987 1342
- Law professors, letter from 100 opposing Judge Bork's confirmation as Associate Justice of the Supreme Court to Chairman Biden and Senator Thurmond, September 22, 1987 1335
- Law professors, list of 100 favoring the confirmation of Robert H. Bork as an Associate Justice of the Supreme Court 408
- Law professors who signed letters in opposition to Robert Bork's nomination to the Supreme Court, list of 3355
- Law schools at which law professors signed letters in opposition to Robert Bork's nomination to the Supreme Court, list of 3351
- Lawson, Gary:
  - Essay, "Judge Bork, Separation of Powers and Special Prosecutor Bills" 1566
- Lawyers' Committee for Civil Rights Under Law:
  - Letter from Conrad K. Harper and Stuart J. Land to Chairman Biden, September 14, 1987 4692
  - Letter from Conrad K. Harper and Stuart J. Land to Chairman Biden, September 30, 1987 4661
  - "Memorandum on the Nomination of Judge Robert H. Bork as an Associate Justice to the United States Supreme Court" 4693
  - "On the Nomination of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court" 4680
  - Statement of Conrad K. Harper, for Individual Members of of the Lawyers' Committee for Civil Rights Under Law, and Individual Members of Local Lawyers' Committees, September 29, 1987 4663
- Lawyers for the Judiciary 3692
  - Statement 3692
- Leahy, Senator Patrick J.:
  - Opening Statement 66
  - Prepared Statement 70
  - Questioning of:
    - Judge Bork 267, 416, 427, 746
    - Andrew Young 1084
    - William French Smith 1132
    - Nicholas deB. Katzenbach 1149
    - Harold R. Tyler, Jr 1193
    - Laurence H. Tribe 1321
    - Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1408
    - Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2013
    - Honorable Warren E. Burger 2110
    - Panel of John Hope Franklin, William Leuchtenberg and Walter Dellinger 2145
    - Lloyd N. Cutler 2188

Page

Panel of James Thompson, John Frank and Fred Foreman 2234
Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2291
Thomas Sowell 2316
Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2407
Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda 2485
Panel of Thomas Eagleton and Cass Sunstein 2794
Griffin Bell 2820
Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks 2951
Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3104
Elliot Richardson 3149
Panel of Henry Ruth and George Frampton 3232, 3238
Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3528
Rabbi William Handler 3631

Leadership Conference on Civil Rights:
  "The Bork Record on Labor" 4752
  "Bork v. Bork," with supplement 4745
  Statement, September 17, 1987 4743
  Statement of Benjamin Hooks, October 1987 4739
  "Summary of Some of the Major Arguments of the Nomination of Robert Bork" 4757
Lebron, Michael:
  Letter to Diana Huffman, September 19, 1987 4761
Lee, Joseph D.:
  Affidavit regarding *Vander Jagt* v. *O'Neill*, with attachments, October 2, 1987 4762
Leibe, Diane C.:
  Letter to committee members, undated 2305
  Letter to Senator Grassley, September 18, 1987 2304
Leuchtenburg, William:
  Prepared Statement 2132
  Testimony 2128
Levi, Edward:
  Prepared Statement 1115
  Testimony 1111
Levin, A. Leo:
  Prepared Statement 2936
  Testimony 2935
Licht, Richard A.:
  "Brief in Opposition to the Nomination of Judge Bork to the Supreme Court" 4776
  Statement 4771
Lipshutz, Robert J.:
  Letter to Chairman Biden, September 29, 1987 4791
List of majority and minority staff members who assisted with the hearings 3894
Luff, Ruth:
  Affidavit regarding *Vander Jagt* v. *O'Neill*, September 25, 1987 .... 775, 3930
Marcus, Paul:
  Letter to Senator DeConcini, September 17, 1987 725
  "UA's Dean Marcus Calls for Bork's Confirmation," *Arizona Daily Star*, August 29, 1987 726
Marshall, Burke:
  Prepared Statement 1090
  Testimony 1087
Marshall, Thurgood:
  Passage from the hearing on the nomination of Justice Marshall, 1967 744
Martinez, Vilma:
  Prepared Statement 3580
  Testimony 3576
Maryland Association of Equal Opportunity Personnel:
  Statement of Yvonne A. Edwards 4792
Mahoney, Barry and Feeney, Floyd:
  Letter to Chairman Biden, October 5, 1987 4552
  "The Lawfulness of Robert Bork's Firing of the Watergate Special Prosecutor," October 6, 1987 4554

Page

McAninch, William S.:
  Letter to Chairman Biden, September 21, 1987 4796
McConnell, Michael:
  Prepared Statement 1358
  Testimony 1354
  Essay, "The First Amendment Jurisprudence of Judge Robert Bork" 1419
McDonald, Forrest:
  Prepared Statement 2415
  Testimony 2412
McLaughlin, Francis X.:
  Statement, with attachments 4797
Meador, Daniel:
  Prepared Statement 2423
  Testimony 2420
Meltzer, Bernard D.:
  Essay, "The ACLU's Evaluation of Judge Bork's Employment Decisions" .. 1579
Mental Health Law Project:
  "Judge Bork and the Rights of Disabled People" 4807
  Letter from Leonard S. Rubenstein to Diana Huffman, October 2, 1987 4818
  Letter from Norman S. Rosenberg to Chairman Biden, September 15, 1987 4806
  Statement of Leonard S. Rubenstein, October 5, 1987 4822
Meserve, Robert:
  Prepared Statement 2248
  Testimony 2244
Metzenbaum, Senator Howard M.:
  Opening Statement 44
  Prepared Statement 45
  Questioning of:
    Judge Bork 193, 235, 360, 467, 678
    William Coleman 963, 966
    Barbara Jordan 1049
    Andrew Young 1082
    Burke Marshall 1101
    William French Smith 1135
    William Rogers 1172, 1175
    Harold R. Tyler, Jr 1201
    Laurence H. Tribe 1307
    Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1402
    Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2004
    Honorable Warren E. Burger 2105
    Lloyd N. Cutler 2184
    Panel of James Thompson, John Frank and Fred Foreman 2226
    Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2286
    Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3088
    Panel of Henry Ruth and George Frampton 3211
    Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3521, 3523
    Roy Innis 3804, 3806
    Panel of Harold Johnson, Robert Kliesmet and Ronald Hampton 3871
  Letter to Harold Tyler, August 26, 1987 1256
Mexican American Legal Defense and Educational Fund:
  Statement of Antonia Hernandez, with attachments, October 5, 1987 4838
Minnesota Coalition of 372,000 to Stop Bork:
  Letter from Rev. Lee S. Wiskochil to Chairman Biden, with attachments, September 22, 1987 4852
Minnick, John B.:
  Letter to Chairman Biden, September 22, 1987 4885
  Letter to Senator Hatch, with attachments, August 19, 1987 4887
  Letter to Senator Hatch, September 22, 1987 4886
Minority Business Enterprise Legal Defense and Education Fund, Inc.:
  Statement 4896
Monaghan, Henry:
  Testimony 2926
Morgan, Thomas D.:
  Prepared Statement 3273
  Testimony 3269

Page

Morris, Earl F.:
- Letter to Chairman Biden, September 18, 1987 ... 2740

Morrison, Alan B.:
- Statement "Concerning *Nader* v. *Bork* and the Nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States," October 5, 1987 ... 5941

Mundheim, Robert H.:
- Letter with Gerhard Casper to Chairman Biden, August 25, 1987 ... 3241

NAACP Legal Defense and Educational Fund, Inc.:
- "*Bork* v. *Bork*. A Comparison of Judge Bork's Confirmation Testimony with His Previous Speches and Articles," with People for the American Way Action Fund, September 1987 ... 4908
- "Judge Bork's Views Regarding Supreme Court Constitutional Precedents," with People for the American Way Action Fund, September 1987 ... 5742
- "Most Recent Date of Bork Criticism of Supreme Court Constitutional Precedents," with attachments, October 5, 1987 ... 4974
- Statement of James M. Nabrit, III, October 8, 1987 ... 5055
- Statement of Julius L. Chambers, October 5, 1987 ... 5042

Nader, Ralph:
- Letter to Chairman Biden, with attachments, October 12, 1987 ... 5059

Nation Institute:
- "The Bork Report. The Supreme Court Watch Project's Analysis of the Record of Judge Robert H. Bork" ... 5084
- Letter from Emily Sack to Chairman Biden, October 1, 1987 ... 5083

National Abortion Rights Action League:
- "Bork as 'Confirmation-day Moderate,' " September 16, 1987 ... 5307
- "The Opposition to Bork: The Case for Women's Liberty" ... 5266

National Association for the Advancement of Colored People:
- Howard University School of Law, letter from faculty members to Chairman Biden and Senator Thurmond, September 17, 1987 ... 5511
- J. Clay Smith, Jr., "A Response to Professor Robert Bork's 'Giving Meaning to the Constitution: Competing Visions of Judicial Review,' " June 12, 1987 ... 5482
- J. Clay Smith, Jr., "Toward Pure Legal Existence: Blacks and the Constitution," June 18, 1987 ... 5490
- Nathaniel R. Jones, "The Desegregation of Urban Schools Thirty Years After Brown," Summer 1984 ... 5338
- Olive Taylor, "Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States," September 1987 ... 5382
- Statement of Althea T.L. Simmons, September 1987 ... 5309

National Association of Criminal Defense Lawyers:
- Statement of Joseph Tydings ... 5514

National Association of Evangelicals:
- Statement of Robert P. Dugan, Jr., October 2, 1987 ... 5526

National Association of Federal Investigators:
- Letter from Alan Nelson to Chairman Biden ... 2089
- Resolution ... 2090

National Bar Association:
- Letter from Walter L. Sutton, Jr. to Chairman Biden, September 29, 1987. 5532

National Black Caucus of State Legislators:
- Statement of David P. Richardson, Jr., September 1987 ... 5533

National Coalition for Women and Girls in Education:
- Letter from Jill Miller to Chairman Biden, September 25, 1987 ... 5538

National Conference of Black Lawyers and Medgar Evers College for Law and Social Justice:
- Statement ... 5541

National Council of the Churches of Christ:
- Letter from Bishop Philip R. Cousin and Dr. Arie R. Brouwer to Chairman Biden, October 1, 1987 ... 5549
- Letter from James A. Hamilton to Chairman Biden, October 1, 1987 ... 5550
- "Resolution Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States" ... 5551

National Conference of Women's Bar Associations:
- Statement, September 17, 1987 ... 5571

National Council of Jewish Women:
- Statement ... 5575

Page

National Education Association:
  Letter from Kenneth F. Melley to Chairman Biden, October 1, 1987 5577
  Statement, October 1, 1987 5578
National Family Planning and Reproductive Health Association, Inc.:
  Statement of Scott R. Swirling, October 5, 1987 5585
National Lawyers Guild:
  Statement of Haywood Burns, with attachment 5588
National Press, Inc.:
  Statement of Joe D. Joseph, October 31, 1987 5600
National Urban League, Inc.:
  Statement of Douglas G. Glasgow, October 5, 1987 5605
National Women's Law Center:
  Statement of Marcia D. Greenberger, Suzanne E. Meeker and Ellen J. Vargyas, with attachment, October 5, 1987 5611
National Women's Political Caucus:
  Statement of Irene Natividad, October 5, 1987 5663
Natural Resources Defense Council:
  Letter from Adrian W. DeWind to Chairman Biden, September 22, 1987.... 5670
  Memorandum, September 22, 1987 5673
"New York Bar Association Split Over Stand on Bork," *The New York Times*, undated 2295
New York State Defenders Association, Inc.:
  Letter from Wilfred R. O'Connor to Chairman Biden, September 16, 1987 . 5683
New York Times, The:
  Black, Charles L., Jr., Letter to the Editor, July 25, 1973 200
  Black, Charles L., Jr., "Mr. Nixon, the Tapes and Common Sense," undated 203, 205
  Cutler, Lloyd N., "Saving Bork from Both Friends and Enemies," July 16, 1987 2171
  Goldstein, Joseph, "That Was the Real Bork Who Testified," September 27, 1987 4627
  "New York Bar Association Split Over Stand on Bork," undated 2295
  "Nixon and Bork Reported Split on Prosecutor's Role," October 29, 1973 ... 636
  "Nixon Plan on Prosecutor is Opposed by Mansfield," October 28, 1973...... 634
  Rostow, Eugene, Letter to the Editor, August 3, 1987, (published and unpublished) 3287
  Smith, Stuart, "Bork Deserves to be a Justice," September 16, 1987 455
"Nixon and Bork Reported Split on Prosecutor's Role," *The New York Times*, October 29, 1973 636
"Nixon Plan on Prosecutor is Opposed by Mansfield," *The New York Times*, October 28, 1973 634
Nolan, Robert L.:
  Letter to Chairman Biden, September 21, 1987 5684
NOW Legal Defense and Education Fund, with Federation of Women Lawyers Judicial Screening Panel, Women's Legal Defense Fund, Equal Rights Advocates:
  Statement, October 19, 1987 4531
Oaks, Dallin:
  Prepared Statement 2944
  Testimony 2941
Oil, Chemical and Atomic Workers International Union v. *American Cyanamid Co.*:
  AFL-CIO, "Memorandum on Judge Bork's Opinion and Testimony Concerning the *American Cyanamid* Case" 3091
  American Civil Liberties Union, Press Release, September 29, 1987 781
  American Civil Liberties Union, "Memorandum and Analysis: *OCAW* v. *American Cyanamid Co.*" 783
  Bertin, Joan E., Letter to Chairman Biden, September 29, 1987 782
  Bertin, Joan E., Letter to Senator Simpson, September 23, 1987 785
  Federal regulations (OSHA) relating to occupational exposure to lead, November 14 and 21, 1978 4510
  Riggs, Betty, Letter to Senators, September 28, 1987 788
  Simpson, Honorable Alan, Letter to Joan E. Bertin, September 30, 1987 779
Olmstead v. *United States*, 277 U.S. 438 (1928) 1015
Patriotic Majority:
  "The Case of Bork Versus the American Revolution" 5685
Pearce, Jack:
  Letter to Chairman Biden, August 17, 1987 5688

Page
"Recommendation that Judge Robert Bork Not be Confirmed as an Associate Justice of the United States Supreme Court on the Basis of Deficiencies in His Approach to Interpretation of the Antitrust Laws"... 5692
People for the American Way Action Fund:
"*Bork v. Bork*. A Comparison of Judge Bork's Confirmation Testimony with His Previous Speeches and Articles," with the NAACP Legal Defense and Educational Fund, Inc., September 1987 ... 4908
"Judge Bork's Views Regarding Supreme Court Constitutional Precedent," with the NAACP Legal Defense and Educational Fund, Inc., September 1987 ... 5742
Statement of John R. Buchanan, October 1987 ... 5701
Peterson, Henry E.:
Statement, September 22, 1987 ... 3222
Physicians Forum, Inc.:
Statement, September 14, 1987 ... 5888
Pilpel, Harriet F.:
Letter to Chairman Biden, September 16, 1987 ... 5892
Pitofsky, Robert:
Prepared Statement ... 3443
Testimony ... 3441
Planned Parenthood Federation of America:
Statement of Faye Wattleton, October 5, 1987 ... 5893
Polsby, Daniel D.:
Essay, "Judge Bork and Standing" ... 1470
Popeo, Daniel J. and Kamenar, Paul D.:
"The Questionable Role of the ABA in the Judicial Selection Process" ... 5898
Priest, George:
Prepared Statement ... 2439
Testimony ... 2435
Public Citizen Litigation Group:
"Judge Bork's Civil Rights Record on the Court of Appeals" ... 5931
The Judicial Record of Judge Robert Bork, August 1987 ... 1725
Letter from Ralph Nader to Chairman Biden, with attachments, October 12, 1987 ... 5059
Statement, October 5, 1987 ... 5913
"Statement of Alan B. Morrison Concerning *Nader* v. *Bork*, and the Nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States," October 5, 1987 ... 5941
"Statistics Lie: Reponse to Statistics Frequently Cited by the White House to Support Nomination of Judge Bork" ... 5939
Puerto Rican Legal Defense and Educational Fund, Inc.:
Statement, October 2, 1987 ... 6003
Randolph, A. Raymond:
Prepared Statement ... 2870
Testimony ... 2868
Rauschenberg, Robert:
Prepared Statement ... 2000
Testimony ... 1998
Report of the Committee ... 6180
Report of the Subcommittee on Separation of Powers on the Human Life bill, S. 158, 97th Cong., 1st Sess. (1981) ... 1376
Resnick, Judith:
Prepared Statement ... 2532
Testimony ... 2528
"Response Prepared to White House Analysis of Judge Bork's Record," September 3, 1987 ... 1630
"A Retraction on Bork," *The Washington Post*, November 22, 1973 ... 638
Rhyne, Charles:
Prepared Statement ... 2727
Testimony ... 2724
Telegram to President Reagan, September 13, 1987 ... 2742
Richards, David A.J.:
Prepared Statement ... 3050
Testimony ... 3047
Richardson, Elliott:
Prepared Statement ... 3116
Testimony ... 3112

Page

  Hearings Before the Committee on the Judiciary, Nomination to be Attorney General, 93rd Cong., 1st Sess., May 9, 10, 14, 15, 21, 22, 1973, p. 185 3128

Riggs, Betty:
  Letter to Senators, September 28, 1987 788

Riley, Wallace:
  Prepared Statement 2750
  Testimony 2748

Robb, Judge Roger:
  Memorandum to Judges Bork and Gordon, March 19, 1982 ..... 144, 761, 3916
  Memorandum to Judges Bork and Gordon, October 5, 1982 ..... 140, 765, 3920

Roberts, John C.:
  Testimony 3688
  "Judge Bork's Legal Philosophy" 6008

Rogers, William:
  Prepared Statement 1165
  Testimony 1160

Rostow, Eugene:
  Prepared Statement 3282
  Testimony 3279
  Letter to the Editor, *The New York Times*, August 3, 1987 (published and unpublished) 3287

Rotunda, Ronald:
  Prepared Statement 2457
  Testimony 2454

Ruth, Henry:
  Testimony 3192

San Francisco Lawyers' Committee for Urban Affairs:
  Letter from Mark N. Aaronson to Chairman Biden, October 1, 1987 6016
  "Resolution of the Executive Committee in Opposition to the Nomination of Robert H. Bork to the Supreme Court of the United States" 6017

Sandalow, Terrance:
  Prepared Statement 3292
  Testimony 3289

Schauer, Frederick:
  Letter to Chairman Biden, September 22, 1987 6018

Schulhofer, Steven J.:
  Letter to Chairman Biden, September 28, 1987 3844

Schwartz, Louis B.:
  "Bork: Why Conservatives Should Oppose Him" 6023
  Letter to Senator Leahy, September 10, 1987 6022
  "Moderate Bork? Defender of the First Amendment?" 6027

Schwartz, Herman:
  "The Frantic Reflagging of Bork," *The Nation*, September 19, 1987 3504
  Statement 3491

"Senate Democrats Ask Independent Special Prosecutor," *The Washington Post*, October 31, 1973 632

Shepherd, John:
  Testimony 2735
  "In Support of Bork," *National Law Journal*, September 21, 1987 2744

Simon, John G.:
  Prepared Statement 2448
  Testimony 2445
  Letter to Chairman Biden, September 29, 1987 6029

Simon, Senator Paul:
  Opening Statement 92
  Questioning of:
    Judge Bork 307, 438
    Panel of John Clay, John C. Roberts and John Boley 3787

Simpson, Senator Alan K.:
  Opening Statement 47
  Closing Statement 856
  Questioning of:
    Judge Bork 236, 242, 380, 669, 677, 850
    William Coleman 968
    William French Smith 1142
    Nicholas deB. Katzenbach 1152
    William Rogers 1176

Page
        Harold R. Tyler, Jr 1205
        Laurence H. Tribe 1310
        Panel of Lee Bollinger, Robert Styron and Robert Rauschenberg 2007
        Panel of Donald Baldwin, Dewey Stokes, Jerald R. Vaughn, John J. Bellizzi, John L. Hughes, Frank Carrington and L. Cary Bittick 2092
        Honorable Warren E. Burger 2106
        Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger 2147
        Lloyd N. Cutler 2186
        Panel of James Thompson, John Frank and Fred Foreman 2230, 2238
        Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2267
        Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2389
        Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda 2480
        Panel of Robert Bennett, Paul Gerwirtz, Owen Fiss, Thomas Grey and Judith Resnick 2716
        Panel of Thomas Eagleton and Cass Sunstein 2802
        Griffin Bell 2818
        Philip Kurland 2852
        Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks 2949
        Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3084, 3087
        Elliot Richardson 3151
        Panel of Henry Ruth and George Frampton 3234
        Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3517
        Vilma Martinez 3616
        Rabbi William Handler 3633, 3635
        Herbert Brownell 3842
        Panel of Harold Johnson, Robert Kliesmet and Ronald Hampton 3872
    Letter to Joan E. Bertin, September 30, 1987 779
    List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities" 975
    List of "Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women" 978
    Questions submitted in connection with William Coleman's testimony 979
Sinclair, I.B.:
    Memorandum, with attachments, October 6, 1987 6032
Smith, Chesterfield:
    Testimony 2243
Smith, Stuart:
    Prepared Statement 2895
    Testimony 2892
    "Bork Deserves to be a Justice," *The New York Times*, September 16, 1987 455
Smith, William French:
    Prepared Statement 1128
    Testimony 1124
Society of American Law Teachers:
    Letter from Emma C. Jordan to Chairman Biden, September 22, 1987 2607
    List of "Law Professors Who Subscribe to the Society of American Law Teachers' Letter of Opposition to the Nomination of Judge Robert H. Bork to the United States Supreme Court" 2608
Sowell, Thomas:
    Testimony 2310
Specter, Senator Arlen:
    Opening Statement 75
    Questioning of:
        Judge Bork 277, 427, 713, 815
        William Coleman 988, 992
        Barbara Jordan 1046
        Andrew Young 1080
        Burke Marshall 1104
        Edward Levi 1121
        William French Smith 1137
        Nicholas deB. Katzenbach 1155
        William Rogers 1178

Page
Laurence H. Tribe 1324
Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1394
Panel of Lee Bollinger, William Styron and Robert Rauschenberg 2004
Honorable Warren E. Burger 2111
Panel of John Hope Franklin, William Leuchtenburg and Walter Dellinger 2152
Lloyd N. Cutler 2194
Panel of Chesterfield Smith, Robert Meserve and Robert Kaufman 2284
Thomas Scwell 2323
Panel of Shirley Hufstedler, Barbara Babcock, Sylvia Law and Wendy Williams 2405
Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda 2482
Panel of Thomas Eagleton and Cass Sunstein 2793
Griffin Bell 2822
Philip Kurland 2853
Panel of Richard Thornburgh, A. Raymond Randolph, Stuart Smith and Jewel S. LaFontant 2899
Panel of Paul Bator, Henry Monaghan, Lillian Reimer BeVier, A. Leo Levin and Dallin H. Oaks 2956
Rev. Kenneth Dean 3011
Panel of Herma Hill Kay, Kathleen Sullivan and David Richards 3102
Elliot Richardson 3131
Panel of Terrance Sandalow, Steven Frankino, Maurice Holland, Ronald Davenport, Eugene Rostow, Thomas Morgan and Gerhard Casper 3309
Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3525
Beverly LaHaye 3574
Vilma Martinez 3619
Rabbi William Handler 3636
Panel of John Clay, John C. Roberts and John Boley 3788
Roy Innis 3804
"Statement by Members of the Association of the Bar of the City of New York Repudiating the Unauthorized Action of its Executive Committee in Opposing the Nomination of Judge Robert H. Bork to the Supreme Court of the United States," September 22, 1987 2271
"Statistics Concerning Judge Bork's Record on Appeal in Cases Where He Wrote or Joined the Majority Opinion" 737
"Statistics Concerning Subsequent History with Respect to Judge Bork's Dissenting Opinions" 740
Stewart, Richard:
Testimony 1369
Essay, "The Judicial Performance of Robert Bork in Administrative and Regulatory Law" 1520
Stokes, Dewey:
Prepared Statement 2026
Testimony 2023
Strong, Jerome A.:
Statement 6049
Styron, William:
Prepared Statement 1992
Testimony 1989
Suffolk University Law School:
"Report on the 'Judge Bork Survey' of Constitutional Law Professors," October 5, 1987 6058
Sullivan, Kathleen:
Prepared Statement 3072
Testimony 3070
Sullivan, Lawrence A.:
Statement 3479
Sunstein, Cass:
Prepared Statement 2767
Testimony 2765
"Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Minorities," list of 354, 584, 975
"Supreme Court Briefs Where Solicitor General Bork Supported the Rights of Women," list of 357, 583, 978

Page

- Tachau, David Brandeis:
  - Affidavit regarding *Vander Jagt* v. *O'Neill*, October 1, 1987 6062
- Tate, S. Shepherd:
  - Letter to Chairman Biden, September 18, 1987 2738
- Telephone Memorandum, The White House, August 3, 1973 216
- Thompson, James:
  - Testimony 2202
- Thornburgh, Richard:
  - Prepared Statement 2865
  - Testimony 2863
- Thurmond, Senator Strom:
  - Opening Statement 29
  - Closing Statement 3893
  - Questioning of:
    - Judge Bork 128, 329, 464
    - William Coleman 954, 964
    - Edward Levi 1120
    - William French Smith 1132
    - Nicholas deB. Katzenbach 1148
    - William Rogers 1169
    - Harold R. Tyler, Jr 1189, 1247
    - Laurence H. Tribe 1299
    - Panel of Carla Hills, Michael McConnell, Thomas Campbell, Richard Stewart and Gary Born 1985
    - Panel of Donald Baldwin, Dewey Stokes, Jerald R. Vaughn, John J. Bellizzi, John L. Hughes, Frank Carrington, L. Cary Bittick 2091
    - Honorable Warren E. Berger 2100
    - Lloyd N. Cutler 2177
    - Panel of James Thompson, John Frank and Fred Foreman 2225
    - Thomas Sowell 2315
    - Panel of Forrest McDonald, Daniel Meador, George Priest, John Simon and Ronald Rotunda 2479
    - Panel of Robert Bennett, Paul Gewirtz, Owen Fiss, Thomas Grey and Judith Resnick 2613
    - Panel of Charles Ryne, John Shepherd, Wallace Riley and James T. Bland, Jr 2755
    - Panel of Thomas Eagleton and Cass Sunstein 2789
    - Griffin Bell 2810
    - Panel of Paul Bator, Henry Monaghan, Lillian Riemer BeVier, A. Leo Levin and Dallin H. Oaks 2974
    - Panel of Howard Krane and George Read Carlock 2994
    - Rev. Kenneth Dean 3019
    - Elliot Richardson 3121
    - Panel of Henry Ruth and George Frampton 3205
    - Panel of Terrance Sandalow, Steven Frankino, Maurice Holland, Ronald Davenport, Eugene Rostow, Thomas Morgan and Gerhard Casper 3305
    - Panel of Phillip Areeda, Thomas Kauper, Donald Baker and James Halverson 3347
    - Panel of Robert Abrams, Charles Brown and Robert Pitofsky 3510, 3516
    - Beverly LaHaye 3551
    - Rabbi William Handler 3630
    - Panel of John Clay, John C. Roberts and John Boley 3786
    - Roy Innis 3805
    - Herbert Brownell 3841
    - Panel of Harold Johnson, Robert Kleismet and Ronald Hampton 3869
- Transcript of Department of Justice "Press Conference of Honorable Robert H. Bork, Acting Attorney General of the United States," October 24, 1973 595
- Transcript of Proceedings, Subcommittee on Antitrust, Monopolies and Business Rights, S. 567, Malt Beverage Interbrand Competition Act, August 4, 1987, p. 57 3533
- Tribe, Laurence H.:
  - Prepared Statement 1272
  - Testimony 1267
- Tyler, Harold R., Jr.:
  - Testimony 1184

Page

- Letter to Chairman Biden regarding the nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, September 21, 1987 ... 1228
- Letter to Senator Metzenbaum, September 4, 1987 ... 1255

United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, International Union:
- Statement, September 1987 ... 6066
- Statement of Owen Bieber, September 1987 ... 6078

United States Justice Foundation:
- Statement of Gary G. Kreep ... 6085

University of Akron:
- Letters from faculty members to Senator Metzenbaum ... 6086

University of California, Berkeley, School of Law:
- Letter from faculty members to Chairman Biden and Senator Thurmond, September 15, 1987 ... 6090

University of California, Davis, School of Law:
- Letter from faculty members to Chairman Biden, September 16, 1987 ... 6092

University of California, Santa Barbara:
- Letter from members of the Chicano/Latino Faculty Caucus to Chairman Biden, September 24, 1987 ... 6095

Univerity of Texas at Austin Law School:
- Letter from faculty members to Chairman Biden and Senator Thurmond, September 1, 1987 ... 6099

University of Wisconsin Law School:
- Letter from faculty members to committee members, September 16, 1987 .. 6104

Vander Jagt v. O'Neill:
- Bork, Judge Robert H., Memorandum to Judges Robb and Gordon, September 17, 1987 ... 145, 762, 3917
- Bork, Judge Robert H., Memorandum to Judge Robb, October 1, 1982 .... 139, 764
- Bork, Judge Robert H., Letter to Judge Robb, October 1, 1982 ... 146, 763, 3919
- Bork, Judge Robert H., letter to Judge Gordon, September 24, 1982 .... 146, 763, 3918
- Bork, Judge Robert H., Memorandum to Judges Robb and Gordon, October 8, 1982 ... 141, 766, 3921
- Bork, Judge Robert H., Letter to Chairman Biden, with attachments, October 1, 1987 ... 756, 3911
- Gordon, Judge James F., Letter to Chairman Biden, August 24, 1987 ... 136, 808
- Gordon, Judge James F., Letter to Judge Bork, December 17, 1982 .... 143, 768, 3923
- Gordon, Judge James F., Affidavit, October 2, 1987 ... 4628
- Harrison, John, Declaration, September 28, 1987 ... 772, 3927
- Hufstedler, Shirley M., Letter to Senator Kennedy, October 3, 1987 ... 4648
- Larkin, Paul, Declaration, September 25, 1987 ... 769, 3924
- Lee, Joseph D., Affidavit, with attachments, October 2, 1987 ... 4762
- Luff, Ruth, Affidavit, September 25, 1987 ... 775, 3930
- Robb, Judge Roger, Memorandum to Judges Bork and Gordon, March 19, 1982 ... 144, 761, 3916
- Robb, Judge Roger, Memorandum to Judges Bork and Gordon, October 5, 1982 ... 140, 765, 3920
- Tachau, David Brandeis, Affidavit, October 1, 1987 ... 6062

Vaughn, Jerald:
- Prepared Statement ... 2040
- Testimony ... 2038

Volk, Kenneth:
- Letter to Senator Hatch, September 24, 1987 ... 6106
- Letter to Senator Simpson, September 24, 1987 ... 2275

Vorenberg, James:
- Letter to Chairman Biden, September 28, 1987 ... 6107

Washington Council of Lawyers:
- Letter from Dennis A. Henigan to Chairman Biden, September 18, 1987 6108

Washington Legal Foundation:
- Statement, September 23, 1987 ... 6111

Washington Post, The:
- Belter, Leonard W., Letter to the Editor, September 22, 1987 ... 2233

Page
Cutler, Lloyd N., "Judge Bork: Well Within the Mainsteam," September 16, 1987 .... 247, 2175
Haberman, Joshua O., Letter to the Editor, August 6, 1987 .... 311, 3018
Halverson, James T., Letter to the Editor, August 7, 1987 .... 388, 2276
"Senate Democrats Ask Independent Special Prosecutor," October 31, 1973 632

Watergate:

American Bar Association, Minutes of meeting with Judge Bork (1987 nomination) 1250
American Bar Association, Excerpts from William Coleman's Memorandum on Robert Bork for the 1982 report 1258
Ben-Veniste, Richard and Frampton, George Jr., *Stonewall: The Real Story of the Watergate Prosecution* 142 (Simon and Schuster 1977) 639
Black, Charles L., Jr., Letter to *The New York Times*, July 25, 1973 200
Black, Charles L., Jr., Letter to Congressman Bob Eckhardt, July 30, 1973 205
Black, Charles L., Jr., "Mr. Nixon, the Tapes, and Common Sense," *The New York Times*, undated 203, 205
Bork, Judge Robert H., Letter to Alexander Haig, July 31, 1973 199
Bork, Judge Robert H., Letter to Alexander Haig, August 3, 1973 212
Bork, Judge Robert H., Letter to Leonard Garment, August 3, 1973 215
Bork, Judge Robert H., Letter to Senator Kennedy in response to the Senator's November 16, 1973 letter, undated 223
Buchanan, Patrick, Memorandum to Alexander Haig, August 3, 1973 202
Congressional Record, Excerpt on "Obtaining the White House Tapes," August 1, 1973 213
Federal regulations, Creation of the Watergate Special Prosecution Force. 3125
Federal regulations, Abolition of the Watergate Special Prosecution Force, October 23, 1973 3210
Feeney, Floyd and Mahoney, Barry, letter to Chairman Biden, October 5, 1987 4552
Feeney, Floyd and Mahoney, Barry, "The Lawfulness of Robert Bork's Firing of the Watergate Special Prosecutor," October 6, 1987 4554
Frampton, George, Prepared Statement 3197
Frampton, George, Testimony 3194
Haig, Alexander, Memorandum to President Nixon, August 2, 1973 198
Haig, Alexander, Memorandum to President Nixon, August 8, 1973 204
Hearings Before the Committee on the Judiciary, "Nomination of Elliot Richardson to be Attorney General," 93rd Cong., 1st Sess., May 9, 10, 14, 15, 21 and 22, 1973, p. 185 3128
Kennedy, Senator Edward M., Letter to Robert Bork, November 16, 1973 .. 218
Lacovara, Philip, Statement, September 1987 3214
Morrison, Alan B., Statement "Concerning *Nader* v. *Bork* and the Nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States," October 5, 1987 5941
"Nixon and Bork Reported Split on Prosecutor's Role," *The New York Times*, October 29, 1973 636
"Nixon Plan on Prosecutor is Opposed by Mansfield," *The New York Times*, October 28, 1973 634
Oaks, Dallin, Prepared Statement 2944
Oaks, Dallin, Testimony 2941
Peterson, Henry E., Statement, September 22, 1987 3222
Richardson, Elliot, Prepared Statement 3116
Richardson, Elliot, Testimony 3112
Ruth, Henry, Testimony 3192
"Senate Democrats Ask Independent Special Prosecutor," *The Washington Post*, October 31, 1973 632
Telephone Memorandum, The White House, August 3, 1973 216
Transcript of Department of Justice "Press Conference of Honorable Robert H. Bork, Acting Attorney General of the United States," October 24, 1973 595
Winter, Judge Ralph K., Affidavit, September 25, 1987 3225

Weicker, Senator Lowell:

Letter to Judge Bork, September 11, 1987 3936

Weiss, Congressman Ted:

Statement, September 29, 1987 6117

Wilken, Madeleine:

Letter to Chairman Biden and Senator Thurmond, September 9, 1987 6122

Page
Wilkey, Malcolm R.:
  Letter to Chairman Biden and Senator Thurmond, September 24, 1987 6124
Williams, Wendy:
  Prepared Statement 2373
  Testimony 2369
Williamson, Charles M.:
  Letter to Senator Hatch, with attachments, September 21, 1987 2624
Winter, Judge Ralph K.:
  Affidavit, September 25, 1987 3225
Witness List 6501
Women's Bar Association of the State of New York:
  Statement of Committee to Review the Nomination of Judge Robert H. Bork, September 17, 1987 6127
Women's Legal Defense Fund, with Federation of Women Lawyers, Judicial Screening Fund, NOW Legal Defense and Education Fund, Equal Rights Advocates:
  Statement, October 19, 1987 4531
Yale Law School students:
  Record of opposition to Judge Bork's confirmation, September 11, 1987 6144
Young, Andrew:
  Prepared Statement 1071
  Testimony 1067
Youth for Democratic Action:
  Statement of Daniel Press, October 1987 6145
Zebley, John:
  Letter to Chairman Biden, September 13, 1987 6150

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 15, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Hatch, Simpson, Grassley, Specter, Humphrey.

The CHAIRMAN. The hearing will come to order, please.

I welcome everyone here this morning, Judge Bork, his distinguished panel of introducers, my colleagues, and the public, and I would like to take just a moment at the outset to explain how we are going to proceed today and from here on, I hope.

It is the ordinary practice of the committee in a hearing like this, Judge, to have opening statements from all of my colleagues, and then to invite the presenters of the nominee to speak, and then ask the nominee for his or her statement. But we are going to change the beginning just a little bit today to accommodate some very busy and, quite frankly, very important people.

Today, you have a distinguished panel of introducers that are here, and what I would like to suggest is this—and I have checked this with my colleagues. I believe they are all in agreement. Even though every Senator will have up to 10 minutes to make an opening statement, I will for the time being forego my opening statement; and I understand the distinguished ranking member, Senator Thurmond, will also. Then we will yield to President Ford—and it is a great honor to have you here, Mr. President—and distinguished Members of the Congress who will be introducing you.

Then we will come back to opening statements, either Senator Thurmond or Senator Kennedy, whomever wishes to proceed next, and finish our opening statements. I suspect that after the introducers and the opening statements that will, quite frankly, take the better part of the morning. So I beg your indulgence, Judge, to sit through all the flattering comments that you will hear and all the questions that you may hear raised.

Then we will reconvene approximately an hour after we finish. My hope is we will finish by 1 o'clock or earlier, and we will reconvene at 2 o'clock. At that time, I will make a brief opening statement. I will invite you to make your statement, and at that time hopefully introduce your very lovely family that I had an opportunity to meet just a few moments ago.

If that is agreeable with my colleagues, without any further waste of time, I welcome you, Mr. President. It truly is an honor to have you here. As you know, on both sides of the aisle you have had nothing but friends. We miss you here in Washington. Quite frankly, most of us envy you; not only that you have been President——

[Laughter.]

The **Chairman**. Senator Dole and I do not care much about that. But not only that you have been President, but that you seem to be flourishing in the status of a former President as well.

Mr. President, please, your opening statement.

STATEMENT OF HON. GERALD R. FORD

President FORD. Mr. Chairman, distinguished members of the Senate Committee on the Judiciary. First, Mr. Chairman, I thank you for your very kind and generous introduction. It is a very high honor and a very rare privilege for me to return to Capitol Hill and to appear before this distinguished committee of the United States Senate.

Although I never had the privilege of serving as a member of the United States Senate, I did have the great honor of 25½ years as a member of the House of Representatives. During my years in the House, my 9 months as President of the Senate, and 2½ years as President of the United States, I had an abiding respect for the Senate, especially its unique and special responsibilities under the Constitution.

In addition, in my 28½ years in the Nation's capital, I developed warm and treasured friendships with members of the Senate on both sides of the aisle. I am pleased to see some of these cherished friends on the panel on this occasion.

My appearance before the committee is for the purpose of introducing Hon. Robert Bork, judge of the U.S. Circuit Court of Appeals for the District of Columbia, who has been nominated by President Reagan for service as an Associate Justice of the Supreme Court of the United States.

Under the Constitution, article II, section 2, the President has the authority and the responsibility of nominating an individual for the position of Justice on the United States Supreme Court. The Senate, under article II, section 2, has the duty of advise and consent for presidential nominees to the Supreme Court.

During my service in the Presidency, I had the opportunity and the honor to propose to the Senate an individual for confirmation to serve on the nation's highest judicial body. I consider the nomination of a Supreme Court Justice one of the most important responsibilities of a President of the United States. It is vital that the nominee selected be of unquestioned character, broad training in the law, in-depth experience in the legal profession, and have a capability to analyze the facts with objectivity and articulate one's decision on the basis of the law and the Constitution.

It was my honor and privilege as President to submit the name of Judge John Paul Stevens to the Senate for confirmation. The then U.S. Attorney General, Edward Levi, was invaluable in the selection process to fill this vacancy. We extensively reviewed Judge Stevens' background in private practice, as a U.S. District Court judge, and as a judge of the Seventh Circuit of the Court of Appeals.

Attorney General Levi and I personally read a number of his decisions. On the basis of his superb qualifications, I submitted his name to the Senate, and he was promptly and overwhelmingly confirmed. I am very proud of Justice Stevens' superb record on the Supreme Court for the past 12 years. While I have not always agreed with Justice Stevens, such differences in no way whatsoever undercut my faith in his effective and dedicated service on the Supreme Court.

Because I have such high regard for Justice Stevens, I am pleased to note that on July 17, 1987, while attending a meeting of lawyers and judges in Omaha, Nebraska, Justice Stevens stated that Judge Bork, and I quote, "is a very well-qualified candidate and one who will be a very welcome addition to the Court."

I have known Judge Bork since the mid-1960s when he was a distinguished faculty member of the Yale University Law School, my alma mater. While teaching at the Yale Law School for 15 years, he held two endowed chairs in recognition of his achievements as a scholar. He is an honored graduate of the University of Chicago Law School and managing editor of the Law Review.

Prior to law school, he served in the United States Marines and, while in law school, interrupted his legal education for a second Marine Corps tour. He had broad experience in private practice as a partner with Kirkland & Ellis, a nationally known prestigious law firm.

My friendship with Robert Bork expanded during his service as Solicitor General, 1973–1977, while I was the Republican leader in the House of Representatives, Vice President, and President. For the record, he was unanimously confirmed as Solicitor General.

Just months into the job as Solicitor General, Robert Bork was faced with a crisis not of his own making. President Nixon, during the Watergate investigation, ordered the dismissal of Special Prosecutor Archibald Cox. Judge Bork, when thrust into a very difficult situation, acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation. I think in retrospect that history has shown that his performance was in the Nation's interest.

When I became President August 9, 1974, I requested that he stay on as Solicitor General, and he distinguished himself as the principal government advocate before the Supreme Court during my administration. The Ford administration and the nation benefited enormously from this outstanding service.

I was especially pleased that President Reagan nominated Robert Bork for judge of the U.S. Circuit Court of Appeals for the District of Columbia, and that the United States Senate confirmed him unanimously just 5 short years ago. In my judgment, in my opinion, Judge Bork's record on the bench has been exemplary.

There are four kinds of occupations that a lawyer can have: private practitioner, law professor, government lawyer and judge. Robert Bork has distinguished himself in not one, but in all four endeavors. A renowned Federal Appeals Court judge, former Solicitor General of the United States, professor of law at Yale University, and twice a partner in one of the nation's leading law firms.

Judge Robert Bork is uniquely qualified to sit on the United States Supreme Court. It is, therefore, my distinct honor and great pleasure to introduce to this distinguished committee a man who, as Chief Justice Burger noted, may well be the most qualified nominee to the Supreme Court in more than half a century.

Mr. Chairman and members of this distinguished committee of the United States Senate, I strongly urge affirmative committee consideration and favorable approval by the U.S. Senate.

Thank you very much, Mr. Chairman.

[Prepared statement follows:]

STATEMENT BY PRESIDENT GERALD R. FORD
AT
CONFIRMATION HEARINGS
OF
JUDGE ROBERT H. BORK
TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. Chairman, distinguished members of the Senate Committee on the Judiciary:

It is a high honor and rare privilege for me to return to Capitol Hill and to appear before this distinguished committee of the U.S. Senate.

Although I never had the privilege of serving as a United States Senator, I did have the great honor of 25½ years as a member of the House. During my years in the House, my nine months as President of the Senate and 2½ years as President of the United States, I had an abiding respect for the Senate, especially its unique and special responsibilities under our Constitution. In addition, in my 28½ years in the nation's capital I developed warm and treasured friendships with members of the Senate, on both sides of the aisle. I am pleased to see some of these cherished friends on the panel on this occasion.

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He is an honor graduate of the University of Chicago Law School and was managing editor of the law review. Prior to law school, he served in the U.S. Marines and while in law school interrupted his legal education for a second Marine Corps tour.

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The CHAIRMAN. Thank you very much, Mr. President.

Now, we will go to the Senator Minority Leader, Republican leader, Senator Bob Dole.

I understand you have a very tight schedule, Mr. President. Do not feel required to stay. You are excused.

Senator DECONCINI. Mr. Chairman, I wonder if the Chairman would indulge me to ask the President a question, seeing that he is going to leave. It will only take 30 seconds.

President FORD. Mr. Chairman, I am delighted and I would be pleased to stay and respond to questions if you or other members of the committee would like to pursue that. I have a schedule, but nothing today is more important than my presence before this committee on this vital matter.

So I am delighted and honored if somebody on the committee would——

The CHAIRMAN. Well, Mr. President, maybe to accommodate your schedule, I do not have any questions and I do not think anyone else does. Obviously, Senator DeConcini has one.

Senator DECONCINI. Mr. Chairman, I am sorry to indulge the committee, and I know this is different than what you and I talked about the day before yesterday. I did not realize I had any questions, but I read your statement this morning very carefully, Mr. President. I wanted to ask you if you have read any of the opinions of Judge Bork since he has sat on the circuit court in the District.

President FORD. I have read a limited number. I have read various analyses pro and con of those opinions. I have read those that have been submitted to me by the people that are favorable, and I have taken the time to read some of the analyses that are critical.

Senator DECONCINI. Mr. President, have you had a chance to read any of his Law Review articles, in particular the Indiana Law Review article of 1971, or any of his other Law Review articles that are of a controversial nature?

President FORD. I have not read individual Law Review articles. I have read synopses of some of those articles, comments pro and con by individuals who were interested.

Senator DECONCINI. Thank you, Mr. President. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I appreciate your indulgence.

Mr. President, as I said, you are welcome to stay, but there is truly no need. I know you have a schedule, and I do not mean to imply in any way that this is not the single most important thing to you. I understand that. But I think Judge Bork is well represented. You are welcome to stay; if your schedule dictates that you go, please do.

I thank you very, very much for being here. It has been an honor for the committee. It is not often we have a former President before this committee. It has been a great honor.

President FORD. Thank you again. Unless there are any questions, I appreciate very much being excused.

The CHAIRMAN. We have no further questions. Thank you very much, Mr. President.

Now, we will proceed with the Senate Republican leader, Senator Dole, who has been a member of this committee for many years. Welcome back, Bob. Please proceed.

STATEMENT OF SENATOR ROBERT DOLE

Senator DOLE. Mr. Chairman and members of the committee, I am certainly pleased to have this brief opportunity—and I will be brief. I know the committee has a lot of work to do.

I want to thank my former House colleague and friend for over 25 years, President Ford, for being here this morning. I think his presence adds a great deal to this hearing. He does have the respect of Republicans and Democrats and has always had it, as far as I can recall. So I am certainly pleased to see him again. I agree with the comments made earlier by the chairman about former Presidents and future Presidents.

I am very pleased to be here for a couple of reasons. There is more than a little fortuity in the timing and location of these hearings because in 2 days we will be celebrating in Philadelphia the bicentennial of our Constitution. That Constitution established, of course, three branches of government—the executive, the legislative, and the judicial—each with a role to play in governing our nation.

All through this past summer in this very room, members of Congress explored the complex and dynamic relationship between the executive and the legislative branches of our Government. In the process of doing this, they raised the level of public debate on that relationship.

Now, the committee will explore a different aspect of our constitutional system: the proper scope of the Senate's role in the selection of Supreme Court Justices.

In Judge Robert Bork, the President has found a man of unquestionable ability and integrity. His professional background made him a leading and obvious candidate for the Supreme Court even before Justice Powell resigned.

Those who have opposed his nomination and may oppose his nomination in the future, in my view, have conceded that much. Many have focused their attention on his ideology. In doing so, they have found different reasons why they now must oppose, or why they might oppose in the future, Judge Bork.

I think this hearing is going to be of tremendous significance. We are all politicians, and we know that 1988 is next year. But I have got to believe that Republicans and Democrats alike, members of this committee, take this responsibility very seriously. There are going to be some tough questions. Judge Bork knows that. Judge Bork is prepared for that. I believe, in the final analysis, he is going to be the key factor in this whole confirmation process.

Some of us have indicated our support, and some of us have indicated our opposition. But I have been pleased with what I see developing. I think we are going to have a very objective effort by this committee. And I would hope when this nomination comes to the Senate floor—as I believe it will—that we can move with dispatch and keep the debate on the same high plane. I know that is going to be the effort of the distinguished chairman and the distinguished ranking member, Senator Thurmond, and others who will be involved in that debate. I would hope that as part of the leadership, I can be of assistance along with Senator Byrd.

There are a number of issues that do not lend themselves to easy answers or instant analysis. They certainly do not lend themselves to slogans or statistics.

I would ask the committee and the American people to take the time to understand Judge Bork's approach to the Constitution. That approach is based upon "judicial restraint," the principle that judges are supposed to interpret the law and not make it.

Now, Judge Bork did not invent this concept. It has been around for a long time. One of the most eloquent advocates was Oliver Wendell Holmes.

Similarly, his views on many cases are not original. As I understand, and I have not read all the articles, but his writings on the right to privacy are difficult to distinguish from those of Hugo Black.

There are many similarities, and I am certain the committee will go into it case-by-case, Law Review-by-Law Review; they will make the final determination.

Now, it has been some time since this nomination was made. I would say at the outset some of us were critical of that. But I would guess in retrospect it may have taken that much time, with the August recess, to prepare for this very important hearing. There is tremendous interest in the Bork nomination across the country. Wherever you go, and some of us go a lot of places, this is generally question no. 1 or no. 2 in any town meeting in America.

So the American people are tuned in. The American people are ready for a fair and impartial, tough hearing. I have got to say, Judge Bork, you are probably going to have one. And I know you are prepared for it. I want to join my colleagues here to indicate my appreciation for having an opportunity to help introduce Judge Bork this morning.

[The statement of Senator Dole follows:]

News from Senator

BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510-1601

FOR IMMEDIATE RELEASE
SEPTEMBER 15, 1987

CONTACT: WALT RIKER, DALE TATE
(202) 224-3135

INTRODUCTION OF JUDGE ROBERT BORK TO THE SENATE JUDICIARY COMMITTEE

MR. CHAIRMAN, IT IS MY GREAT PLEASURE AND HONOR TO APPEAR IN SUPPORT OF THE NOMINATION OF JUDGE ROBERT H. BORK, A MEMBER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE PRESIDENT'S NOMINEE TO FILL THE VACANCY THAT EXISTS ON THE SUPREME COURT.

THERE IS MORE THAN A LITTLE FORTUITY IN THE TIMING AND LOCATION OF THESE HEARINGS. IN TWO DAYS WE WILL BE CELEBRATING IN PHILADELPHIA THE BICENTENNIAL OF OUR CONSTITUTION. THAT CONSTITUTION ESTABLISHED, OF COURSE, THREE BRANCHES OF GOVERNMENT, THE EXECUTIVE, THE LEGISLATIVE, AND THE JUDICIAL, EACH WITH A ROLE TO PLAY IN GOVERNING OUR NATION.

THIS PAST SUMMER, IN THIS VERY ROOM, MEMBERS OF CONGRESS EXPLORED THE COMPLEX AND DYNAMIC RELATIONSHIP BETWEEN THE EXECUTIVE AND THE LEGISLATIVE BRANCHES OF OUR GOVERNMENT. IN THE PROCESS OF DOING THIS, THEY RAISED THE LEVEL OF PUBLIC DEBATE ON THAT RELATIONSHIP.

THIS COMMITTEE WILL NOW EXPLORE A DIFFERENT ASPECT OF OUR CONSTITUTIONAL SYSTEM: THE PROPER SCOPE OF THE SENATE'S ROLE IN THE SELECTION OF SUPREME COURT JUSTICES.

IN JUDGE ROBERT BORK THE PRESIDENT HAS FOUND A MAN OF UNQUESTIONABLE ABILITY AND INTEGRITY. HIS PROFESSIONAL BACKGROUND MADE HIM A LEADING AND OBVIOUS CANDIDATE FOR THE SUPREME COURT EVEN BEFORE JUSTICE POWELL RESIGNED

THOSE WHO HAVE OPPOSED HIS NOMINATION HAVE ALL BUT CONCEDED THIS MUCH, AND HAVE FOCUSED THEIR ATTENTION ON HIS SO-CALLED IDEOLOGY. IN DOING SO, THEY HAVE COINED SLOGANS AND COMPILED STATISTICS THAT, IN MY OPINION, PRESENTED A VERY DISTORTED PICTURE OF JUDGE BORK'S RECORD.

FORTUNATELY, JUDGE BORK WILL SOON HAVE AN OPPORTUNITY TO SET THOSE CRITICS STRAIGHT. AS HE DOES SO, I THINK THAT THE AMERICAN PEOPLE WILL COME TO UNDERSTAND, AS THIS COMMITTEE HAS UNDERSTOOD FOR SOME TIME, THE SUBTLETY AND COMPLEXITY OF THE ISSUES

CONFRONTED BY THE SUPREME COURT. AS I AM SURE HE WILL TELL YOU, THOSE ISSUES DO NOT LEND THEMSELVES TO EASY ANSWERS OR INSTANT ANALYSIS. THEY CERTAINLY DON'T LEND THEMSELVES TO SLOGANS OR STATISTICS.

I WOULD ASK THE COMMITTEE AND THE AMERICAN PEOPLE TO TAKE THE TIME TO UNDERSTAND JUDGE BORK'S APPROACH TO THE CONSTITUTION. THAT APPROACH IS BASED UPON "JUDICIAL RESTRAINT," THE PRINCIPLE THAT JUDGES ARE SUPPOSED TO INTERPRET THE LAW, NOT MAKE IT.

JUDGE BORK DID NOT, OF COURSE, INVENT THIS CONCEPT. IT FOUND ONE OF ITS EARLIEST, AND MOST ELOQUENT, ADVOCATES IN OLIVER WENDELL HOLMES.

SIMILARLY, JUDGE BORK'S VIEWS ON MANY ISSUES OF CONSTITUTIONAL LAW ARE NOT ORIGINAL. HIS WRITINGS ON THE RIGHT TO PRIVACY, FOR EXAMPLE, ARE DIFFICULT TO DISTINGUISH FROM THOSE OF HUGO BLACK. HIS POSITIONS IN THE AREA OF CRIMINAL PROCEDURE ARE ALMOST IDENTICAL TO THOSE ENDORSED BY LEWIS POWELL.

IF THIS COMMITTEE DOES, IN FACT, DECIDE TO CONSIDER JUDGE BORK'S SO-CALLED IDEOLOGY, IT SHOULD NOT IGNORE THESE PRECEDENTS. NOR SHOULD IT SETTLE FOR CATCH-PHRASES AND SLOGANS WHEN REAL ANALYSIS IS IN ORDER. IT SHOULD, IN SHORT, TAKE THE TIME TO INQUIRE AND UNDERSTAND.

I HAVE A PARTICULAR INTEREST IN KEEPING THE DEBATE ON A HIGH PLANE. WHEN JUDGE BORK'S NOMINATION ARRIVES ON THE SENATE FLOOR, AS I AM SURE IT WILL, THE DEBATE THERE WILL MIRROR WHAT TAKES PLACE HERE. I WOULD LIKE TO HELP POINT THAT DEBATE IN A DIRECTION THAT WILL EDIFY BOTH THE SENATE AND THE AMERICAN PEOPLE. I ALSO HAPPEN TO BELIEVE THAT JUDGE BORK'S WRITINGS AND RECORD, IF CAREFULLY EXAMINED AND CONSIDERED, MAKE HIM AN OUTSTANDING CANDIDATE FOR THE SUPREME COURT.

BEFORE I CONCLUDE LET ME REMIND THE COMMITTEE THAT A VACANCY HAS EXISTED ON THAT COURT FOR MORE THAN TWO MONTHS NOW. THE COURT WILL OPEN ITS NEW TERM IN LESS THAN 3 WEEKS. I WOULD ASK THE COMMITTEE TO APPROACH ITS TASK WITH ALL DELIBERATE SPEED.

I LOOK FORWARD TO RECEIVING THE NOMINATION ON THE SENATE FLOOR.

THANK YOU, MR. CHAIRMAN.

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The CHAIRMAN. Thank you very much, Senator. Again, I know your duties exceed those of us on the committee here in your leadership position. You are welcome to stay, obviously, but we understand if you do not.

Senator DOLE. I want to stay for the other two statements.

The CHAIRMAN. My next door neighbor in this building is the Senator from Missouri, Senator Danforth. Welcome, and if you would, proceed.

STATEMENT OF SENATOR JOHN C. DANFORTH

Senator **Danforth**. Mr. Chairman, thank you very much, and members of the committee. Normally, Presidential nominees ask Senators from their home State to present them to Senate committees. Judge Bork resides in the District of Columbia, so he has turned to the next available option and has asked a former student of his to be here today.

His first year on the faculty of Yale Law School was my final year as a student there. He taught me all I ever knew about antitrust. For those who wonder about his compassion and humanity, I passed Professor Bork's course.

Mr. Chairman, I am genuinely honored to be here today. Twenty-five years after that law school class, my memories are dim about the details of antitrust law, but I have a clear recollection of Bob Bork, the teacher. Even in his first class, he was a first-rate professor. He has since told me that he was panicked when he stood before that class. He certainly did not show it. By every indication, he loved teaching. His eyes sparkled; so did his sense of humor. He delighted in saying things to provoke responses from his students. Far from playing the self-important pedagogue, Bob Bork delighted in the give-and-take of the classroom in the clash of ideas.

He did not require us to receive his thoughts as revealed truth. He taught us to think for ourselves. He held strong views; every good law professor does. But he used those views to evoke a response from his students. He encouraged argument. He respected dissent. This to him was the joy of classroom teaching.

Judge Bork has said that his own philosophy of the law has evolved over the 25 years since I knew him in class. He is the best one to explain just how that evolution occurred, and I am sure he will do just that, clearly and unequivocally.

My point is simply this: Those who say that Judge Bork is an unyielding ideologue are not describing the man I know. In my experience, unyielding ideologues do not resemble Judge Bork. They do not encourage dissent; they do not have a sense of humor; and they do not evolve in their own thinking.

Mr. Chairman, having made these comments about Judge Bork, the person, I do not believe that the Senate's decision will or should be made on the basis of personality. The issue before us is far more fundamental and far more important than that.

In this confirmation, we in the Senate will be expressing our views on the role and power of the U.S. Supreme Court. The straightforward issue is the readiness of the Court to strike down the acts of the legislative branch of government, federal or State. The power of the Court to nullify legislation is restrained only by the Court itself. As Justice Hughes once said, "The Constitution is what the judges say it is."

A court which is willing to read novel meanings into the Constitution has the power to do so. Judge Bork is an advocate of judicial restraint. His view, as I understand it, is this: If the Supreme Court strikes down a legislative act, its decision must be based on sound legal reasoning, not on the personal opinions of the Court about the wisdom of the legislation dressed up in legal terminology.

Judge Bork's judicial philosophy is open to fair debate by able people of good will. I happen to agree with Judge Bork's view of judicial restraint; some do not. Some believe that the Court should stand at the ready to supplant legislative opinion with its own.

Whether one agrees with Judge Bork or disagrees with him, his is not a novel position. It reaffirms the faith we place in the democratic process. Judge Bork stands on a highly respectable tradition, including such giants as Justice Frankfurter and his late colleague at Yale, Professor Alexander Bickel. He would state his position with great intellectual force in the Supreme Court, but with good humor and civility.

Mr. Chairman, in this bicentennial year of the Constitution, the Senate now commences a most important debate. It is not about Judge Bork, the person, however much I like and respect him. It is about the power of the Supreme Court and how, if at all, it should restrain that power.

The CHAIRMAN. Thank you very much, Senator.

[Prepared statement follows:]

STATEMENT BY SENATOR JOHN C. DANFORTH
ON THE NOMINATION OF JUDGE ROBERT BORK TO THE SUPREME COURT
Before the Senate Judiciary Committee
September 15, 1987

Mr. Chairman, members of the Committee: Normally, presidential nominees ask Senators from their home state to present them to Senate Committees. Judge Bork resides in the District of Columbia, so he has turned to the next available option and has asked a former student of his be here today. His first year on the faculty of Yale Law School was my final year as a student there. He taught me all I ever knew about antitrust. For those who wonder about his compassion and humanity, I passed Professor Bork's course. Mr. Chairman, I am genuinely honored to be here today.

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Mr. Chairman, in this bicentennial year of the Constitution, the Senate now commences a most important debate. It is not about Judge Bork the person, however much I like and respect him. It is about the power of the Supreme Court and how, if at all, it should restrain that power.

The CHAIRMAN. We welcome from the House, Congressman Hamilton Fish. Congressman Fish, welcome. Please proceed.

STATEMENT OF CONGRESSMAN HAMILTON FISH, JR.

Mr. **Fish**. Thank you, Mr. Chairman and members of this distinguished committee. I greatly appreciate your courtesy in inviting me to participate in these very important proceedings. Up to now, I did not realize why I was invited, but having heard the reasons for the other people being present, I realize that in this ecumenical spirit they wanted one Harvard graduate on this panel.

Like yourself, as a Member of Congress who serves on the House Judiciary Committee, I naturally have a strong and abiding interest in the quality, effectiveness and constitutional legitimacy of our federal judiciary. There are many relevant factors to consider in connection with an individual nominated to serve on the United States Supreme Court. Obviously, this includes intellect, legal training, practical legal experience, demonstrated professional competence and personal integrity. A record of legal scholarship, while historically not always a prerequisite, is also an important consideration when relevant.

Finally, and very importantly, if the nominee has prior judicial experience—what does that record reveal both in terms of legal soundness and judicial temperament? But that is what the Senate confirmation process is about: reviewing these factors, hearing both sides on the merits of a particular nominee, and ultimately deciding in the best interests of our nation.

Certainly, no one can look at the career of Judge Bork without being impressed with his extraordinary credentials. A graduate of the University of Chicago Law School, a Phi Beta Kappa and managing editor of that institution's Law Review, Robert Bork has twice served on the faculty of Yale Law School and was a professor at that prestigious institution for a total of 15 years. Mr. Bork, as you have been told, has also been in the private practice of law on numerous occasions during his career and earned a national reputation as an outstanding litigator. From 1973 to 1977, Robert Bork was Solicitor General of the United States, a job universally recognized as one requiring the talents of a "lawyer's lawyer."

Since 1982, Robert Bork has served as judge on the Circuit Court of Appeals for the District of Columbia and during that time has, in my judgment, accumulated a remarkable record; a record, I respectfully submit, that should be most relevant to this committee's consideration. Of the 426 cases in which he has participated, Judge Bork has been the author of the majority opinion in 106 instances. With respect to those 106 majority opinions, it is deserving of emphasis that he never has been reversed by the Supreme Court. Furthermore, of the 401 cases in which Judge Bork joined with the majority, none have been reversed by the U.S. Supreme Court.

In addition, Judge Bork authored dissenting opinions in 25 remaining cases, and the Supreme Court adopted the viewpoint expressed by Judge Bork in those dissents on six different occasions.

Many have offered the observation that Judge Bork may well have the most remarkable record on appeal of any currently sitting U.S. Federal judge. I think it is a fair conclusion from these statistics that Judge Bork's judicial rulings during these 5 years have not been at variance with the prevailing views of the current Supreme Court.

Frankly, Mr. Chairman, I find it personally difficult to reconcile some of the charges that have been leveled against Judge Bork with his record since becoming an appellate federal judge. His judicial philosophy, in practice as well as in theory, is fully consistent with traditional American legal thought. For Robert Bork, the role of the judge is to apply the intent of the legislature to a legal fact situation. Following the President's nomination of Judge Bork to the Supreme Court, I reviewed a number of his opinions in the District of Columbia Circuit Court with particular emphasis on matters of great concern to me—the first amendment and civil rights cases. Those cases demonstrate that, in application, the result of Judge Bork's philosophy can often be civil libertarian in nature. They certainly do not disclose a view that our Constitution should be other than contemporary and workable in a modern society.[1]

From his perspective, a judge may not insert his own personal preferences or political philosophy into a case. The media calls it exercising "judicial restraint," but Judge Bork states it more clearly as the intellectual rejection of "judicial imperialism." That is the term he applies to judges who would substitute their private personal philosophy or private political views for that of the legislators who actually wrote the laws. He recognizes that judges are not elected and that under our system of government, it is the elected representatives that write and amend the laws.

He asks the following kinds of questions: What does the Statute say? Does the statute permit a government agency, a private organization, or an individual to act in a particular manner? Do the regulations issued by the agency reflect the statutory authority given to that agency? Does the language of the Constitution allow the outcome sought by the litigant in this particular case? These, to me, do not sound like the questions of someone outside the realm of traditional American legal thought. More specifically, they sound exactly like the types of questions that a judge ought to ask.

I have every confidence that these proceedings will allow the distinguished members of this committee to probe and to analyze the remarkable qualifications of this outstanding lawyer and judge. Robert Bork deserves to be judged for the lawyer he actually is and on the basis of how he actually rendered judicial decisions. These hearings afford an opportunity to elicit his views directly rather than leave the record to theoretical speculation.

Mr. Chairman, this man is qualified to be an Associate Justice of the Supreme Court of the United States on the basis of virtually every logical criterion. He was an excellent courtroom lawyer, is a widely recognized scholar, and has had an exceptional record as an appellate jurist. I urge this committee, as I know that it will, to judge this man fairly and to review all the facts in this case before a final judgment is rendered. Thank you.

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[1] *See: Planned Parenthood Federation of America* v. *Heckler*, 712 F.2d 650, 665–668 (1983); *Lebron* v. *Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (1984); *Quincy Cable TV, Inc.* v. *Federal Communications Commission*, 768 F.2d 1434 (1985); *County Council of Sumter County, South Carolina* v. *United States*, 596 F.Supp. 35 (1984); and *Emory* v. *Secretary of Navy*, 819 F. 2d (1987).

[The statement of Mr. Fish follows:]

STATEMENT OF THE HONORABLE HAMILTON FISH, JR.
BEFORE THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE
SEPTEMBER 15, 1987

MR. CHAIRMAN AND MEMBERS OF THIS DISTINGUISHED COMMITTEE, I GREATLY APPRECIATE YOUR COURTESY IN INVITING ME TO PARTICIPATE IN THESE VERY IMPORTANT PROCEEDINGS.

LIKE YOURSELVES, AS A MEMBER OF CONGRESS WHO SERVES ON THE HOUSE JUDICIARY COMMITTEE, I HAVE A STRONG AND ABIDING INTEREST IN THE QUALITY, EFFECTIVENESS AND CONSTITUTIONAL LEGITIMACY OF OUR FEDERAL JUDICIARY. THERE ARE MANY RELEVANT FACTORS TO CONSIDER IN CONNECTION WITH AN INDIVIDUAL NOMINATED TO SERVE ON THE UNITED STATES SUPREME COURT. OBVIOUSLY, THIS INCLUDES INTELLECT, LEGAL TRAINING, PRACTICAL LEGAL EXPERIENCE, DEMONSTRATED PROFESSIONAL COMPETENCE, AND PERSONAL INTEGRITY. A RECORD OF LEGAL SCHOLARSHIP, WHILE HISTORICALLY NOT ALWAYS A PREREQUISITE, IS ALSO AN IMPORTANT CONSIDERATION WHEN RELEVANT. FINALLY, AND VERY IMPORTANTLY, IF THE NOMINEE HAS PRIOR JUDICIAL EXPERIENCE -- WHAT DOES THAT RECORD REVEAL BOTH IN TERMS OF LEGAL SOUNDNESS AND JUDICIAL TEMPERAMENT? BUT THAT IS WHAT THE SENATE CONFIRMATION PROCESS IS ABOUT -- REVIEWING THESE FACTORS, HEARING BOTH SIDES ON THE MERITS OF A PARTICULAR NOMINEE, AND ULTIMATELY DECIDING IN THE BEST INTERESTS OF OUR NATION.

CERTAINLY, NO ONE CAN LOOK AT THE CAREER OF JUDGE BORK WITHOUT BEING IMPRESSED WITH HIS EXTRAORDINARY CREDENTIALS. A GRADUATE OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, A PHI BETA KAPPA AND MANAGING EDITOR OF THAT INSTITUTION'S LAW REVIEW, ROBERT BORK HAS TWICE SERVED ON THE FACULTY OF YALE LAW SCHOOL AND WAS A PROFESSOR AT THAT PRESTIGIOUS INSTITUTION FOR A TOTAL OF 15 YEARS. MR. BORK HAS ALSO BEEN IN THE PRIVATE PRACTICE OF LAW ON NUMEROUS OCCASIONS DURING HIS CAREER AND EARNED A NATIONAL REPUTATION AS AN OUTSTANDING LITIGATOR. FROM 1973 TO 1977, ROBERT BORK WAS THE SOLICITOR GENERAL OF THE UNITED STATES -- A JOB THAT IS UNIVERSALLY RECOGNIZED AS ONE REQUIRING THE TALENTS OF A "LAWYER'S LAWYER".

SINCE 1982, ROBERT BORK HAS SERVED AS A JUDGE ON THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND DURING THAT TIME HAS ACCUMULATED A REMARKABLE RECORD; A RECORD, I RESPECTFULLY SUBMIT, THAT SHOULD BE MOST RELEVANT TO THIS COMMITTEE'S CONSIDERATION. OF THE 426 CASES IN WHICH HE HAS PARTICIPATED, JUDGE BORK HAS BEEN THE AUTHOR OF THE MAJORITY OPINION IN 106 INSTANCES. WITH RESPECT TO THOSE 106 MAJORITY OPINIONS, IT IS DESERVING OF EMPHASIS THAT HE NEVER HAS BEEN REVERSED BY THE SUPREME COURT. FURTHERMORE, OF THE 401 CASES IN WHICH JUDGE BORK JOINED WITH THE MAJORITY, NONE HAVE BEEN REVERSED BY THE SUPREME COURT. JUDGE BORK AUTHORED DISSENTING OPINIONS IN 25 REMAINING CASES, AND THE SUPREME COURT ADOPTED THE VIEWPOINT EXPRESSED BY JUDGE BORK IN THOSE DISSENTS ON SIX DIFFERENT OCCASIONS. MANY HAVE OFFERED THE OBSERVATION THAT JUDGE BORK MAY WELL HAVE THE

MOST REMARKABLE RECORD ON APPEAL OF ANY CURRENTLY SITTING UNITED STATES FEDERAL JUDGE. I THINK IT IS A FAIR CONCLUSION FROM THESE STATISTICS THAT JUDGE BORK'S JUDICIAL RULINGS DURING THESE FIVE YEARS HAVE NOT BEEN AT VARIANCE WITH THE PREVAILING VIEWS OF THE CURRENT SUPREME COURT.

FRANKLY, I FIND IT PERSONALLY DIFFICULT TO RECONCILE SOME OF THE CHARGES THAT HAVE BEEN LEVELED AGAINST JUDGE BORK WITH HIS RECORD SINCE BECOMING AN APPELLATE FEDERAL JUDGE. HIS JUDICIAL PHILOSOPHY -- IN PRACTICE AS WELL AS IN THEORY -- IS FULLY CONSISTENT WITH TRADITIONAL AMERICAN LEGAL THOUGHT. FOR ROBERT BORK, THE ROLE OF THE JUDGE IS TO APPLY THE INTENT OF THE LEGISLATURE TO A LEGAL FACT SITUATION. FOLLOWING THE PRESIDENT'S NOMINATION OF JUDGE BORK TO THE SUPREME COURT, I REVIEWED A NUMBER OF HIS OPINIONS IN THE DISTRICT OF COLUMBIA CIRCUIT COURT WITH PARTICULAR EMPHASIS ON THE FIRST AMENDMENT AND CIVIL RIGHTS CASES. THOSE CASES DEMONSTRATE THAT, IN APPLICATION, THE RESULT OF JUDGE BORK'S PHILOSOPHY CAN OFTEN BE CIVIL LIBERTARIAN IN NATURE. THEY CERTAINLY DO NOT DISCLOSE A VIEW THAT OUR CONSTITUTION SHOULD BE OTHER THAN CONTEMPORARY AND WORKABLE IN OUR MODERN SOCIETY. _SEE_: _PLANNED PARENTHOOD FEDERATION OF AMERICA_ v. _HECKLER_, 712 F.2D 650, 665-668 (1983); _LEBRON_ v. _WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY_, 749 F.2D 893 (1984); _QUINCY CABLE TV, INC._ v. _FEDERAL COMMUNICATIONS COMMISSION_, 768 F.2D 1434 (1985); _COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA_ v. _UNITED STATES_, 596 F.SUPP. 35 (1984); AND _EMORY_ v. _SECRETARY OF NAVY_, 819 F. 2D 291 (1987).

FROM HIS PERSPECTIVE, A JUDGE MAY NOT INSERT HIS OWN PERSONAL PREFERENCES OR POLITICAL PHILOSOPHY INTO A CASE. THE MEDIA CALLS IT EXERCISING "JUDICIAL RESTRAINT" -- BUT JUDGE BORK STATES IT MORE CLEARLY AS THE INTELLECTUAL REJECTION OF "JUDICIAL IMPERIALISM". THAT IS THE TERM HE APPLIES TO JUDGES WHO WOULD SUBSTITUTE THEIR PRIVATE PERSONAL PHILOSOPHY OR PRIVATE POLITICAL VIEWS FOR THAT OF THE LEGISLATORS WHO ACTUALLY WROTE THE LAWS. HE RECOGNIZES THAT JUDGES ARE NOT ELECTED AND THAT UNDER OUR SYSTEM OF GOVERNMENT, IT IS THE ELECTED REPRESENTATIVES THAT WRITE AND AMEND THE LAWS.

HE ASKS THE FOLLOWING KINDS OF QUESTIONS: WHAT DOES THE STATUTE SAY? DOES THE STATUTE PERMIT A GOVERNMENT AGENCY, A PRIVATE ORGANIZATION, OR AN INDIVIDUAL TO ACT IN A PARTICULAR MANNER? DO THE REGULATIONS ISSUED BY THE AGENCY REFLECT THE STATUTORY AUTHORITY GIVEN TO THAT AGENCY? DOES THE LANGUAGE OF THE CONSTITUTION ALLOW THE OUTCOME SOUGHT BY THE LITIGANT IN THIS PARTICULAR CASE? THESE, TO ME, DO NOT SOUND LIKE THE QUESTIONS OF SOMEONE OUTSIDE THE REALM OF TRADITIONAL AMERICAN LEGAL THOUGHT. MORE SPECIFICALLY, THEY SOUND EXACTLY LIKE THE TYPES OF QUESTIONS THAT A JUDGE OUGHT TO ASK.

I HAVE EVERY CONFIDENCE THAT THESE PROCEEDINGS WILL ALLOW THE DISTINGUISHED MEMBERS OF THIS COMMITTEE TO PROBE AND ANALYZE THE REMARKABLE QUALIFICATIONS OF THIS OUTSTANDING LAWYER AND JUDGE. ROBERT BORK DESERVES TO BE JUDGED FOR THE LAWYER HE ACTUALLY IS AND ON THE BASIS OF HOW HE HAS ACTUALLY RENDERED JUDICIAL DECISIONS. THESE HEARINGS AFFORD AN OPPORTUNITY TO

ELICIT HIS VIEWS DIRECTLY RATHER TO LEAVE THE RECORD TO THEORETICAL SPECULATION.

THIS MAN IS QUALIFIED TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES ON THE BASIS OF VIRTUALLY EVERY LOGICAL CRITERION. HE WAS AN EXCELLENT COURTROOM LAWYER, IS A WIDELY RECOGNIZED SCHOLAR, AND HAS HAD AN EXCEPTIONAL RECORD AS AN APPELLATE JURIST. I URGE THIS COMMITTEE, AS I KNOW THAT IT WILL, TO JUDGE THIS MAN FAIRLY AND TO REVIEW ALL THE FACTS IN THIS CASE BEFORE A FINAL JUDGMENT IS RENDERED.

The CHAIRMAN. Thank you very much, Congressman.

Before I yield to the distinguished ranking member of this committee, I suggest you all are welcome to stay and listen to us all. Once again, showing your good judgment.

Thank you, Congressman.

I have two housekeeping matters before we move on. I have been informed that there will be a vote at 11 o'clock. What we will do is we will not recess in the middle of a Senator's statement. We may, prior to the next statement being given, recess to go over and then come back so that we are not interrupting statements.

I yield to my colleagues, and apologize. I should have probably yielded to you earlier, Senator. You had welcoming remarks, and I apologize. So please take what time you need. Senator Thurmond.

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, I have had the pleasure of serving with you on this committee, with me as chairman and you as ranking member. I have always found you to be fair, courteous and considerate, and I am sure that is the way this hearing will be held.

Judge Bork, I would like to welcome you and your family here today. I think it particularly fitting that the Senate in performing its constitutional duty is considering your nomination to be an Associate Justice of the Supreme Court at the time we are celebrating the 200th anniversary of the Constitution of the United States.

Today, the committee begins consideration of this important nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court. This is the fourth Supreme Court nomination that this committee has considered in the past 6 years. In fact, I might say that it is the 20th such nomination that I have had the opportunity to review during my 33 years in the Senate. On earlier occasions, I have set forth the qualities I believe a nominee to the Court should possess:

First, unquestioned integrity; the courage to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress;

A keen knowledge and understanding of the law; in other words, professional competency;

Compassion, which recognizes both the rights of the individual and the rights of society in the quest for equal justice under law;

Proper judicial temperament; the ability to prevent the pressures of the moment from overpowering the composure and self-discipline of a well-ordered mind;

An understanding of and appreciation for the majesty of our system of government—in its separation of powers between the branches of our federal government; its division of powers between the federal and State governments; and the reservation to the States and to the people of all powers not delegated to the federal government.

There is no doubt that the nominee before us today meets these qualifications. His intellectual credentials are impeccable: Phi Beta Kappa, distinguished professor of law at Yale Law School; and respected author. His experience is extraordinary: in academia, as a general practitioner, as Solicitor General, and as a judge for the U.S. Court of Appeals for the D.C. Circuit, felt by many to be the second most important court in this country. Judge Bork has a long-standing reputation for integrity and judicial temperament. On two occasions, Judge Bork has had his professional qualifications and personal character specifically examined and carefully scrutinized by the American Bar Association. On both occasions, the ABA has given Judge Bork the highest possible rating for his professional competence, integrity, and temperament.

Judge Bork is not a new or unknown quantity. He has been before this committee twice previously, and both times the committee and the full Senate have deemed him worthy of confirmation: to be Solicitor General and to be a judge of the U.S. Court of Appeals for the D.C. Circuit. It is also worthy of note that both times Judge Bork was confirmed by the full Senate—once when Democrats controlled the Senate and once when Republicans did—there was not a single dissenting vote.

In fact, if we were to put aside questions of philosophy and ideology, Judge Bork would in all likelihood already be sitting on the Court. However, it is apparent that some would have the issue of philosophy become the standard for whether or not we confirm this nominee for the Supreme Court. This nomination has been delayed longer, by any standard, than any other Supreme Court nomination in the last 25 years, while opponents mount an ideological campaign against him. Because so much has been said about the question of philosophy and ideology, I believe we should examine that issue within the context of the nominating process.

Some have said that philosophy should not be considered at all in the confirmation process. In fact, I have been incorrectly aligned with that position. Others say that philosophy should be the sole criteria. I reject both of these positions. I believe that a candidate's philosophy may properly be considered, but philosophy should not be the sole criteria for rejecting a nominee with one notable exception. The one exception is when the nominee clearly does not support the basic, long-standing consensus principles of our nation.

I want to be very clear about this point: I do not believe that philosophy alone should bar a nominee from the Court unless that nominee holds a belief that is so contrary to the fundamental, long-standing principles of this country that the nominee's service would be inconsistent with the very essence of this country's shared values.

Such a nominee's position should be unequivocal and in violation of a basic belief. For example, freedom of speech is a fundamental, accepted principle in this country; but exactly what constitutes "speech" and whether or not there are limitations on any particular activity, are issues on which reasonable people can disagree. Freedom of religion is an accepted tenet of this country; but whether freedom of religion means that a person in the military can wear religious garb rather than his uniform is a matter that can be, and is, openly debated. That there should be no government-established religion in America is a fundamental principle; but whether that proscribed prayer in our schools is a matter of accepted public debate and commentary. That discrimination based on race or national origin is unacceptable is a basic tenet of this nation; but there certainly is no such agreement on the use of preferential quotas.

I raise these examples not to launch into a substantive debate on any of these issues, but merely to point out that we should not confuse core, fundamental principles with evolving and debatable applications of those principles.

In applying this standard, which could lead to automatic rejection of a nominee, we must be reasonable. We must apply it in a manner which also protects the basic American interest of free and open debate on important issues. As the courts, and all Americans, grappled with new applications of our principles and new doctrines are created and offered, these evolving decisions are not sacrosanct and above criticism. In fact, debate and discussion of these new ideas is not only welcomed, it is essential. This is a stringent standard, but in my tenure in the Senate, this test has never been used to disqualify a nominee because no President has ever sent such a nominee to the Senate. To apply a broader philosophical litmus test would put a nominee in jeopardy of being labeled "un-American" or "unfit" if he has ever been in a minority position on any issue.

It has been said that since the President uses philosophy to pick a nominee, the Senate can use philosophy in evaluating a nominee. A corollary statement should be just as true. When the President does not solely use philosophy to choose his nominee, the Senate should not solely use philosophy to reject that nominee. Historically, Presidents do consider philosophy when appointing nominees to the Supreme Court. That is part of our system of government; it is the manner in which the American people have an opportunity to influence the Court. But this President was re-elected overwhelmingly when the issue of such appointments was a major, well-discussed campaign issue.

Because this process is well understood by the American people, any nominee selected by a President comes to the Senate with a presumption in his favor. Accordingly, opponents of the nominee must make the case against him. That is why opponents of Judge Bork are trying to fit him into some accepted basis for disqualification or create a new one to defeat him.

First, Judge Bork's opponents will try to raise questions about his character and integrity. Failing this, they will assert that he is disqualified by virtue of his philosophy, by labeling him as an extremist or "outside the mainstream." This, in essence, refers to the purely philosophical test which I have discussed. A review of Judge Bork's record indicates that he, indeed, is well within the mainstream of legal debate and discussion in this country. His record on appeals is perhaps the best in the country.

However, even if a nominee occasionally dissents from a majority view, that should not disqualify him. Although Judge Bork has been in the accepted majority position almost without fail, there is a grand tradition of legal dissent in this country. As Justice Felix Frankfurter said, "In this Court, dissents have gradually become majority opinions." There certainly is nothing wrong with writing a dissent at any judicial level if it is called for; in fact, integrity demands it.

Opponents of this nominee have also surfaced a new theory of "balance" on the Court; that somehow there is a mandated immutable balance on the Court. This theory has an inherent problem: When did the Court reach the perfect balance? Was it in the Warren Court, or the courts which preceded the Warren Court and which were so greatly overturned by the Warren Court?

Further, does anyone really believe that these proponents of a "balance theory" would oppose a liberal nominee solely because he had been named to replace a conservative Justice? Of course not. More fundamentally, such a theory presupposes that the Supreme Court is infallible, when clearly it is not. Do we really want to enshrine, for all time, every decision the Court makes? History gives us many examples of the Supreme Court overruling itself and correcting its own errors. Usually, those who argue "balance" have certain decisions they do not want reconsidered under any circumstances. On the other hand, I believe the Court should be allowed to correct errors it has made.

Finally, there is one other issue that should be addressed. I believe, as I have stated before, that the full Senate should make the final determination on all nominations. The confirmation process should not stop at the committee level. The Constitution requires the advice and consent of the Senate, not simply the opinion of any one committee. I am pleased that both Chairman Biden and the distinguished majority leader, among others, have indicated that they agree that this nomination should be dealt with by the full Senate.

Judge Bork, welcome again to the committee, and we look forward to your testimony.

The CHAIRMAN. Thank you very much, Senator.

Before we begin with Senator Kennedy's opening statement, we will have a vote in the middle of it. I would appreciate it if we not adjourn until the statement is made, and then we will adjourn, all of us at once, and come back afterwards.

Senator Kennedy.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Good morning, Judge Bork.

From the beginning, America has set the highest standards for our highest Court. We insist that a nominee should have outstanding ability and integrity. But we also insist on even more: that those who sit on the Supreme Court must deserve the special title we reserve for only nine federal judges in the entire country, the title that sums up in one word the awesome responsibility on their shoulders—the title of "Justice."

Historically, America has set this high standard because the Justices of the Supreme Court have a unique obligation: to serve as the ultimate guardians of the Constitution, the rule of law, and the liberty and the quality of every citizen. To fulfill these responsibilities, to earn the title of "Justice," a person must have special qualities:

A commitment to individual liberty as the cornerstone of American democracy.

A dedication to equality for all Americans, especially those who have been denied their full measure of freedom, such as women and minorities.

A respect for justice for all whose rights are too readily abused by powerful institutions, whether by the power of government or by giant concentrations of power in the private sector.

A Supreme Court Justice must also have respect for the Supreme Court itself, for our constitutional system of government, and for the history and heritage by which that system has evolved, including the relationship between the federal government and the States, and between Congress and the President.

Indeed, it has been said that the Supreme Court is the umpire of the federal system because it has the last word about justice in America. Above all, therefore, a Supreme Court nominee must possess the special quality that enables a justice to render justice. This is the attribute whose presence we describe by the words such as fairness, impartiality, open-mindedness, and judicial temperament, and whose absence we call prejudice or bias.

These are the standards by which the Senate must evaluate any judicial nominee. And by these standards, Robert Bork falls short of what Americans demand of a man or woman as a Justice on the Supreme Court. Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty.

He has harshly opposed—and is publicly itching to overrule—many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans.

He is instinctively biased against the claims of the average citizen and in favor of concentrations of power, whether that is governmental or private.

And in conflicts between the legislative and executive branches of government, he has repeatedly expressed a clear contempt for Congress and an unbridled trust in the power of the President.

Mr. Bork has said many extreme things in his comments of a lifetime in the law. We already have a more extensive record of his work and writings than perhaps we have had for any other Supreme Court nominee in history.

It is easy to conclude from the public record of Mr. Bork's published views that he believes women and blacks are second-class citizens under the Constitution. He even believes that, in the relation to the executive, Members of Congress are second-class citizens, yet he is asking the Senate to confirm him.

The strongest case against this nomination is made by the words of Mr. Bork himself. In an article he wrote in 1963, during the battle to desegregate lunch counters, motels, hotels, and other public accommodations in America, he referred to the civil rights principle underlying that historic struggle as a principle of unsurpassed ugliness.

Ten years later, he recanted his opposition, but in the time since then he has consistently demonstrated his hostility towards equal justice for all.

As recently as June of this year, he ridiculed a Supreme Court decision prohibiting sex discrimination and suggested that the extension of the equal protection clause to women trivializes the Constitution.

In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women, and in our America there should be no seat on the Supreme Court for Robert Bork.

Mr. Bork has been equally extreme in his opposition to the right to privacy. In an article in 1971, he said, in effect, that a husband and wife have no greater right to privacy under the Constitution than a smokestack has to pollute the air.

President Reagan has said that this controversy is pure politics, but that is not the case. I and others who oppose Mr. Bork have often supported nominees to the Supreme Court by Republican Presidents, including many with whose philosophy we disagree. I voted for the confirmation of Chief Justice Burger and also Justices Blackmun, Powell, Stevens, O'Connor and Scalia. But Mr. Bork is a nominee of a different stripe. President Reagan has every right to take Mr. Bork's reactionary ideology into account in making the nomination, and the Senate has every right to take that ideology into account in acting on the nomination.

Now, Mr. Bork's supporters are understandably seeking to change his spots and deflect attention from the public record of his controversial career. He will have ample opportunity in these hearings to explain, or explain away, the extraordinarily extreme and biased positions he has taken. But a switch at a convenient time should not be sufficient to make Mr. Bork one of the nine.

Some observers are predicting a bitter battle over this nomination and have suggested that the struggle is reminiscent of the great confrontations over civil rights and equal justice in the past. But those confrontations were inevitable and irrepressible. All Americans should realize that the confrontation over this nomination is the result of a deliberate decision by the Reagan administration. Rather than selecting a real judicial conservative to fill Justice Powell's vacancy, the President has sought to appoint an activist of the right whose agenda would turn us back to the battles of a bitterly divided America, reopening issues long thought to be settled and wounds long thought to be healed.

I for one am proud of the accomplishments of America in moving towards the constitutional ideas of liberty and equality and justice under law. I am also proud of the role of the Senate in ensuring that Supreme Court nominees adhere to the tradition of fairness, impartiality, and freedom from bias.

I believe the American people strongly reject the administration's invitation to roll back the clock and relive the more troubled times of the past. I urge the committee and the Senate to reject the nomination of Mr. Bork.

The CHAIRMAN. Thank you.

I would like to ask staff, is the vote still on for 11:00, because I do not want Senator Hatch's statement to be interrupted.

It is scheduled for 11 o'clock. I ask Senator Hatch, would you prefer, Senator, to begin and go until the end, or shall we go vote and then come back and begin? What would you prefer?

Senator HATCH. Why do we not go vote.

The CHAIRMAN. If the vote is still on, the committee will recess for 10 minutes or less, I hope. Please, I ask my colleagues, it is going to be a long day. And by the way, immediately after adjourning the morning session, we will convene this committee in executive session to vote out the nomination of Judge Sessions.

We are recessed for 10 to 15 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order. We will now proceed with the opening statements.

Judge, thank you for your indulgence. Neither Senator Hatch nor I are the majority or minority leader yet so we cannot control the business of the floor. Obviously we will be interrupted on occasion through this hearing but hopefully not too much.

I now invite Senator Hatch to make his opening statement.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you. I want to welcome you to the committee, Judge Bork, and I would just state that I think it is important that potential Justices be treated with fairness too; not with inflammatory mis-characterizations; not with distorted statistics; not with misleading methodology leading up to these type of statements and statistics, and certainly not with the selective use of evidence, a lot of which I have seen by your critics in this particular matter.

Mr. Chairman, I feel honored to welcome to the committee one of the most qualified individuals ever nominated to serve on the United States Supreme Court. His résumé—outstanding law student, successful trial practitioner, leading law professor, esteemed author and lecturer, excellent Solicitor General, and respected judge on the District of Columbia Circuit—speaks for itself.

Nonetheless a few details might demonstrate the quality of his life's work. He was not merely one of the top law students at the University of Chicago, but he was the managing editor of the Law Review, as has been stated. He was not merely one of the top law professors for 15 years, but the holder of two endowed chairs. He was not merely an excellent Solicitor General, but successfully represented the United States before the Supreme Court in hundreds of cases during his 4-year tenure. He was not merely another appellate judge, but a judge who in at least 416 total cases was never once reversed on appeal. Moreover, the Supreme Court six times adopted his dissenting opinion when he had the courage to dissent from the majority of his judicial colleagues.

Now, this is a jurist who, in the words of President Carter's legal counsel, Lloyd Cutler, will be counted by history as belonging alongside a few select justices, like Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart—whose wife is with you here today and whom I have a great deal of admiration and respect for, of course, her husband—and Lewis Powell, as well.

You have been paid an even higher tribute than even that endorsement, however, Judge Bork. That tribute is found in the witness list of those who have volunteered to testify in your behalf, and I will just mention a few. That list includes, as we have seen, a former President, a former Chief Justice, six former Attorney Generals of both parties, twelve top leaders of law enforcement officers, seven law school deans, twelve leading law professors in this country, four top anti-trust lawyers, three bar leaders, several of your former colleagues at the Department of Justice, and other influential lawyers and organizational heads. If an individual can be judged by the company he keeps, then you are unrivaled.

In light of these remarkable credentials, it is hard to understand why your nomination would generate controversy. The answer is found in one word, which is tragic in this judicial context, and that word is "politics." Judge Bork is experiencing the kind of innuendo and intrigue that usually accompanies a campaign for the U.S. Senate. Many Senators are experienced at running that kind of campaign but it has no place in a judicial nominating proceeding. Federal judges are not politicians and ought not to be judged like politicians.

The great danger I see in the impending ideological inquisition is injury to the independence and integrity of the Supreme Court and the whole federal judiciary. When we undertake to judge a judge according to political rather than legal criteria, we have stripped the judicial office of all that makes it a distinct separated power. If the general public begins to measure judges by a political yardstick and if the judges themselves begin to base their decisions on political criteria, we will have lost the reasoning processes of the law which have served us so well to check political excesses and fervor over the past 200 years. I would ask any American if they would wish to have their life, liberty and property resting on the decisions of judges who are more worried about what the newspaper might say about the case than they are about life, liberty or property.

Recognizing precisely this danger, the Senate has refused to employ political litmus tests while confirming 53 justices over this past century. Senate precedent does not support subjecting judicial nominees to ideological inquisitions.

Moreover, the Constitution itself does not support that practice. Based on the common sense observation that a diverse congressional body would have difficulty overcoming jealousies and politics to select the best candidate, the framers in 1878—200 years ago, just 2 days from now—unanimously voted to vest the nomination power in the President. The Senate, however, was given a checking function. In the words of Alexander Hamilton, the advice and consent function was to prevent "nepotism" and "unfit characters." The advice and consent function is a checking function, not a license to exert political influence on another branch, not a license to control the outcome of future cases by overriding the President's prerogatives.

Despite the lessons of Senate precedent and the Constitution and despite the political damage to the independence and integrity of the judiciary, we are likely to witness a bruising political campaign before your nomination comes to a final vote in the Senate. It is not difficult to outline in advance the type of campaign it will be.

In the first place, you will be labelled. Even though political litmus tests do not work well with judges, you will be branded an extreme conservative. Of course, this will require some explanation as to why you voted with your Carter-appointed colleague, Judge Ruth Ginzburg—who is a great judge, by the way—in 90 percent of the cases in which you both sat, or with your Carter-appointed colleague, Judge Abner Mikva, in 83 percent of the cases in which you both sat.

The next tactic will be to extract a few quotes from 15-year-old articles while you were a law professor and ignore your judicial actions. For example, we have already heard allegations that you might allow censorship of free speech. In fact, anyone who wants to know your views on censorship would merely need to read your Lebron decision where you held that the D.C. Metro authorities violated Mr. Lebron's free speech rights by refusing to let him hang a poster that was extremely critical of President Reagan. In fact, those posters are going up today. You were even willing to allow the embarrassment of the President who appointed you to uphold his rights. In my mind, actions speak louder than words.

Another tactic will be to selectively use evidence. For instance, we have already seen criticism that your *Dronenburg* decision denied homosexuals a special constitutional protection. The evidence that these critics consistently ignore is that the Supreme Court reached precisely the same decision and the same result in the *Bowers* v. *Hardwick* case.

Still another tactic, familiar to political campaigns is to accuse you of ethical violations. In that vein, we have heard too much recently about the so-called Saturday Night Massacre. In fact, this was one of your finest hours. You were not the cause of Watergate but you were part of the solution. As a precondition of carrying out the President's order, you gained a commitment that the investigation would go forth without further interference. You had to make a difficult decision on the spur of the moment. Even then you had to be convinced by Attorney General Richardson not to resign, but the evidence that your decision was correct is history. Because you preserved the investigation, the President was later forced to resign and several others were prosecuted. The performance that you gave, it seems to me, deserves commendation, not criticism.

It will not end there. Inconsistent charges will be hurled at you. For example, you will be called both an "extremist" and "the one vote likely to tip the balance." You cannot be both, unless those making the charges are actually saying that four other justices are already "extremists." Frankly, it is more likely that those making the charge are the extremists themselves because the four other justices, includes one—Justice White—appointed by President John Kennedy, and two—Scalia and O'Connor—who were unanimously approved by the Senate. Unless they are also extremists, I do not see how you can change anything there. Consistency, I think you can conclude, will not be a hallmark of this debate.

We could discuss likely political tactics for a long time. The important thing to remember is that these political charges betray themselves. As Hodding Carter, an official from the previous Democratic administration, candidly observed, quote: "The nomination of Judge Bork forces liberals like me to confront a reality we don't want to confront, which is that we are depending in large part on the least democratic institution, with a small "d", in government to defend what it is we no longer are able to win out there in the electorate," unquote.

That is really what is involved here, and I think he was candid and honest enough to state it in those succinct, candid terms.

This is the reason that politics are injected into this proceeding, because many politicians are hoping to win from unelected judges what they cannot win in the Congress or with the people of the United States of America. My fear, however, is that the price of a politicized judiciary is too high to pay in exchange for a short-term policy set of gains. If judges fear to uphold the Constitution due to political pressures or sense that their judicial careers might be advanced by reading that document in the smokey back rooms of political intrigue, then the Constitution will no longer be the solid anchor holding our nation in place during the times of storm and crisis. Instead, the Constitution will just become part of that political storm, blowing hot and cold whenever the wind changes. That is a price that we in this country cannot afford to pay, and I think it is important that the American people understand that here.

I commend you for subjecting yourself to this situation and I commend you for the work that you have done and for the respect that you have from people who are truly learned in the law all over this country and who set aside political gain.

Thank you for being here and thanks for accepting this nomination.

The CHAIRMAN. Thank you, Senator.

[Prepared statement follows:]

STATEMENT OF ORRIN G. HATCH

MR. CHAIRMAN. AT THE OUTSET OF THESE HEARINGS, I WAS GOING TO GIVE JUDGE BORK ONE SUGGESTION ON STYLE, NAMELY, BE CAREFUL NOT TO APPEAR SMARTER THAN THE SENATORS ON THE COMMITTEE. BUT, ON SECOND THOUGHT, THAT MIGHT PLACE SEVERE RESTRICTIONS ON HIM FROM THE VERY START.

IN ALL SERIOUSNESS, MR. CHAIRMAN, I FEEL HONORED TO WELCOME TO THE COMMITTEE ONE OF THE MOST QUALIFIED INDIVIDUALS EVER NOMINATED TO SERVE ON THE SUPREME COURT. HIS RESUME -- OUTSTANDING LAW STUDENT, SUCCESSFUL TRIAL PRACTITIONER, LEADING LAW PROFESSOR, ESTEEMED AUTHOR AND LECTURER, EXCELLENT SOLICITOR GENERAL, AND RESPECTED JUDGE ON THE DISTRICT OF COLUMBIA CIRCUIT -- SPEAKS FOR ITSELF. NONETHELESS A FEW DETAILS MIGHT DEMONSTRATE THE QUALITY OF HIS LIFE'S WORK. HE WAS NOT MERELY ONE OF THE TOP LAW STUDENTS AT THE UNIVERSITY OF CHICAGO, BUT THE MANAGING EDITOR OF THE LAW REVIEW. HE WAS NOT MERELY A TOP LAW PROFESSOR FOR 15 YEARS, BUT THE HOLDER OF TWO ENDOWED CHAIRS. HE WAS NOT MERELY AN EXCELLENT SOLICITOR GENERAL, BUT SUCCESSFULLY REPRESENTED THE UNITED STATES BEFORE THE SUPREME COURT IN HUNDREDS OF CASES DURING HIS FOUR-YEAR TENURE. HE WAS NOT MERELY ANOTHER APPELLATE JUDGE, BUT A JUDGE WHO IN 416 TOTAL CASES WAS NEVER ONCE REVERSED ON APPEAL. MOREOVER, THE SUPREME COURT SIX TIMES ADOPTED HIS POSITION WHEN HE HAD THE COURAGE TO DISSENT FROM THE MAJORITY OF HIS JUDICIAL COLLEAGUES. THIS IS A JURIST WHO, IN THE WORDS OF PRESIDENT CARTER'S COUNSEL, LLOYD CUTLER, WILL BE COUNTED BY HISTORY AS BELONGING ALONGSIDE A FEW SELECT JUSTICES, LIKE "OLIVER WENDELL HOLMES, LOUIS BRANDEIS, FELIX FRANKFURTER, POTTER STEWART, AND LEWIS F. POWELL, JR."

YOU HAVE BEEN PAID AN EVEN HIGHER TRIBUTE THAN EVEN THAT ENDORSEMENT, HOWEVER, JUDGE BORK. THAT TRIBUTE IS FOUND IN THE WITNESS LIST OF THOSE WHO HAVE VOLUNTEERED TO TESTIFY ON YOUR BEHALF. THAT LIST INCLUDES A FORMER PRESIDENT, A FORMER CHIEF JUSTICE, SIX FORMER ATTORNIES GENERAL OF BOTH PARTIES, TWELVE TOP

LEADERS OF LAW ENFORCEMENT OFFICERS, SEVEN LAW SCHOOL DEANS, TWELVE OF THE LEADING LAW PROFESSORS IN THE NATION, FOUR TOP ANTITRUST LAWYERS, THREE BAR LEADERS, SEVERAL OF YOUR FORMER COLLEAGUES AT THE DEPARTMENT OF JUSTICE, AND OTHER INFLUENTIAL LAWYERS AND ORGANIZATION HEADS. IF AN INDIVIDUAL CAN BE JUDGED BY THE COMPANY HE KEEPS, YOU ARE UNRIVALED.

IN LIGHT OF THESE REMARKABLE CREDENTIALS, IT IS HARD TO UNDERSTAND WHY JUDGE BORK'S NOMINATION WOULD GENERATE CONTROVERSY. THE ANSWER IS FOUND IN ONE WORD, WHICH IS TRAGIC IN THIS JUDICIAL CONTEXT, AND THAT WORD IS "POLITICS." JUDGE BORK IS EXPERIENCING THE KIND OF INNUENDO AND INTRIGUE THAT USUALLY ACCOMPANIES A CAMPAIGN FOR THE SENATE. MANY SENATORS ARE EXPERIENCED AT RUNNING THAT KIND OF CAMPAIGN, BUT IT HAS NO PLACE IN A JUDICIAL NOMINATION PROCEEDING. FEDERAL JUDGES ARE NOT POLITICIANS AND OUGHT NOT TO BE JUDGED LIKE POLITICIANS.

THE GREAT DANGER I SEE IN THE IMPENDING IDEOLOGICAL INQUISITION IS INJURY TO THE INDEPENDENCE AND INTEGRITY OF THE FEDERAL JUDICIARY. WHEN WE UNDERTAKE TO JUDGE A JUDGE ACCORDING TO POLITICAL, RATHER THAN LEGAL CRITERIA, WE HAVE STRIPPED THE JUDICIAL OFFICE OF ALL THAT MAKES IT A DISTINCT SEPARATED POWER. IF THE GENERAL PUBLIC BEGINS TO MEASURE JUDGES BY A POLITICAL YARDSTICK AND IF THE JUDGES THEMSELVES BEGIN TO BASE THEIR DECISIONS ON POLITICAL CRITERIA, WE WILL HAVE LOST THE REASONING PROCESSES OF THE LAW WHICH HAVE SERVED SO WELL TO CHECK POLITICAL FERVOR OVER THE PAST TWO HUNDRED YEARS. I WOULD ASK ANY AMERICAN IF THEY WOULD WISH TO HAVE THEIR LIFE, LIBERTY, AND PROPERTY RESTING ON THE DECISION OF JUDGES WHO ARE MORE WORRIED ABOUT WHAT THE NEWSPAPER MIGHT SAY ABOUT THE CASE THAN THEY ARE ABOUT THE LIFE, LIBERTY OR PROPERTY.

RECOGNIZING PRECISELY THIS DANGER, THE SENATE HAS REFUSED TO EMPLOY POLITICAL LITMUS TESTS WHILE CONFIRMING 53 JUSTICES OVER THE PAST CENTURY. SENATE PRECEDENT DOES NOT SUPPORT SUBJECTING JUDICIAL NOMINEES TO IDEOLOGICAL INQUISITIONS.

Moreover the Constitution itself does not support that practice. Based on the common sense observation that a diverse congressional body would have difficulty overcoming jealousies and politics to select the best candidate, the Framers in 1787 unanimously voted to vest the nomination power in the President. The Senate, however, was given a checking function. In the words of Alexander Hamilton, the advice and consent function was to prevent "nepotism" and "unfit characters." The advice and consent function is a checking function, not a license to exert political influence on another branch, not a license to control the outcome of future cases by overriding the President's prerogatives.

Despite the lessons of Senate precedent and the Constitution and despite the potential damage to the independence and integrity of the Judiciary, we are likely to witness a bruising political campaign before your nomination comes to a final vote in the Senate. It is not difficult to outline in advance the type of campaign it will be.

In the first place, you will be labelled. Even though political litmus tests do not work well with judges, you will be branded an "extreme conservative." Of course, this will require some explanation as to why you voted with your Carter-appointed colleague, Judge Ruth Ginzburg, in 90% of the cases on which you both sat, or with your Carter-appointed colleague, Judge Abner Mikva, in 83% of the cases on which you both sat.

The next tactic will be to extract a few quotes from 15-year-old articles and ignore your judicial actions. For example, we have already heard allegations that you might allow censorship of free speech. In fact, anyone who wants to know your views on censorship would merely need to read your Lebron decision where you held that the D.C. Metro authorities violated Mr. Lebron's free speech rights by refusing to let him hang a poster that was extremely critical of President Reagan. You were even willing to allow the embarrassment of the President who

APPOINTED YOU TO UPHOLD MR. LEBRON'S RIGHTS. IN MY MIND, ACTIONS SPEAK LOUDER THAN WORDS.

ANOTHER TACTIC WILL BE TO SELECTIVELY USE EVIDENCE. FOR INSTANCE, WE HAVE ALREADY SEEN CRITICISMS THAT YOUR DRONENBURG DECISION DENIED HOMOSEXUALS A SPECIAL CONSTITUTIONAL PROTECTION. THE EVIDENCE THAT THESE CRITICS CONSISTENTLY IGNORE IS THAT THE SUPREME COURT REACHED PRECISELY THE SAME RESULT IN THE BOWERS V. HARDWICK CASE.

STILL ANOTHER TACTIC, FAMILIAR TO POLITICAL CAMPAIGNS, IS TO ACCUSE YOU OF ETHICAL VIOLATIONS. IN THAT VEIN, WE HAVE HEARD TOO OFTEN RECENTLY ABOUT THE SATURDAY NIGHT MASSACRE. IN FACT, THIS WAS ONE OF YOUR FINEST HOURS. YOU WERE NOT THE CAUSE OF WATERGATE, BUT YOU WERE PART OF THE SOLUTION. AS A PRECONDITION OF CARRYING OUT THE PRESIDENT'S ORDER, YOU GAINED A COMMITMENT THAT THE INVESTIGATION WOULD GO FORTH WITHOUT FURTHER INTERFERENCE. YOU HAD TO MAKE A DIFFICULT DECISION ON THE SPUR OF THE MOMENT. EVEN THEN YOU HAD TO BE CONVINCED BY ATTORNEY GENERAL RICHARDSON NOT TO RESIGN, BUT THE EVIDENCE THAT YOUR DECISION WAS CORRECT IS HISTORY. BECAUSE YOU PRESERVED THE INVESTIGATION, THE PRESIDENT WAS LATER FORCED TO RESIGN AND SEVERAL OTHERS WERE PROSECUTED. THIS PERFORMANCE DESERVES COMMENDATION, NOT CRITICISM.

IT WILL NOT END THERE. INCONSISTENT CHARGES WILL BE HURLED AT YOU.. FOR EXAMPLE, YOU WILL BE CALLED BOTH AN "EXTEMIST" AND "THE ONE VOTE LIKELY TO TIP THE BALANCE." YOU CANNOT BE BOTH, UNLESS THOSE MAKING THE CHARGE ARE ACTUALLY SAYING THAT FOUR OTHER JUSTICES ARE ALREADY "EXTREMISTS." FRANKLY, IT IS MORE LIKELY THAT THOSE MAKING THE CHARGE ARE THE EXTREMISTS BECAUSE THE FOUR OTHER JUSTICES INCLUDE ONE (WHITE) APPOINTED BY PRESIDENT JOHN KENNEDY AND TWO (SCALIA AND O'CONNOR) WHO WERE UNANIMOUSLY APPROVED BY THE SENATE. CONSISTENCY WILL NOT BE A HALLMARK OF THIS DEBATE.

WE COULD DISCUSS LIKELY POLITICAL TACTICS FOR A LONG TIME. THE IMPORTANT THING TO REMEMBER IS THAT THESE POLITICAL CHARGES BETRAY THEMSELVES. AS HODDING CARTER, AN OFFICIAL FROM THE PREVIOUS DEMOCRATIC ADMINISTRATION, CANDIDLY OBSERVED:

> "[THE NOMINATION OF JUDGE BORK] FORCES LIBERALS LIKE ME TO CONFRONT A REALITY WE DON'T WANT TO CONFRONT, WHICH IS THAT WE ARE DEPENDING IN LARGE PART ON THE LEAST DEMOCRATIC INSTITUTION, WITH A SMALL "D," IN GOVERNMENT TO DEFEND WHAT IT IS WE NO LONGER ARE ABLE TO WIN OUT THERE IN THERE IN THE ELECTORATE."

THIS IS THE REASON THAT POLITICS ARE INJECTED INTO THIS PROCEEDING -- BECAUSE MANY POLITICIANS HOPE TO WIN FROM UNELECTED JUDGES WHAT THEY CANNOT WIN IN CONGRESS OR WITH THE PEOPLE OF AMERICA.

MY FEAR, HOWEVER, IS THAT THE PRICE OF A POLITICIZED JUDICIARY IS TOO HIGH TO PAY IN EXCHANGE FOR ANY SHORT-TERM POLICY GAINS. IF JUDGES FEAR TO UPHOLD THE CONSTITUTION DUE TO POLITICAL PRESSURES OR SENSE THAT THEIR JUDICIAL CAREERS MIGHT BE ADVANCED BY READING THAT DOCUMENT IN THE SMOKEY BACKROOMS OF POLITICAL INTRIGUE, THEN THE CONSTITUTION WILL NO LONGER BE A SOLID ANCHOR HOLDING OUR NATION IN PLACE DURING TIMES OF STORM AND CRISIS. INSTEAD THE CONSTITUTION WILL JUST BECOME PART OF THE POLITICAL STORM -- BLOWING HOT AND COLD WHENEVER THE WIND CHANGES. THAT IS A PRICE WE CANNOT AFFORD TO PAY.

The CHAIRMAN. Senator Metzenbaum.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Judge Bork, I am happy to join my colleagues in welcoming you this morning.

My vote, Judge Bork, on this nomination will be one of the most important I cast as a U.S. Senator. The passions generated by this nomination on both sides reflect the enormous significance it has for every American, yes for our children, for our grandchildren, and maybe even our great grandchildren.

One of the threshold questions we face in this confirmation process is the respective roles of the President and the Senate. President Reagan and his Attorney General have made it a major priority to change basic constitutional principles. The President has proposed a series of constitutional amendments, none of which has made any progress toward enactment. His Attorney General has attempted to persuade the Supreme Court to reinterpret the Bill of Rights. Fortunately, he too has been unsuccessful.

Now it is clear that the President wants to revise the Constitution through his appointments to the Supreme Court. No one would question the President's right to attempt to amend the Constitution, but in the Senate we have every right—yes, we have a duty—to challenge his attempt to amend it by the back door. If the President attempts to change constitutional interpretation through appointments to the Supreme Court, the Senate cannot stand by and passively acquiesce.

As the distinguished ranking member of this committee, Senator Thurmond, and the President's Chief of Staff, Howard Baker, have both said, the Senate has a constitutional obligation to consider the views of a nominee. This is especially our obligation when the President has selected a nominee by reason of those views. Moreover, the confirmation of this nominee is likely to tip the Court radically on key constitutional issues.

Justice Powell was a conservative justice who followed a pragmatic and careful approach. His mind was not closed. He had great respect for precedent. He did not have a rigid view of the boundaries of constitutional protections. Upon his retirement he said: "I never think of myself as having a judicial philosophy. I try to be careful to do justice to the particular case rather than try to write principles."

Those who know Robert Bork know he is not Lewis Powell, nor I suspect, would he claim to be. Judge Bork categorically rejects any constitutional right of privacy. He believes the Government has the right to regulate the family life and the sex life of every American. He believes the Government can make it a crime for married adults to use birth control. He has an extremely narrow view of free speech. He does not believe the equal protection clause applies to women. He opposes the constitutional principle of one-man, one-vote. He would have upheld a poll tax on the constitutional right to vote. He would have upheld a law allowing the forced sterilization of convicts.

Judge Bork criticizes judges who make law, yet in interpreting certain statutes, he appears eager to do just that. He would radically reinterpret the anti-trust laws in disregard of the intent of Congress which he considers—that being the Congress, quote, "institutionally incapable of fashioning a rational anti-trust policy," end of quote.

He would allow giant companies to merge until only two or three were left. He would eliminate the right of retailers to give consumers a discount on the products they buy. He would ignore Congress' concern about preserving small and independent businesses.

Judge Bork says he is neutral and even-handed in applying the law. Yet, in split decisions involving disputes between the Government and an individual, he has voted for the Government almost 100 percent of the time. When citizens have wanted access to the courts, he has always voted against them. Yet, when a business is challenging a regulatory agency of the Government, he has been on the corporate side in virtually every case.

Another issue is Judge Bork's role in the Saturday Night Massacre. A federal court found that his firing of Archibald Cox on President Nixon's orders was illegal, a ruse—in the court's words—to get around the law. Now new information has come to light which suggests Judge Bork may not have been completely forthcoming regarding his role in this affair. It is important to explore these matters, for what message does it convey if the Senate confirms to the highest court of the land someone who has violated the law.

Finally, where does the nominee really stand on the vital issues that he would face on the Supreme Court. A recent article stated that Judge Bork would now have us believe that his controversial writings were the product of inexperience and youth, when he tended to go, quote, "wild with ideas," end of quote. In fact, Judge Bork was 36 when he wrote that requiring public establishments to serve blacks is a matter of "unsurpassed ugliness." He was 44 when he wrote that the first amendment does not protect scientific or literary speech. And he was 60 when he reiterated just a few months ago his view that the Constitution does not protect our privacy.

I strongly encourage you, Judge Bork, to be straightforward and clear with this committee. The record is voluminous. It would be a disservice to you and the country to distort it. These considerations lead me to be very troubled by this nomination. Judge Bork could weaken, literally within a few years, fundamental constitutional freedoms which the Supreme Court has protected throughout its history.

The Senate's inquiry follows more than just a consideration of Judge Bork's professional credentials. In the end each Senator just search his or conscience and ask, is the confirmation of Robert Bork in the best interest of this country.

The **Chairman**. Thank you, Senator.

[Prepared statement follows:]

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Moreover, the confirmation of this nominee is likely to tip the Court radically on key constitutional issues. Justice Powell was a conservative Justice who followed a pragmatic and careful approach. His mind was not closed. He had great respect for precedent. He did not have a rigid view of the boundaries of constitutional protections. Upon his retirement, he said:

"I never think of myself as having a judicial philosophy * * * I try to be careful, to do justice to the particular case, rather than try to write principles." Those who know Robert Bork know he is not Lewis Powell, nor, I suspect, would he claim to be.

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The Senate's inquiry involves more than just a consideration of Judge Bork's professional credentials. In the end, each Senator must search his or her conscience and ask: Is the confirmation of Robert Bork in the interest of our country?

The CHAIRMAN. The Senate Republican Whip, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Would you do all of that, really? [Laughter.]

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

Senator SIMPSON. Here we go again. We shall all be witness to one of the peculiar things we see often in this great city. What we now do is hereby targeted as "high drama," "the most critical issue of the day," a "watershed," the "greatest test of the Presidency." It is called the 4-H Club of hype, hoorah, hysteria and hubris.

I have served on this committee since I came to the U.S. Senate. I chaired such a committee when I was in the Wyoming Legislature. It is a rich honor and privilege to do so. It is this kind of a committee that I enjoy. I enjoy my colleagues. It has been a tremendous privilege. It always commands my utmost respect, admiration, and also, my energies.

I have served under the chairmanship of Ted Kennedy. I have always been treated exceedingly fairly and most courteously by him as chairman, and I have greatly enjoyed working with him on illegal immigration and some other tough issues.

I have served under Strom Thurmond, one of the most extraordinary and deeply respected Members of the Senate, a courtly, sincere and dedicated man. He has been of great help to me and assisted in enabling me to grow and learn in many ways.

Now I serve under the able chairmanship of Joe Biden. I have come to enjoy him very much. He is good to deal with, a spirited man of great energies and zest and enthusiasms, and he too has been most generous to me.

Over the course of those years I have voted for judges presented by Jimmy Carter and Ronald Reagan, some of them absolutely outstanding. Some seemed to me to be steady and thoughtful, of whatever party, and they have proven to be so. I think of Ab Mikva and Pat Wald in the other party, superb judges. And there have been some real duds from both sides of the aisle—just like in Congress.

I have learned much from this committee, from these fine members on both sides of the aisle, but the single most remarkable lesson learned, and yet probably the most disappointing revelation to the layman, would be that I have found that you either pass or kill a bill in the U.S. Congress by the use of a deft blend of emotion, fear, guilt or racism.

We now debate the confirmation or rejection of Robert Bork with the use of the same deft blend of emotion, fear, guilt or racism. The American people deserve a lot better than that. That is really too bad. That ought not to be so. Go scratch through the records. You will find that I have never objected to a nominee of either party on the basis of ideological grounds alone, not one.

I am certainly not saying this nominee should be somehow spared ideological litmus tests of both sides. That will be. No complaints. Ideology is a fair game, but surely not the acid test.

I do not agree with this nominee on several positions. Abortion may be one. He is here to explain in full his judicial position on that. I think he already has, if you read it honestly. As a personal matter I happen to feel that this deeply intimate and awesome human decision should be a woman's choice. Hopefully, it can be made with the concurrence of the spouse, if one, and pastoral counselors or physicians, but it should be her choice. Judge Bork's personal views on this issue are not our concern. Too bad that has to now be the litmus test here.

Twice, you passed the confirmation of the U.S. Senate. Twice, unanimously. Twice. I hope people remember that. They must have new ground rules now over at the American Bar Association. I paid my dues there for 18 years. They unanimously designated you as being, quote, "exceptionally well qualified" in 1981, the highest rating they can give. Obviously, they are a rather forgetful lot over there. I think, at one time or another, every single member of this committee has either toasted the ABA to the high heavens or trashed them royally, depending on just how they rated one of their particular favorite nominees.

Now you are going to have to pass some other tests. You used to give them; now you are going to pass them—tests about abortion, affirmative action, civil rights, rights of privacy, homosexuality, contraception. I have not heard it said yet, but there is the *Griswold* case that they speak of here with great passion—you described as "nutty." I think it was nutty, too.

So maybe we will get to the truth somewhere in all of this stuff. Obviously, we are going to be picking at a lot of old scabs. Too bad. Who among us here on this panel—we in the U.S. Senate—are designated as the "official score keepers" of our fellow humans? Who does or does not judge, when we put aside the mistakes, the utterances, the errors of our earlier lives, and who in this room has not felt the rush of embarrassment or pain or a feeling of plain stupidity about a phrase previously uttered or an act long ago committed? Who of us here can pass that test, and who then are the judges of that? Who appointed them?

Three present sitting members of the U.S. Senate voted against the Civil Rights Bill of 1964—three of our colleagues, along with Bill Fulbright, Senators Ervin, Smathers, the vice presidential candidate of the United States, Sparkman and Senators Long and Russell. Are these then lessor people than us? Are they less respected? Are they held up to a certain ridicule or to some different test? Of course not. How absurd. All Bork did was write about it. They voted about it.

Since this man's name was proposed by the President, the various interest groups have been salivating at the chops, and I note they have been thoroughly engrossed in an exercise that must be the epitome of effort for a lawyer—pouring over non-unanimous decisions. What an exercise. Send them out to practice law for a few days to represent some woman who says she is going to have an abortion or commit suicide, or wants to get some dude out of her hair that is chopping her to pieces, or represent a client that is in a probate contest before the body has even cooled, or defend some cowboy who chewed another guy's ear off. Send them out into real life. Get them out from under their green eyeshades downtown and let them do a little work. I referred to them once as "bug-eyed zealots." I have no reason to change that opinion at all.

Is this man wholly "outside the mainstream" of American thought and judicial theory in America? I will not go any further. There is the witness list. What an extraordinary witness list. Support from a President of the United States to the presidential "Counsel Emeritus" of all, Lloyd Cutler, and everyone in between, including our remarkable former Chief Justice Warren Burger and Bill Ruckelshaus, and a panel of attorneys general—an extraordinary array of people.

I have always felt that everyone is entitled to their own opinion, but nobody is entitled to their own facts. You have been on the bench. The Senate put you on the bench. The sitting members of this committee put you on the bench unanimously. And Solicitor General, unanimously. Each and every one of us. And what have you done since? That should be an issue before us.

You have written 102 opinions and none of them have been overruled. I will not go into that. Your six dissents. I will not go into that. But I think it is important to notice that Judge Lewis Powell, the "swing-vote," quote, that you replace, on the cases where he was voting on your decisions agreed with you in 9 out of 10 of those decisions. Let's not miss that. Do not let that go off the wall or skip off the puddle.

You have, indeed, voted with Ab Mikva 82 percent of the time, or he with you. And Pat Wald, 76 percent, Harry Edwards, 80 percent, Skelley Wright, 75 percent. You must be doing something right.

Well, I surely hope we do not spend an inordinate amount of time on words uttered and printed in 1971 or 1963, or articles written in 1979, or speeches made in 1954 or 1964 or 1974, or mistakes made or opinions revised or arguments lost and found, unless we would all want to go through that particular test. And as the battery of attorneys who have worked up a sweat on this one seem to be gaining all of their material from non-unanimous decisions, I think they really are going to do nothing more in the long run but to be seen as replacing what was originally an intense hostility toward your positions with what may prove to be a trivialization of their own position—instead of a strengthening of it. I think we are going to watch that happen. I want to be here. I think it will.

There are not many of us here that would like to be at that table, I can tell you. I always get a kick out of the argument, "yeah, but we do not have to do that, we are United States Senators. We do not have to pass that kind of test. The voters do that for us. This man is going to the Court."

I would sure hate to have someone rifling through the collected utterances and scratchings of Al Simpson. Lord, I did things and wrote things and said things—I did all sorts of things when I was 20 and 30 and 40 and 50 that I am not very proud of, and even today at this magnificent and mature age of 56 I still cross the fine line between good humor and "smart aleck." And when I do, I usually get hammered and I think I usually deserve it.

So here we have before us a man who the American public is going to get to know and see, and I think, understand in full context. You will be subjected to some of the toughest and the easiest, the most appropriate and the most inappropriate, and the most thoughtful and the most unthoughtful, and the most inordinate and inane questioning known to man—some of it laced with cynicism and sarcasm. But you will be ready for that. I really think you will.

After all, it was you yourself who said, in the *Ollman* case, quote: "Those who step into the areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement and even wounding assessments," unquote.

I have a hunch you like to mix it up, and there are some panelists here that just love to do that—me too—and you are going to get an awfully fine opportunity. My hunch is you are going to acquit yourself very well. My stronger hunch is that you will make a very fine addition to the U.S. Supreme Court. There, now, I too have made a judgment before the hearings are concluded. A confession is made.

But the people who know you best—those at the bench and the bar and in academe and those in Congress who passed upon you twice—after thorough investigations—will share that view. So ours is the task of advice and consent. Would you be wise, even-handed, fair, responsible, and an intelligent associate justice? Do you meet that test? That is what we are here for. That is what we should be here for.

The test is not whether the nominee meets the approval of every single special interest group who just happens to have a Washington office or a hyperactive executive director. That is not the test. Or worse, a group that has been running a little low on funds since the last guy they strung on the gallows was carried out feet first. And there are a lot of them running around in this village.

I hope we do not do what we did the last time with Justice Rehnquist. It seems to be an unpleasant reality that a Supreme Court nominee has every single constitutional protection until he or she walks into this room. And once in this room, unlike a defendant in a court of law, the nominee is not guaranteed any single right analogous to the Miranda rule or the fifth amendment or anything else. They are often meat for every form of accusation, innuendo and irrelevant and immaterial statement. It is that part of the process that disturbs me greatly and which I believe is unseemly and the dark side of our deliberations.

So I hope there will be restraint. I think there will be. We have our work to do. We must be about that in reviewing the work product of this man, Mr. Chairman, and doing so exceedingly carefully and not being delayed by aimless and remarkable volleys fired in order to "get that guy—get that man." We need not sully and trash the highest standards of the United States Senate and this committee in our work.

I intend to participate, Mr. Chairman, to listen, to hear, to try to understand better, to try to understand the questioners, the opponents, the detractors. Will it be that we will get to where the scriveners will eventually write, that the researchers will have finished piling distinction upon distinction in non-uniform and non-unanimous decisions and gathered excised words and phrases to make you look like a boob or a madman? Or will we settle in and get to the know the essence of Robert Bork—human being, lawyer, jurist, author, debater, professor, nominee for the highest court in the land? I hope that is what we will do, and I hope to help assure it.

Finally, I conclude—and I thank the chairman for his courtesy—it seems to me in my extensive readings, and I really have done some about you, that you have grown and learned and listened and probed and debated and argued and challenged and have been involved in that life long adventure of what I call "creeping maturity." That is a lot better than being lumped together with that great legion of those of humankind known as the "dead un-killed."

I await your presentation with great anticipation. The chairman and all members of the committee will assure that you will be treated most fairly and courteously. That is the way he does it. So welcome to you and to Mary Ellen and your family. I can assure you that this will be absolutely the most stimulating class you have ever been in.

Thank you very much.

The CHAIRMAN. Thank you, Senator Simpson, for that preview of what the committee is about to do.

Judge Bork, I guarantee you this little mallet is going to assure you every single right to make your views known, as long as it takes, on any grounds you wish to make them. That is a guarantee, so you do have rights in this room and I will assure you they will be protected.

Judge BORK. Thank you, Mr. Chairman.

The CHAIRMAN. I would also like to suggest that we try to keep to 10 minutes like we all agreed, if we could. I have not been calling the clock, but it would be useful if we could.

Senator DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, thank you.

Judge Bork, I am not here to get you or to hurt you or to embarrass you and my questions during this effort here are going to be a far cry from what Senator Simpson seems to depict may happen to you, at least from this Senator.

For the third time in my short career in the Senate I am joining other members to do what I think is probably the second most important obligation we have as Senators. I guess, with the exception to the power to declare war, this is a responsibility that, to me, rests with us in the Constitution on the highest basis.

It is fitting that the Judiciary Committee begins the confirmations of you, Judge Bork, during the week that we are celebrating our 200th anniversary. That is a great day that is upon us this week, as a matter of fact. My father was a lawyer and a Supreme Court Judge in Arizona. I have been involved and interested in the Constitution most of my life. And having served on the Bicentennial Commission with other members of this committee, I have gained a new respect and awareness of what our Founding Fathers had, at least as I see.

The authors of the Constitution were worried that one branch of government over time could dominate another. To prevent such imbalance from occurring, they crafted a delicate system of checks and balances among the three branches. It is as a part of that delicate system signed 200 years ago this Thursday that we gather here today to implement.

Because the Constitution contemplated that the three branches of government be equal, the selection of a Supreme Court Justice is just as important as the election of a new President or a new Congress. As a matter of fact, the nomination and confirmation of a Supreme Court Justice is a pivotal point of our system of checks and balances. That is why we are all here today.

The founders did leave one important decision about the advice and consent procedures for us to decide after the Constitution was in place. What was left unanswered in 1787 was simply this—what were the criteria by which the decision of nomination and confirmation should be made? Much controversy about these criteria has existed over the years and that controversy remains as great today as I believe it ever was.

Some supporters of you, Judge Bork, argue that the Senate should not consider your philosophy and ideology but should decide only whether you have the appropriate intellect, temperament and integrity. Some of your opponents, on the other hand, argue that not only may the Senate consider philosophy and ideology, we must base our decision on the effects the nomination will have on future decisions; every future decision of the Supreme Court.

There is no immutable standard contained in the Constitution or any other law for Senators to look to when they are facing the responsibility before us today. Neither approach described above in my opinion is right or wrong. The Framers of the Constitution left the decision to each individual Senator based on his or her own conscience and sense of responsibility.

I will base my decision on you, Judge Bork, on your ability and experience, your temperament, your integrity, and whether or not I believe you will decide the cases before you based on the Constitution, the statutes before you, the regulations, and to some extent, the traditional interpretations of those items.

I would be opposed to any nominee whose intentions are to ignore the precedents of the Court and lead it in a radically new direction. I must be satisfied that in the guise of what you represent and Attorney General Meese called "judicial restraint," that you, Judge Bork, are not a conservative judicial activist bent on imposing your own political philosophy on the Court and on this nation.

It is obvious, Judge Bork, that you have an extreme intellect. Your experience as a lawyer, as Solicitor General, as a law professor, and as a circuit court judge is very impressive to anyone. I have been told by many mutual friends that you enjoy a wit and a sense of humor, a congeniality with your other colleagues. From what I have read about you, Judge Bork, I believe I would be pleased personally with your views on the criminal justice system, the right of the government to prosecute criminals swiftly, firmly and finally.

The question is not whether I agree with you, Judge Bork, more often than I disagree. I will not prepare a score card of your decisions and vote according to the previous hit and misses that you and I make. If I were to do this, I might find the score in your favor. But this is not a game. There is no next day for the loser in the Supreme Court.

The question that I will ask myself at the end of these confirmations hearings is whether I am comfortable with the approach that you take in applying the Constitution and federal laws to the facts presented to you. Do I believe that faced with the difficult decisions, with wide ranging implications, that you, Judge Bork, will listen carefully to the arguments on both sides and then apply the appropriate law in an objective and unbiased way? Or will you find an intellectually supportable and highly articulated way to decide the case as you see fit and how you feel it should come out?

In my opinion, we have had too many result-oriented Supreme Court Justices. I spent the last several weeks reading many of your opinions, your law review articles and speeches. I have read comments and analyses by experts and commentators on both sides of this issue. In addition, I have talked to literally thousands of people in Arizona and outside my State.

I have identified the areas that concern me and I will not review those now at this time but ask that they be included in my full statement, but I will go into some detail.

The ultimate question that I must decide is whether I feel secure putting our individual liberties, freedoms and the future of our country in your hands. History will tell us if a Justice confirmed by the Senate is truly what our Founding Fathers had in mind when they created our system of checks and balances. I intend to do all I can to determine if you, Judge Bork, measure up to that high standard established by the Founding Fathers.

Thank you, and thank you, Mr. Chairman.

[The statement of Senator DeConcini follows:]

STATEMENT OF DENNIS DECONCINI
NOMINATION OF ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT
SEPTEMBER 15, 1987

FOR THE THIRD TIME IN MY TENURE AS A UNITED STATES SENATOR I AM JOINING THE OTHER MEMBERS OF THE SENATE JUDICIARY COMMITTEE TO FACE THE RESPONSIBILITY OF ADVICE AND CONSENT TO THE PRESIDENT'S NOMINATION OF AN INDIVIDUAL TO BE AN ASSOCIATE JUSTICE ON THE SUPREME COURT OF THE UNITED STATES. WITH THE EXCEPTION OF THE POWER TO DECLARE WAR, I BELIEVE THIS RESPONSIBILITY IS THE MOST IMPORTANT ONE GRANTED TO THE SENATE BY OUR CONSTITUTION. IT IS FITTING THAT THE JUDICIARY COMMITTEE BEGIN THE CONFIRMATION HEARINGS ON JUDGE ROBERT H. BORK DURING THE WEEK THAT WE CELEBRATE THE 200TH ANNIVERSARY OF THAT GREAT DOCUMENT.

BECAUSE MY FATHER WAS A LAWYER AND MEMBER OF ARIZONA'S SUPREME COURT, I HAVE BEEN INTERESTED IN OUR CONSTITUTION MOST OF MY LIFE. BUT AS A MEMBER OF THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, I HAVE GAINED NEW RESPECT FOR THE WISDOM AND FORESIGHT OF OUR FOUNDING FATHERS. THE AUTHORS OF THE CONSTITUTION WERE WORRIED THAT ONE BRANCH OF GOVERNMENT WOULD, OVER TIME, COME TO DOMINATE THE OTHERS. TO PREVENT SUCH AN IMBALANCE FROM OCCURRING, THEY CRAFTED A DELICATE SYSTEM OF CHECKS AND BALANCES AMONG THE THREE BRANCHES. IT IS AS PART OF THAT DELICATE SYSTEM SIGNED 200 YEARS AGO ON THURSDAY, THAT WE GATHER HERE TODAY.

Because the Constitution contemplates that the three branches of government be equal, the selection of a Supreme Court Justice is just as important as the election of a new President or of a new Congress. As a matter of fact, the nomination and confirmation of a Supreme Court Justice is the pivotal point of our system of checks and balances. It is the fulcrum on which the system is most carefully and delicately balanced.

The founders did leave one important decision about the advice and consent procedure for us to decide after the Constitution was in place. What was left unanswered in 1787 was this: what criteria were the criteria by which the decisions of nomination and confirmation should be made? Much controversy about these criteria has existed over the years, and that controversy remains as great today as it has ever been.

Some supporters of Judge Bork argue that the Senate should not consider his philosophy or ideology, but should decide only whether he has the appropriate intellect, temperament, and integrity. Judge Bork's opponents, on the other hand, argue that not only may the Senate consider philosophy and idealogy, we must base our decision on the effect the nomination will have on future decisions of the Supreme Court.

There is no immutable standard contained in the Constitution or any other law for Senators to look to when faced with the responsibility of voting on a Supreme Court Justice. Neither approach described above is right or wrong. The framers of the

CONSTITUTION LEFT THE DECISION TO EACH INDIVIDUAL SENATOR BASED ON HIS OR HER OWN CONSCIENCE AND SENSE OF RESPONSIBILITY.

I WILL BASE MY DECISION ON JUDGE BORK ON HIS LEGAL ABILITIES AND EXPERIENCE, HIS TEMPERAMENT, HIS INTEGRITY, AND ON WHETHER OR NOT I BELIEVE HE WILL DECIDE THE CASES BEFORE HIM BASED ON THE CONSTITUTION, STATUTES, REGULATIONS, AND, TO SOME EXTENT, THE TRADITIONAL INTERPRETATIONS OF THEM. I WOULD BE OPPOSED TO ANY NOMINEE WHOSE INTENTIONS ARE TO IGNORE THE PRECEDENTS OF THE COURT AND LEAD IT IN RADICALLY NEW DIRECTIONS. I MUST BE SATISFIED THAT IN THE GUISE OF WHAT JUDGE BORK AND ATTORNEY GENERAL MEESE CALL "JUDICIAL RESTRAINT", JUDGE BORK IS NOT A CONSERVATIVE JUDICIAL ACTIVIST BENT ON IMPOSING HIS OWN POLITICAL PHILOSOPHY ON THE COURT AND ON THE NATION.

IT IS OBVIOUS JUDGE BORK IS EXTREMELY ABLE INTELLECTUALLY. HIS EXPERIENCE AS A LAWYER, AS SOLICITOR GENERAL, AS A LAW PROFESSOR AND AS A CIRCUIT COURT JUDGE IS AS IMPRESSIVE AS THAT OF ANYONE WHO HAS BEEN NOMINATED FOR THE SUPREME COURT IN MANY YEARS. I HAVE BEEN TOLD BY MANY MUTUAL FRIENDS THAT JUDGE BORK IS A WITTY AND CONGENIAL MAN WHO WOULD GET ALONG WELL WITH HIS COLLEAGUES ON THE COURT. FROM WHAT I HAVE READ ABOUT JUDGE BORK, I BELIEVE I WOULD BE PLEASED PERSONALLY WITH HIS VIEWS ON CRIMINAL JUSTICE AND THE RIGHTS OF THE GOVERNMENT TO PROSECUTE CRIMINALS SWIFTLY AND FINALLY.

THE QUESTION IS NOT WHETHER I AGREE WITH JUDGE BORK MORE OFTEN THAN I DISAGREE WITH HIM. I WILL NOT PREPARE A SCORECARD OF HIS DECISIONS AND VOTE ACCORDING TO HIS PREVIOUS HITS AND MISSES.

IF I WERE TO DO SO, I MIGHT FIND THE SCORE IN HIS FAVOR. BUT THIS IS NOT A GAME. THERE IS NO NEXT DAY FOR THE LOSERS IN THE SUPREME COURT.

THE QUESTION THAT I WILL ASK MYSELF AT THE END OF THESE CONFIRMATION HEARINGS IS WHETHER I AM COMFORTABLE WITH THE APPROACH THAT JUDGE BORK TAKES IN APPLYING THE CONSTITUTION AND FEDERAL LAWS TO THE FACTS PRESENTED TO HIM. DO I BELIEVE THAT FACED WITH A DIFFICULT DECISION WITH WIDE-RANGING IMPLICATIONS, JUDGE BORK WILL LISTEN CAREFULLY TO THE ARGUMENTS ON BOTH SIDES AND THEN APPLY THE APPROPRIATE LAW IN AN OBJECTIVE AND UNBIASED WAY? OR WILL HE FIND AN INTELLECTUALLY SUPPORTABLE AND HIGHLY ARTICULATE WAY TO DECIDE THE CASE AS HE WANTS IT TO COME OUT? IN MY OPINION, WE HAVE HAD TOO MANY RESULTS-ORIENTED SUPREME COURT JUSTICES.

I HAVE SPENT THE LAST SEVERAL WEEKS READING MANY OF JUDGE BORK'S OPINIONS, LAW REVIEW ARTICLES AND SPEECHES. I HAVE READ COMMENTS AND ANALYSES BY EXPERTS AND COMMENTATORS BOTH FOR AND AGAINST JUDGE BORK. IN ADDITION, I HAVE TALKED TO LITERALLY THOUSANDS OF PEOPLE ABOUT JUDGE BORK IN ARIZONA AND THROUGHOUT THE COUNTRY. I HAVE IDENTIFIED THE AREAS THAT CONCERN ME AND I INTEND TO DISCUSS THESE WITH JUDGE BORK AT THE HEARINGS THIS WEEK.

I AM CONCERNED ABOUT JUDGE BORK'S PAST STATEMENTS ON CIVIL RIGHTS AND EQUAL PROTECTION. HE HAS CRITICIZED MANY OF THE SUPREME COURT DECISIONS THAT BROUGHT BLACKS IN THIS COUNTRY OUT OF THE QUASI-SLAVERY THAT HAD EXISTED SINCE THE CIVIL WAR. HE HAS CRITICIZED DECISIONS THAT HAVE BROUGHT SOME MEASURE OF LEGAL

EQUALITY TO WOMEN. HE HAS EXPRESSED A VERY NARROW VIEW OF THE CONSTITUTION'S APPLICABILITY TO ISSUES OF CIVIL RIGHTS.

I AM CONCERNED ABOUT HOW JUDGE BORK VIEWS THE PURPOSE AND APPLICATION OF OUR ANTITRUST LAWS. MANY ANTITRUST EXPERTS WHO HAVE READ HIS VIEWS HAVE CONCLUDED THAT HE WOULD REPEAL MOST OF THEM. I NEED TO BE SATISFIED HE THAT HE WON'T ATTEMPT TO REPEAL THEM FROM THE BENCH.

THERE ARE OTHER ISSUES THAT I AM INTERESTED IN HEARING JUDGE BORK DISCUSS. HE HAS EXPRESSED AN OPINION OF FIRST AMENDMENT PROTECTION OF FREEDOM OF SPEECH THAT IS MORE RESTRICTIVE THAN MOST EXPERTS BELIEVE IS PROPER. HE HAS SAID THAT THE CONSTITUTION DOES NOT GUARANTEE AN INDIVIDUAL A RIGHT TO PRIVACY. JUDGE BORK HAS ISSUED DECISIONS AND EXPRESSED VIEWS THAT SEEM TO INDICATE THAT HE FAVORS THE EXECUTIVE BRANCH IN ANY DISPUTE WITH THE LEGISLATIVE.

IN ADDITION, THERE ARE QUESTIONS ABOUT HIS INTEGRITY THAT MUST BE ANSWERED. WE MUST HEAR HIS EXPLANATIONS ABOUT HIS ROLE IN THE FIRING OF THE WATERGATE SPECIAL PROSECUTOR AND HIS SUBSEQUENT EXPLANATIONS OF IT. THERE IS A QUESTION ABOUT NON-PAYMENT OF TAXES THAT WE MUST BE SATISFIED ABOUT. THERE IS ALSO AN ALLEGATION FROM A FEDERAL JUDGE THAT JUDGE BORK FAILED TO WRITE A DECISION IN CONFORMANCE WITH AN UNDERSTANDING REACHED AMONG THREE FEDERAL JUDGES.

THE ULTIMATE QUESTION I MUST DECIDE IS WHETHER I FEEL SECURE PUTTING OUR INDIVIDUAL LIBERTY, FREEDOMS, AND THE FUTURE OF OUR COUNTRY IN HIS HANDS. HISTORY WILL TELL US IF A JUSTICE CONFIRMED BY THE SENATE IS TRULY WHAT OUR FOUNDING FATHERS HAD IN MIND WHEN THEY CREATED OUR SYSTEM OF OF CHECKS AND BALANCES. I INTEND TO DO ALL I CAN TO DETERMINE IF JUDGE BORK MEASURES UP TO THE HIGH STANDARDS ESTABLISHED BY OUR FOUNDING FATHERS.

The CHAIRMAN. Thank you very much, Senator. Senator Grassley.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Bork, I would like to first add my welcome, before I start, to you and your family as you appear before this committee. I know you, too, are eager to use your appearance as a way to address the many questions raised about your nomination. Of course, I am eager to hear your views as well.

It is often said—and I think correctly so—that one of the Senate's most important functions is that of reviewing the President's nominations to the Supreme Court.

Sadly, I believe this important function has been demeaned. Your nomination has been turned into a real life and death battle among the direct mail "giants" of American lobbying. The intense lobbying has transformed this nomination into the legislative equivalent of a pork barrel water project—all strong-armed politics * * * no substance!

The partisans who act as the "generals" in this "war" of mud slinging have had some success. In fact, some members of the Senate have outflanked each other for the honor of taking the most extreme position, even before the first day of the hearings!

I think such positions are as intemperate as they are premature. It puts the judgment ahead of the inquiry—precisely the kind of closed-mindedness that some accuse this nominee of having. These remarks are mindful of the famous passage from "Alice in Wonderland," where the Queen of Hearts says to Alice, "Sentence first, verdict afterwards!"

I am just one of 100 Senators. But I am here to say at the outset of these hearings that I have found much of the furor of the past 2 months deplorable.

I will bet this intellectually empty debate over a Supreme Court nominee would come as a big surprise to at least one of our Constitution's founders—Alexander Hamilton. Hamilton was, of course, the first to articulate the vital power of judicial review, in Federalist No. 78. At the same time, however, he recognized that the judicial branch was to be the weakest of the three Departments. In his words, the judiciary was supposed to have neither force nor will, only judgment.

The framers, such as Hamilton, expected that choices among competing social values would be made by the people's elected representatives—not by the unelected judiciary.

Perhaps this furor during the summer of 1987 only confirms how far the judiciary has drifted from its original purpose of 1787.

It is no exaggeration to say—especially in this the bicentennial of our Constitution—that the existence of constitutional government in America hinges on the capacity and the willingness of the Supreme Court to interpret the Constitution consistent with its true intent. Accordingly, it is our awesome responsibility to ensure, as best we can, that a President's nominee to the Supreme Court possesses this capacity and willingness.

Beyond the mere résumé of this nominee, outstanding as it may be, he is not qualified to serve as a Justice in my view unless he is willing to exercise self-restraint—self-restraint which enables him to accept the Constitution as his rule of decision—self-restraint which makes him resist the temptation to revise or amend that document according to his personal views of what is good public policy.

Former Chief Justice Stone identified this duty of the Court when he remarked in *U.S.* v. *Butler* in 1936, and I quote: "* * * While the unconstitutional exercise of power by the executive and legislative branches of Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

Judges have no license to toy with the Constitution as if it were their personal plaything, rather than the precious heritage of all Americans.

As Justice Frankfurter wrote in his majority opinion in *Ullman* v. *U.S.*, and I quote: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without that same process."

Unfortunately, a new generation of judges seems to have forgotten that they are appointed, not anointed. These judges—including some who have served on the Supreme Court—have demonstrated an impatience with the democratic processes upon which our nation was founded and on which it has flourished. Instead, they would abuse the power of judicial review to impose their own view of wise public policy. They would prefer to act as scientists who use some kind of "judicial alchemy" to transform the words of the Constitution into meanings contrary to its plain reading or intent.

I am unalterably opposed to this kind of judicial arrogation of legislative and executive function.

I believe that judges must give full effect to values that may be fairly discovered in the text, language and history of the Constitution and apply them to modern conditions. But unelected and unaccountable judges should not freely overturn the legitimate policy choices of the equal, elected branches, solely because of personal preference. That is why the Founding Fathers, such as Alexander Hamilton, referred to the judiciary as the "least dangerous" branch. And that is what judicial restraint is all about.

The nominee before us today has weighed-in many times against the kind of judicial activism that tends to create rights not granted in the Constitution or the statutes. Frankly, his view that judges ought to confine themselves to interpreting the law, rather than advocating their own ideas of "wise" public policy, is very appealing to me.

I am anxious to hear more of these views, to see if they follow in the tradition of restraint practiced by Frankfurter, Holmes, Brandeis, Stewart, Powell and a few others.

Along the way, I expect that opponents of this nominee will likely focus on specific views or decisions that they disagree with. I urge my colleagues to keep their eyes on what I believe to be the real issue in this confirmation debate. The real issue is the extent to which judges should respect the decision-making of the elected representative branches of government.

Make no mistake about it; the critics of this nominee know the law they prefer is judge-made, and therefore susceptible to change by other judges. Their loud protests underscore that the law they prefer is not found in the Constitution or the statutes.

If their views were found in the democratically-enacted law, they would have no fear of any new judge pledged to live by the credo of judicial restraint. Instead, these critics prefer judges who will act as some kind of "super legislature"—who will give them victories in the courts when they lose in the legislature.

Judge Bork, I look forward to learning more about you from your own words in the next few days.

Having identified my standard of review for this nomination, I would like to use my remaining time to add my thoughts to a much debated point—the Senate's proper "advise and consent" role for this nomination.

Traditionally, the Senate's role has been a very limited one. The Senate has not made a nominee's political philosophy the test for confirmation.

For example, it is universally acknowledged that judicial nominees should not be asked to commit themselves on particular points of law in order to satisfy a Senator's politics.

I can illustrate the Senate's usual advise and consent standard with some passages from the nomination hearing of Justice O'Connor.

As our now Chairman Senator Biden said, and I quote: "We are not attempting to determine whether or not the nominee agrees with all of us on each and every pressing social or legal issue of the day. Indeed, if that were the test, no one could be passed by this committee, much less the full Senate."

Or as Senator Kennedy stated at that same time, and I quote: "It is offensive to suggest that a potential justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single issue interest group."

Or Senator Metzenbaum, who at the same time said, and I quote: "I come to this hearing with no preconceived notions. If I happen to disagree with you on any specific issues, it will in no way affect my judgment of your abilities to serve on the Court."

I might add that I very much agree with every one of my colleagues in these statements on the Senate's role. Each of these views carefully recognizes that the power to give advice is not the power to decide the issue. From George Washington to Ronald Reagan, the President has enjoyed a range of discretion in nominating Supreme Court judges. Since 1894, the Senate has deferred to the President's choice in all but four cases.

The Senate should refuse its consent only when the President's discretion has been abused. Giving the Senate the last word, without such deference, would mean the Senate has the only word. This constitutional power the framers did not give to us.

Of course, in the absence of constitutional power, raw political power can fill the vacuum. I will stipulate right now to the ability of a handful of my colleagues to block this nomination; but I believe it would be the wrong way to approach this serious Senate duty.

The dangers of politicizing the nomination process are exceeded only by its short-sightedness. After all, Presidential elections—and Supreme Court nominations—come and go.

I urge my colleagues to resist the clarion call of raw politics that undermines the independent judiciary contemplated by Article III of the Constitution.

In closing, if my colleagues cannot resist the use of bald political power, I would at least hope that they have the courage to shed the "fig leaf" behind which they hide their real agenda.

Thank you, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF SENATOR CHARLES E. GRASSLEY

ON THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 1987

THANK YOU MR. CHAIRMAN. JUDGE BORK, I'D LIKE TO FIRST ADD MY WELCOME TO YOU AND YOUR FAMILY AS YOU APPEAR BEFORE THIS COMMITTEE AGAIN. I KNOW YOU ARE EAGER TO USE YOUR APPEARANCE AS A WAY TO ADDRESS THE MANY QUESTIONS RAISED ABOUT YOUR NOMINATION. I AM EAGER TO HEAR YOUR VIEWS, AS WELL.

IT IS OFTEN SAID -- AND I THINK CORRECTLY SO -- THAT ONE OF THE SENATE'S MOST IMPORTANT FUNCTIONS IS THAT OF REVIEWING THE PRESIDENT'S NOMINATIONS TO THE SUPREME COURT.

SADLY, I BELIEVE THIS IMPORTANT FUNCTION HAS BEEN DEMEANED. YOUR NOMINATION HAS BEEN TURNED INTO A LIFE AND DEATH BATTLE AMONG THE DIRECT-MAIL "GIANTS" OF AMERICAN LOBBYING. THE INTENSE LOBBYING HAS TRANSFORMED THIS NOMINATION INTO THE LEGISLATIVE EQUIVALENT OF A PORK BARREL WATER PROJECT -- ALL STRONG-ARMED POLITICS . . . NO SUBSTANCE!

THE PARTISANS WHO ACT AS THE "GENERALS" IN THIS "WAR" OF MUD SLINGING HAVE HAD SOME SUCCESS. IN FACT, SOME MEMBERS OF THE SENATE HAVE OUTFLANKED EACH OTHER FOR THE "HONOR" OF TAKING THE MOST EXTREME POSITION -- BEFORE THE FIRST DAY OF HEARINGS!

I THINK SUCH POSITIONS ARE AS INTEMPERATE AS THEY ARE PREMATURE. IT PUTS THE JUDGMENT AHEAD OF THE INQUIRY -- PRECISELY THE KIND OF CLOSE-MINDEDNESS THAT SOME ACCUSE THIS NOMINEE OF HAVING. THESE REMARKS ARE MINDFUL OF THE FAMOUS PASSAGE FROM ALICE IN WONDERLAND, WHERE THE QUEEN OF HEARTS SAYS TO ALICE -- "SENTENCE FIRST, VERDICT AFTERWARDS"!

I AM JUST 1 OF 100 SENATORS. BUT I'M HERE TO SAY AT THE OUTSET OF THESE HEARINGS THAT I'VE FOUND MUCH OF THE FUROR OF THE PAST TWO MONTHS DEPLORABLE.

I'LL BET THIS INTELLECTUALLY-EMPTY DEBATE OVER A SUPREME COURT NOMINEE WOULD COME AS A BIG SURPRISE TO AT LEAST ONE OF OUR CONSTITUTION'S FOUNDERS -- ALEXANDER HAMILTON. HAMILTON WAS, OF COURSE, THE FIRST TO ARTICULATE THE VITAL POWER OF JUDICIAL REVIEW. AT THE SAME TIME, HOWEVER, HE RECOGNIZED THAT THE JUDICIAL BRANCH WAS TO BE THE **WEAKEST** OF THE THREE DEPARTMENTS. IN HIS WORDS, THE JUDICIARY WAS SUPPOSED TO HAVE NEITHER FORCE NOR WILL, ONLY JUDGMENT.

THE FRAMERS SUCH AS HAMILTON EXPECTED THAT CHOICES AMONG COMPETING SOCIAL VALUES WOULD BE MADE BY THE PEOPLE'S ELECTED REPRESENTATIVES -- NOT BY THE UNELECTED JUDICIARY.

PERHAPS THIS FUROR DURING THE SUMMER OF **1987** ONLY CONFIRMS HOW FAR THE JUDICIARY HAS DRIFTED FROM ITS ORIGINAL PURPOSE OF **1787**.

IT IS NO EXAGGERATION TO SAY -- ESPECIALLY IN THIS THE BICENTENNIAL OF OUR CONSTITUTION -- THAT THE EXISTENCE OF CONSTITUTIONAL GOVERNMENT IN AMERICA HINGES ON THE CAPACITY AND WILLINGNESS OF THE SUPREME COURT TO INTERPRET THE CONSTITUTION CONSISTENT WITH ITS TRUE INTENT. ACCORDINGLY, IT IS OUR AWESOME RESPONSIBILITY TO ENSURE -- AS BEST WE CAN -- THAT A PRESIDENT'S NOMINEE TO THE SUPREME COURT POSSESSES THIS CAPACITY AND WILLINGNESS.

BEYOND THE MERE RESUME OF THIS NOMINEE -- OUTSTANDING AS IT MAY BE -- HE IS NOT QUALIFIED TO SERVE AS A JUSTICE IN MY VIEW UNLESS HE IS WILLING TO EXERCISE SELF-RESTRAINT . . . SELF-RESTRAINT WHICH ENABLES HIM TO ACCEPT THE CONSTITUTION AS HIS RULE OF DECISION . . . SELF-RESTRAINT WHICH MAKES HIM RESIST THE

TEMPTATION TO REVISE OR AMEND THAT DOCUMENT ACCORDING TO HIS PERSONAL VIEWS OF WHAT IS GOOD PUBLIC POLICY.

FORMER CHIEF JUSTICE STONE IDENTIFIED THIS DUTY OF THE COURT WHEN HE REMARKED IN U.S. v. BUTLER IN 1936: . . . "THAT WHILE THE UNCONSTITUTIONAL EXERCISE OF POWER BY THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT IS SUBJECT TO **JUDICIAL** RESTRAINT, THE ONLY CHECK UPON OUR OWN EXERCISE OF POWER IS OUR OWN SENSE OF **SELF**-RESTRAINT."

JUDGES HAVE NO LICENSE TO TOY WITH THE CONSTITUTION AS IF IT WERE THEIR PERSONAL PLAYTHING, RATHER THAN THE PRECIOUS INHERITANCE OF ALL AMERICANS.

AS JUSTICE FRANKFURTER WROTE IN HIS MAJORITY OPINION IN ULLMAN v. U.S., "NOTHING NEW CAN BE PUT INTO THE CONSTITUTION EXCEPT THROUGH THE AMENDATORY PROCESS. NOTHING OLD CAN BE TAKEN OUT WITHOUT THAT SAME PROCESS."

UNFORTUNATELY, A NEW GENERATION OF JUDGES SEEMS TO HAVE FORGOTTEN THAT THEY ARE APPOINTED, NOT ANNOINTED. THESE JUDGES -- INCLUDING SOME WHO HAVE SERVED ON THE SUPREME COURT -- HAVE DEMONSTRATED AN IMPATIENCE WITH THE DEMOCRATIC PROCESSES UPON WHICH OUR NATION WAS FOUNDED, AND HAS FLOURISHED. INSTEAD, THEY WOULD ABUSE THE POWER OF JUDICIAL REVIEW TO IMPOSE THEIR OWN VIEW OF WISE PUBLIC POLICY. THEY WOULD PREFER TO ACT AS SCIENTISTS WHO USE A KIND OF "JUDICIAL ALCHEMY" TO TRANSFORM THE WORDS OF THE CONSTITUTION INTO MEANINGS CONTRARY TO ITS PLAIN READING OR INTENT.

I AM UNALTERABLY OPPOSED TO THIS KIND OF JUDICIAL ARROGATION OF LEGISLATIVE AND EXECUTIVE FUNCTION.

I BELIEVE THAT JUDGES MUST GIVE FULL EFFECT TO VALUES THAT MAY BE FAIRLY DISCOVERED IN THE TEXT, LANGUAGE AND HISTORY OF THE CONSTITUTION AND APPLY THEM TO MODERN CONDITIONS. BUT UNELECTED AND UNACCOUNTABLE JUDGES SHOULD NOT FREELY OVERTURN THE LEGITIMATE POLICY CHOICES OF THE EQUAL, ELECTED BRANCHES, SOLELY BECAUSE OF PERSONAL PREFERENCE. THAT'S WHY THE FOUNDING FATHERS SUCH AS HAMILTON REFERRED TO THE JUDICIARY AS THE "LEAST DANGEROUS" BRANCH. AND THAT'S WHAT JUDICIAL RESTRAINT IS ALL ABOUT.

THE NOMINEE BEFORE US HAS WEIGHED-IN MANY TIMES AGAINST THE KIND OF JUDICIAL ACTIVISM THAT TENDS TO CREATE RIGHTS NOT GRANTED IN THE CONSTITUTION OR THE STATUTES. FRANKLY, HIS VIEW THAT JUDGES OUGHT TO CONFINE THEMSELVES TO INTERPRETING THE LAW, RATHER THAN ADVOCATING THEIR OWN IDEAS OF "WISE" PUBLIC POLICY, IS APPEALING TO ME.

I AM ANXIOUS TO HEAR MORE OF THESE VIEWS, TO SEE IF THEY FOLLOW IN THE TRADITIONS OF RESTRAINT PRACTICED BY FRANKFURTER, HOLMES, BRANDEIS, STEWART, POWELL AND OTHERS.

ALONG THE WAY, I EXPECT THAT OPPONENTS OF THIS NOMINEE WILL LIKELY FOCUS ON SPECIFIC VIEWS OR DECISIONS THEY DISAGREE WITH. I URGE MY COLLEAGUES TO KEEP THEIR EYES ON WHAT I BELIEVE TO BE THE REAL ISSUE IN THIS CONFIRMATION DEBATE.

THE **REAL** ISSUE IS THE EXTENT TO WHICH JUDGES SHOULD RESPECT THE DECISION-MAKING OF THE ELECTED, REPRESENTATIVE BRANCHES OF GOVERNMENT.

MAKE NO MISTAKE ABOUT IT; THE CRITICS OF THIS NOMINEE KNOW THE LAW THEY PREFER IS **JUDGE-MADE** AND THEREFORE SUSCEPTIBLE TO CHANGE BY OTHER JUDGES. THEIR LOUD PROTESTS UNDERSCORE THAT THE LAW THEY PREFER **ISN'T** FOUND IN THE CONSTITUTION OR THE STATUTES.

IF THEIR VIEWS **WERE** FOUND IN THE DEMOCRATICALLY-ENACTED LAW, THEY WOULD HAVE NO FEAR OF ANY NEW JUDGE PLEDGED TO LIVE BY THE CREDO OF JUDICIAL RESTRAINT. INSTEAD, THESE CRITICS PREFER JUDGES WHO WILL ACT AS A KIND OF "SUPER-LEGISLATURE" -- WHO WILL GIVE THEM VICTORIES IN THE COURTS WHEN THEY LOSE IN THE LEGISLATURE.

JUDGE BORK, I LOOK FORWARD TO LEARNING MORE ABOUT YOU, FROM YOUR OWN WORDS.

HAVING IDENTIFIED MY STANDARD OF REVIEW FOR THIS NOMINATION, I'D LIKE TO USE MY REMAINING TIME TO ADD MY THOUGHTS TO A MUCH-DEBATED POINT -- THE SENATE'S PROPER "ADVISE AND CONSENT" ROLE FOR THIS NOMINATION.

TRADITIONALLY, THE SENATE'S ROLE HAS BEEN A LIMITED ONE. THE SENATE HAS **NOT** MADE A NOMINEE'S POLITICAL PHILOSOPHY THE TEST FOR CONFIRMATION.

FOR EXAMPLE, IT'S UNIVERSALLY ACKNOWLEDGED THAT JUDICIAL NOMINEES **SHOULDN'T** BE ASKED TO COMMIT THEMSELVES ON PARTICULAR POINTS OF LAW IN ORDER TO SATISFY A SENATOR'S POLITICS.

I CAN ILLUSTRATE THE SENATE'S USUAL ADVISE AND CONSENT STANDARD WITH SOME PASSAGES FROM THE NOMINATION HEARINGS OF JUSTICE O'CONNOR.

AS OUR NOW-CHAIRMAN, SENATOR BIDEN SAID: "WE ARE NOT ATTEMPTING TO DETERMINE WHETHER OR NOT THE NOMINEE AGREES WITH ALL OF US ON EACH AND EVERY PRESSING SOCIAL OR LEGAL ISSUE OF THE DAY. INDEED, IF THAT WERE THE TEST, NO ONE WOULD PASS BY THIS COMMITTEE, MUCH LESS THE FULL SENATE".

OR AS SENATOR KENNEDY STATED THEN. "IT IS OFFENSIVE TO SUGGEST THAT A POTENTIAL JUSTICE OF THE SUPREME COURT MUST PASS SOME PRESUMED TEST OF JUDICIAL PHILOSOPHY. IT IS EVEN MORE OFFENSIVE TO SUGGEST THAT A POTENTIAL JUSTICE MUST PASS THE LITMUS TEST OF ANY SINGLE-ISSUE INTEREST GROUP".

OR SENATOR METZENBAUM, WHO SAID: "I COME TO THIS HEARING WITH NO PRECONCEIVED NOTIONS. IF I HAPPEN TO DISAGREE WITH YOU ON ANY SPECIFIC ISSUES, IT WILL IN NO WAY AFFECT MY JUDGMENT OF YOUR ABILITIES TO SERVE ON THE COURT".

I MIGHT ADD THAT I AGREE WITH EVERY ONE OF MY COLLEAGUES IN THESE STATEMENTS ON THE SENATE'S ROLE. EACH OF THESE VIEWS CAREFULLY RECOGNIZES THAT THE POWER TO GIVE ADVICE IS **NOT** THE POWER TO DECIDE THE ISSUE. FROM GEORGE WASHINGTON TO RONALD REAGAN, THE PRESIDENT HAS ENJOYED A RANGE OF DISCRETION IN NOMINATING SUPREME COURT JUSTICES. SINCE 1894, THE SENATE HAS DEFERRED TO THE PRESIDENT'S DISCRETION IN ALL BUT FOUR CASES.

THE SENATE SHOULD REFUSE ITS CONSENT **ONLY** WHEN THE PRESIDENT'S DISCRETION HAS BEEN ABUSED. GIVING THE SENATE THE LAST WORD, WITHOUT SUCH DEFERENCE, WOULD MEAN THE SENATE HAS THE **ONLY** WORD. THIS CONSTITUTIONAL POWER THE FRAMERS DID NOT GIVE US.

OF COURSE, IN THE ABSENCE OF **CONSTITUTIONAL** POWER, **RAW POLITICAL** POWER CAN FILL THE VACUUM. I WILL STIPULATE RIGHT NOW TO THE ABILITY OF A HANDFUL OF MY COLLEAGUES TO BLOCK THIS NOMINATION . . . BUT I BELIEVE IT WOULD BE THE WRONG WAY TO APPROACH THIS SERIOUS SENATE DUTY.

THE DANGERS OF POLITICIZING THE NOMINATION PROCESS ARE EXCEEDED ONLY BY ITS SHORTSIGHTEDNESS. AFTER ALL, PRESIDENTIAL ELECTIONS -- AND SUPREME COURT NOMINATIONS -- COME AND GO.

I URGE MY COLLEAGUES TO RESIST THE CLARION CALL OF RAW POLITICS THAT UNDERMINES THE INDEPENDENT JUDICIARY CONTEMPLATED BY ARTICLE III OF THE CONSTITUTION.

IF MY COLLEAGUES CANNOT RESIST THE USE OF BALD POLITICAL POWER, I WOULD AT LEAST HOPE THEY HAVE THE COURAGE TO SHED THE "FIG LEAF" BEHIND WHICH THEY HIDE THEIR REAL AGENDA.

MR. CHAIRMAN, THANK YOU VERY MUCH.

The CHAIRMAN. Thank you. I advise my colleagues to stick as close to the 10-minute rule as you can. I do not want to have to start to impose, as all other committees do, rule by the clock. That statement was an eloquent 20-minute statement, and previous statements have been almost as long. So please, please, keep within the 10 minutes. It seems I always say it to the people who are keeping within the 10 minutes, but I am going to start to enforce the 10-minute rule. Otherwise, as moved by all our statements that Judge Bork, I am sure, is, none of us will get to have any lunch.

The Senator from Vermont, Senator Leahy.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman. I am delighted to have the admonition. I am also pleased to welcome you, Judge Bork, to the Judiciary Committee this morning and your family.

We arrived in the U.S. Senate today at a moment that is really unique in our system of government. Two hundred years ago this week, the delegates to the Constitutional Convention completed their work with a fantastic document that has helped this country flourish for 200 years since.

I think not the least of their achievement was the method established for choosing the leaders of the judicial branch of government. The authors of our Constitution recognized that this decision was far too important to leave to the unfettered discretion of either of the other two branches. They said it had to be shared by them. So our proceeding this morning, or this noon, really, joins the interest of all three branches of the national government in one place.

The goal of the process we begin today is the conveyance of the guardianship of the Constitution. It is a solemn moment, but it is also a moment that teaches much about the system of government established in Philadelphia two centuries ago.

I suppose this confirmation hearing is going to have some aspects reminiscent of both a trial by ordeal or even a graduate seminar on constitutional law. But it is not going to be either. It is going to be an opportunity for Americans in the bicentennial year of the Constitution to see the Constitution in action. I hope Americans are going to be proud of what they see.

The confirmation proceeding formally begins today, but it has really been under way for weeks. In fact, one prominent feature of that process so far has been an interesting debate on the role of the Senate in carrying out its constitutional duty to advise and consent. The focus has been on the role that the nominee's judicial philosophy should play in the Senate's consideration of this nomination.

I believe that judicial philosophy should play a central role. Judge Bork, you and I have already discussed that matter. After all, as the final arbiter of what the Constitution means, the Supreme Court is the ultimate guardian of the liberties of every American. There is no question that the nominee who is confirmed to succeed Justice Lewis Powell is going to be uniquely influential in determining the direction of the Supreme Court's interpretation of the Constitution for many years to come. There can hardly be an issue closer to the heart of the Senate's role than a full and public exposition of the nominee's approach to the Constitution and to the role of the courts in discerning and enforcing its commands. That is my definition of judicial philosophy.

Because I believe that judicial philosophy is so important, I have devoted an awful lot of beautiful summer days up in Vermont in an effort to learn and understand the judicial philosophy of Robert Bork. In fact, everywhere I went in Vermont throughout the month of August, I had people come up to me and speak either for or against this nomination. In fact, I heard more about this issue than any issue in the 13 years that I have been in the U.S. Senate. In fact, Judge Bork, during the few days that you and your wife got a chance to also be in Vermont, you probably heard a little bit about it, too.

I do not claim to understand Judge Bork's judicial philosophy completely. But having spent time immersed in his writing, his speeches, his articles, his judicial decisions, his interviews, his other works has told me a lot about the nominee's conception of the Constitution and what it will mean for the Supreme Court and for our nation if Judge Bork is confirmed.

Now, he has sharply criticized some of the views of what he describes as the "intellectual class," but even though he has done that, it is clear to me that Robert Bork is an intellectual, of the first order. He is a thinker; he is a philosopher. And he comes before this committee with a more comprehensive and clearly expressed judicial philosophy than any nominee to the Supreme Court in recent history. That becomes really the good news and the bad news, depending upon which side somebody might fall on this nomination.

America's Supreme Court Justices have taken many paths to the high bench in that beautiful building that is just a block from here. For the most part, the Justices have ascended to that bench as the culmination of careers as practicing lawyers, or as jurists, or as high ranking government officials. But Judge Bork has been all three of these things at one time or another. If he is confirmed to the Supreme Court, he also comes as a distinguished legal philosopher as well.

But his philosophy is distinguished in another way besides its comprehensiveness and clarity. It stands apart as a record of consistent and forceful opposition to the mainstream of modern constitutional jurisprudence. I doubt that any other nominee to the Supreme Court has ever come before this committee with a record of such unremitting and relentless opposition to the directions that the Court has taken on such a wide range of issues that touch on the basic freedoms of the American people.

In article after article, in speech after speech, Judge Bork has criticized the constitutional decisions of the Supreme Court—not once, not a few times, not a dozen, but in scores of decisions. He has called these decisions "unprincipled," "intellectually empty," and even "unconstitutional." His targets have included the Court's major decisions in areas as important as free speech, the right of privacy and equal protection of the laws.

Now, in the writings I have read, Judge Bork denounces these decisions emphatically, definitively, and very often eloquently. But the elegance of his presentation should not obscure a central fact. He believes that the Supreme Court has taken the wrong path. More precisely, he believes that the Court has wandered off the path into a trackless wilderness, far from the signposts erected in our written Constitution. In fact, he has been consistent and clear and eloquent, and I think that that consistency has also attracted him to the President and the Attorney General in this nomination.

But I am troubled by the record of Judge Bork's philosophy as I understand it today. I am struck by the breadth of his opposition to established precedent, ranging from broad constitutional matters to narrower questions of the antitrust laws and other statutes. I am disturbed by some of the interpretations that he proposes for the majestic but general phrases of our Constitution: "freedom of speech," "liberty," and "equal protection of the laws." And I am concerned about the consequences of his philosophy.

The decisions of the Supreme Court shape in large part the contours of our freedoms. Even the familiar contours of freedoms long established in the Court's precedents can be changed as the power to shape them changes hands. And so we must be concerned about the shape our freedoms will take if the Senate agrees to give this nominee, whose judicial philosophy is so critical of so many precedents—a pivotal portion of the power to overturn them.

But I am also aware that the perspective I have gained so far on Judge Bork's judicial philosophy is incomplete. Times change and so sometimes do the beliefs of men and woman who live through those years.

I hope that through these hearings we can learn more about Judge Bork's judicial philosophy. I know his views on some issues have changed over the years. I will be interested to learn whether and how his views on some of these fundamental constitutional questions have been refined or modified or even abandoned. I look forward to the testimony of the distinguished scholars and lawyers and other witnesses before this committee who have studied the philosophy far more extensively than I have. I will be most interested in Judge Bork's own testimony on these questions because he really is the one who can speak most eloquently, most completely, and, I believe, most honestly to his own philosophy and his own idea of the role of a Supreme Court Justice.

We welcome you to the hearing. If you do not know exactly what to expect from the confirmation process, well, you are not totally alone. There are some things we can say with certainty about this proceeding. It is going to be long; it will be thorough; it will be informative; and I know I voice the sentiments of every member of this committee when I say it will be fair. We really want it to be. Speaking as one Senator, I can tell you that it will be approached with a seriousness and a thoughtfulness that befits its status as one of the most important duties of a United States Senator.

In closing, let me just say one other thing. We have an awful lot of hearings up here, confirmation hearings. In the 13 years I have been here, there have been hundreds of them. Everybody from military officers to Cabinet members to Supreme Court Justices. Almost 95 percent of the time, those confirmation hearings simply provide a record because the person is confirmed either unanimously or overwhelmingly afterward. The confirmation hearing fulfills the constitutional role, but it really does not change anybody's mind.

In your case, it will. I think this confirmation hearing will be one of those rare instances, certainly in my lifetime, where a confirmation hearing has determined whether a nominee will be confirmed or not. So I think this hearing takes on a seriousness and importance to you as an individual, but to the country even more so than virtually any hearing in my lifetime, and certainly in the time that I have been here in the Senate.

Thank you, Mr. Chairman.

[The statement of Senator Leahy follows:]

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

I AM PLEASED TO WELCOME JUDGE BORK TO THE JUDICIARY COMMITTEE THIS MORNING.

WE HAVE ARRIVED IN THE UNITED STATES SENATE TODAY AT A MOMENT THAT IS UNIQUE IN OUR SYSTEM OF GOVERNMENT. TWO HUNDRED YEARS AGO THIS WEEK, THE DELEGATES TO THE CONSTITUTIONAL CONVENTION COMPLETED THEIR WORK. THE FRUIT OF THEIR LABORS WAS A REMARKABLE DOCUMENT: AN ORGANIC LAW UNDER WHICH THE UNITED STATES HAS FLOURISHED AND PROSPERED FOR TWO CENTURIES. NOT THE LEAST OF THEIR ACHIEVEMENTS WAS THE METHOD ESTABLISHED FOR CHOOSING THE LEADERS OF THE JUDICIAL BRANCH OF GOVERNMENT. THE AUTHORS OF OUR CONSTITUTION RECOGNIZED THAT THIS DECISION WAS TOO IMPORTANT TO LEAVE TO THE UNFETTERED DISCRETION OF EITHER OF THE OTHER TWO BRANCHES, BUT MUST BE SHARED BETWEEN THEM. THUS, OUR PROCEEDING THIS MORNING JOINS THE INTERESTS OF ALL THREE BRANCHES OF THE NATIONAL GOVERNMENT ESTABLISHED BY THE PEOPLE.

THE GOAL OF THE PROCESS WE BEGIN TODAY IS THE CONVEYANCE OF THE GUARDIANSHIP OF THE CONSTITUTION. IT IS A SOLEMN MOMENT, BUT ALSO A MOMENT THAT TEACHES MUCH ABOUT THE SYSTEM OF GOVERNMENT ESTABLISHED IN PHILADELPHIA TWO CENTURIES AGO.

THE TESTIMONY OF A SUPREME COURT NOMINEE AT HIS OWN CONFIRMATION HEARING IS A MUCH MORE RECENT INNOVATION. I AM SURE THAT JUDGE BORK MUST BE ASKING HIMSELF AT THIS MOMENT WHETHER THERE ISN'T SOME WAY TO HAVE THAT INNOVATION DECLARED UNCONSTITUTIONAL.

SOME OBSERVERS OF THE PROCESS HAVE NO DOUBT ADVISED JUDGE BORK TO EXPECT SOMETHING AKIN TO A MUCH MORE ANCIENT ANGLO-SAXON LEGAL PROCEEDING: TRIAL BY ORDEAL. OTHERS, NOTING THE NUMBER OF LEGAL SCHOLARS WHO WILL TESTIFY LATER, MAY HAVE LIKENED IT TO AN ENVIRONMENT WITH WHICH JUDGE BORK IS MORE FAMILIAR: A GRADUATE SEMINAR ON CONSTITUTIONAL LAW. I SUPPOSE THIS CONFIRMATION

HEARING WILL HAVE ASPECTS REMINISCENT OF BOTH THOSE PROCEEDINGS. BUT REALLY IT WILL BE NEITHER. IT WILL BE AN OPPORTUNITY FOR AMERICANS, IN THE BICENTENNIAL YEAR OF THE CONSTITUTION, TO SEE THE CONSTITUTION IN ACTION. I HOPE THEY WILL BE PROUD OF WHAT THEY SEE.

THE CONFIRMATION PROCESS FORMALLY BEGINS TODAY. BUT OF COURSE IT HAS ALREADY BEEN UNDERWAY FOR WEEKS. ONE PROMINENT FEATURE OF THAT PROCESS SO FAR HAS BEEN AN INTERESTING DEBATE ON THE ROLE OF THE SENATE IN CARRYING OUT ITS CONSTITUTIONAL DUTY TO ADVISE AND CONSENT. THE FOCUS HAS BEEN ON THE ROLE THAT THE NOMINEE'S JUDICIAL PHILOSOPHY SHOULD PLAY IN THE SENATE'S CONSIDERATION OF THIS NOMINATION.

I BELIEVE THAT JUDICIAL PHILOSOPHY SHOULD PLAY A CENTRAL ROLE. AFTER ALL, AS THE FINAL ARBITER OF WHAT THE CONSTITUTION MEANS, THE SUPREME COURT IS THE ULTIMATE GUARDIAN OF THE LIBERTIES OF EVERY AMERICAN. THERE IS NO QUESTION THAT THE NOMINEE WHO IS CONFIRMED TO SUCCEED JUSTICE LEWIS POWELL WILL BE UNIQUELY INFLUENTIAL IN DETERMINING THE DIRECTION OF THE SUPREME COURT'S INTERPRETATION OF THE CONSTITUTION FOR YEARS TO COME. THERE CAN HARDLY BE AN ISSUE CLOSER TO THE HEART OF THE SENATE'S ROLE THAN A FULL AND PUBLIC EXPOSITION OF THE NOMINEE'S APPROACH TO THE CONSTITUTION AND TO THE ROLE OF THE COURTS IN DISCERNING AND ENFORCING ITS COMMANDS. THAT IS WHAT I MEAN BY JUDICIAL PHILOSOPHY.

BECAUSE I BELIEVE THAT JUDICIAL PHILOSOPHY IS SO IMPORTANT, I HAVE DEVOTED A GREAT MANY BEAUTIFUL SUMMER DAYS IN VERMONT TO AN EFFORT TO LEARN AND UNDERSTAND THE JUDICIAL PHILOSOPHY OF ROBERT BORK. I CANNOT CLAIM TO UNDERSTAND IT COMPLETELY. BUT THE TIME I HAVE SPENT IMMERSED IN JUDGE BORK'S WRITINGS -- HIS SPEECHES, ARTICLES, JUDICIAL DECISIONS, INTERVIEWS AND OTHER WORKS -- HAS TOLD ME A LOT ABOUT THE NOMINEE'S CONCEPTION OF THE CONSTITUTION AND WHAT IT WILL MEAN FOR THE SUPREME COURT, AND FOR OUR NATION, IF HE IS CONFIRMED.

ALTHOUGH HE HAS SHARPLY CRITICIZED SOME OF THE VIEWS OF WHAT HE DESCRIBES AS THE "INTELLECTUAL CLASS," IT IS CLEAR TO ME THAT ROBERT BORK IS AN INTELLECTUAL. HE IS A THINKER AND A PHILOSOPHER. AND HE COMES BEFORE THIS COMMITTEE WITH A MORE COMPREHENSIVE AND CLEARLY EXPRESSED JUDICIAL PHILOSOPHY THAN ANY NOMINEE TO THE SUPREME COURT IN RECENT HISTORY.

AMERICA'S SUPREME COURT JUSTICES HAVE TAKEN MANY PATHS TO THE HIGH BENCH IN THAT MAJESTIC BUILDING A FEW BLOCKS FROM WHERE WE SIT THIS MORNING. FOR THE MOST PART, THE JUSTICES HAVE ASCENDED TO THAT BENCH AS THE CULMINATION OF CAREERS AS PRACTICING LAWYERS, AS JURISTS, AS HIGH-RANKING GOVERNMENT OFFICIALS. JUDGE BORK HAS BEEN ALL THESE THINGS AT ONE TIME OR ANOTHER, BUT IF HE IS CONFIRMED, HE WILL COME TO THE SUPREME COURT AS A DISTINGUISHED LEGAL PHILOSOPHER AS WELL.

BUT JUDGE BORK'S PHILOSOPHY IS DISTINGUISHED IN ANOTHER WAY, BESIDES ITS COMPREHENSIVENESS AND CLARITY. IT STANDS APART AS A RECORD OF CONSISTENT AND FORCEFUL OPPOSITION TO THE MAINSTREAM OF MODERN CONSTITUTIONAL JURISPRUDENCE. I DOUBT THAT ANY OTHER NOMINEE TO THE SUPREME COURT HAS EVER COME BEFORE THIS COMMITTEE WITH A RECORD OF SUCH UNREMITTING AND RELENTLESS OPPOSITION TO THE DIRECTIONS THAT THE COURT HAS TAKEN ON SUCH A WIDE RANGE OF ISSUES THAT TOUCH ON THE BASIC FREEDOMS OF THE AMERICAN PEOPLE.

IN ARTICLE AFTER ARTICLE, SPEECH AFTER SPEECH, JUDGE BORK HAS CRITICIZED THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT -- NOT ONE, NOT A FEW, NOT A DOZEN, BUT SCORES OF DECISIONS. HE HAS CALLED THESE DECISIONS "UNPRINCIPLED," "INTELLECTUALLY EMPTY," AND EVEN "UNCONSTITUTIONAL." HIS TARGETS HAVE INCLUDED THE COURT'S MAJOR DECISIONS IN AREAS AS IMPORTANT AS FREE SPEECH, THE RIGHT OF PRIVACY, AND EQUAL PROTECTION OF THE LAWS.

IN THE WRITINGS I HAVE READ, JUDGE BORK DENOUNCES THESE DECISIONS EMPHATICALLY, DEFINITIVELY, AND OFTEN ELOQUENTLY. BUT THE ELEGANCE OF HIS PRESENTATION SHOULD NOT OBSCURE A CENTRAL FACT. JUDGE BORK BELIEVES THAT THE SUPREME COURT HAS TAKEN THE

WRONG PATH. MORE PRECISELY, HE BELIEVES THAT THE COURT HAS WANDERED OFF THE PATH, INTO A TRACKLESS WILDERNESS, FAR FROM THE SIGNPOSTS ERECTED IN OUR WRITTEN CONSTITUTION.

I AM TROUBLED BY THE RECORD OF JUDGE BORK'S PHILOSOPHY, AS I UNDERSTAND IT TODAY. I AM STRUCK BY THE BREADTH OF HIS OPPOSITION TO ESTABLISHED PRECEDENT, RANGING FROM BROAD CONSTITUTIONAL MATTERS TO NARROWER QUESTIONS OF THE ANTITRUST LAWS AND OTHER STATUTES. I AM DISTURBED BY SOME OF THE INTERPRETATIONS THAT HE PROPOSES FOR THE MAJESTIC BUT GENERAL PHRASES OF OUR CONSTITUTION: "FREEDOM OF SPEECH," "LIBERTY," "EQUAL PROTECTION OF THE LAWS."

AND I AM CONCERNED ABOUT THE CONSEQUENCES OF HIS PHILOSOPHY. OURS IS A GOVERNMENT OF LAWS. BUT MEN AND WOMEN MUST INTERPRET AND APPLY THOSE LAWS. MEN AND WOMEN MUST TRANSLATE THE MAJESTIC GENERALITIES OF THE CONSTITUTION INTO PRACTICAL RULES THAT DEFINE OUR LIBERTIES. AND NO ONE KNOWS BETTER THAN JUDGE BORK THAT THE CONCEPTION OF THE CONSTITUTION HELD BY THE MEMBERS OF THE SUPREME COURT IS REFLECTED IN THE INTERPRETATIONS OF THE CONSTITUTION THEY HAND DOWN AS THE LAW OF THE LAND.

THE DECISIONS OF THE SUPREME COURT SHAPE IN LARGE PART THE CONTOURS OF OUR FREEDOMS. EVEN THE FAMILIAR CONTOURS OF FREEDOMS LONG ESTABLISHED IN THE COURT'S PRECEDENTS CAN BE CHANGED AS THE POWER TO SHAPE THEM CHANGES HANDS. AND SO WE MUST BE CONCERNED ABOUT THE SHAPE OUR FREEDOMS WILL TAKE IF THE SENATE AGREES TO GIVE THIS NOMINEE -- WHOSE JUDICIAL PHILOSOPHY IS SO CRITICAL OF SO MANY PRECEDENTS -- A PIVOTAL PORTION OF THE POWER TO OVERTURN THEM.

But I am also aware that the perspective I have gained so far on Judge Bork's judicial philosophy is incomplete. Times change, and so, sometimes, do the beliefs of men and women who live through those times.

I hope that through these hearings we can learn more about Judge Bork's judicial philosophy. I know his views on some issues have changed over the years. I will be interested to learn whether and how his views on some of these fundamental constitutional questions have been refined, modified, or even abandoned. I look forward to the testimony of the distinguished scholars, lawyers, and other witnesses before this Committee who have studied this philosophy far more extensively than I have. And I will be particularly interested in Judge Bork's own testimony on these questions.

Judge Bork, welcome to this hearing. If you do not know exactly what to expect from the confirmation process, you are not alone. There are some things we can say with certainty about this proceeding. It will be long. It will be thorough. It will be informative. I know I voice the sentiments of every member of this Committee when I say it will be fair. And speaking as one Senator, I can tell you that it will be approached with a seriousness and a thoughtfulness that befits its status as one of the most important duties of a United States Senator.

The CHAIRMAN. Thank you very much. We have four more—five if I count myself—people to speak. If we keep it to 10 minutes, we can finish by about 10 after. I will withhold my statement until we come back, and I will tell those who need to make plans now we will not reconvene until 2:30 when we come back.

The Senator from Pennsylvania, Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Judge Bork, I join my colleagues in welcoming you here. At the outset, I compliment you for being available for discussions with Judiciary Committee members in a somewhat different way than prior occasions. As you know, there are informal sessions, and when we met you were willing to discuss at some length your approach to constitutional law. One of the threshold questions which you and I discussed was whether you thought it appropriate to deal with the question of judicial philosophy. At that time you said you did, and we then had extensive discussions on issue of judicial philosophy. And I believe that that is very helpful. It may be that in your own situation, having written as prolifically as you have, that there was so much fat in the fire, so to speak, to be discussed. But I think that this confirmation hearing may set a precedent.

Some of us were concerned about the hearings last year involving Chief Justice Rehnquist and Justice Scalia in terms of the inability to get to some of the issues. So I think that it is very useful, both for your confirmation hearing and for the process generally.

In my own mind, a good bit of the issue turns on whether many of your prior writings constitute professorial theorizing or represent established judicial positions that you would vote if you were on the Supreme Court of the United States. As I read your prior writings, they are at sharp variance with Justices from Oliver Wendell Holmes to William Rehnquist. They are in agreement with many Justices, but as I see it, there are significant variations: the equal protection clause, for example, where you have written applicable only to race and have stated in later speeches that it is race and perhaps ethnic matters, which is at variance with what the Court has decided for more than a century, extending equal protection to aliens, to women and to indigents and to illegitimates and to others. The issue of due process is a very important issue. The one of freedom of speech in your writings is at variance with the Holmes standard for clear and present danger. Those are some of the issues which I believe are important.

I think that the matters which have been raised really in your writings span the spectrum of constitutional issues, and I think it would be useful to have extensive discussions as to your view of the Constitution. For me, the test is whether you fit within the tradition of U.S. constitutional jurisprudence.

I come to these hearings with an open mind, and I am prepared to listen to your views on these subjects and to make a decision based upon what I hear significantly in this room. Your prior background cannot be ruled out, and what I have read about you and what I know about you and your opinions and your speeches and your Law Review articles are, of course, important. But I think the central issue is what you will testify in this proceeding.

On the issues which I have raised so far, my sense is that the President is entitled to appropriate deference in his selection of a Supreme Court nominee. I will be interested in your view on that philosophical question as well.

There is another subject which may present a somewhat different issue, and that turns on the matter of the conflict between the executive and legislative branch, article I and article II of the Constitution. There are many issues where the President and the Congress differ historically and differ today; for example, on the War Powers Act or, for example, on independent counsel or, for example, on congressional oversight of covert action. There, you have written extensively, and there is a question in my mind as to whether your own views would tip the scale in favor, inordinately in favor of executive control.

I am not sure, and I have seen no writings on this subject as to whether the traditional deference which the Senate gives to the executive appointing power would be applicable in that range because the Court, of course, is article III of the Constitution. That is a subject which is of real concern to me, one that I thought about and one that I will seek your opinion about.

The writings which you have undertaken have been extensive. One of the professors has criticized you for campaigning for the Supreme Court, going from podium to podium, making speeches. It may be that in this group that is quite a commendation. That is what we do all the time, go from podium to podium, and I frankly find no problem with that. The real issue is one of interpretation of the Constitution and where you stand.

The comments which you have made have been colorful. There has been a certain quality of toughness, perhaps a biting quality, and I think we will be interested in some of those matters in terms of your approach, some acerbity in some of the things which you have had to say about the Court. One of the comments which I found particularly intriguing was one of your references—this is an old law journal article, but I think they are relevant to talk about. I do not weigh them too heavily, but I think they are relevant—where you referred to the Supreme Court's "institutionalized role as perpetrator of limited coups d'etats." And you suggested that the Court was no more "legitimate than any other institution," so "if the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with a rather better means for implementing its decisions." An interesting approach.

It may be that so much of what is in your writing is hyperbole and something that a Justice or a professor would have to write about to attract attention. We know in the Senate people think that we have great platforms, but very frequently we think nobody listens to us, and probably they should not listen to most of what we have to say. So perhaps what you have written which appears to be at variance with established constitutional doctrine is such hyperbole.

Those, for me, are the issues which are presented here and the matters which I will focus on when my turns comes to question on the key factors upon which I will make my decision.

I yield back the balance of my time.

The **Chairman**. Thank you very much, Senator. I appreciate that.

The Senator from Alabama, Senator Heflin.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator **Heflin**. Mr. Chairman, often in these hallowed halls, we say that we are engaged in an historic process. Such statements, sincerely made, are sometimes true. Seldom, however, do we stop to think of the significance of those statements. I would propose we do so today.

Today, we are participating in a process to determine the fitness of the nominee to become an Associate Justice of the highest Court of our land.

This process, historic as it is, has meaning for men and women 10 years from now, 20 years from now, and even into the next century, for judicial opinions have real consequences for real people. Judicial confirmations, likewise, have real consequences for the men and women of America.

Even though the proceedings of the Supreme Court are not televised, the Supreme Court is really "The People's Court." While it deals, on one level, with abstract legal propositions—standing, ripeness, due process and the like—the Court at heart deals with people, their rights, their liberties, their property, their disputes and grievances and their means of redress and resolution. There is not a single case which comes to the Court which, in some manner, does not involve or affect people.

My point is a simple one, and it is one that underscores the importance of the position, Judge Bork, to which you have been nominated. Judicial opinions rendered in real cases and controversies involve real people and have actual consequences:

They determine where and with whom people may live, and the legal limits of permissible activity in which people may engage;

They determine where and with whom children may go to school, what textbooks they may use, and what, if any, prayers they may pray;

They determine the rights of people to be secure in their homes, properties and thoroughfares, the rights of all people to enjoy the fruits of their toil and the pursuits after happiness;

They determine the rights of victims and the rights of the accused;

They determine delicate questions of personal privacy;

They also determine what books we may read, what movies we may see, and by result though not intent, what stories the press may cover and how they may cover them.

These hearings, then, are about justice, about the rights of individuals and the rights of society as a whole. In essence, equality under the law. The question, then, for us is whether the ends of justice will be further served, or disserved, by our vote for or against confirmation.

Let us be intellectually honest with ourselves and with the American people. Let us put out on the table, get out in the open, those things we hear, those allegations made in the media and in the letters, telegrams and the phone calls we receive. Let us air all of the arguments, pro and con, about this nominee.

We are told by some that Judge Bork is a brilliant man, an erudite scholar whose credentials, experience and fundamental integrity are beyond question.

We are told by others that Judge Bork is intolerant and that he will personally be responsible for the courts rolling back the clock on advances in the areas of individual rights, racial progress and personal privacy.

We are told by some that Judge Bork will strictly construe the Constitution, eschewing activism and interpreting the law, not substituting his personal opinion for what the law should be.

We are told by others that Judge Bork is an extremist, an ideologue of the first order, a legal zealot who will use his position on the Court to advance a far right radical judicial agenda.

We are told that President Reagan is entitled to have his nominees confirmed unless they are incompetent or dishonest.

We are told by others, however, that President Reagan made his choice on the basis of ideology, which some contend is an impermissible criterion. Still others say if ideology is a permissible criterion for the President, then it is a permissible factor for the Senate to consider in evaluating this nomination.

To all of Judge Bork's sponsors and supporters, I say come forward. Let us have the evidence about competence, tolerance and fairness.

To all Judge Bork's critics and detractors, I likewise say come forward. Let us have the evidence of incompetence, intolerance and unfairness.

While the hearing process should be comprehensive and complete, there is, nevertheless, one area of inquiry which should be approached with caution; that is in the area of the nominee's religious beliefs.

There are those who charge that Judge Bork is an agnostic or a non-believer. These critics contend that such beliefs will affect the opinions of the courts and, hence, our churches, our synagogues, and, ultimately, our lives. While voicing concern about the propriety of a religious test, some critics contend, nevertheless, that this is a legitimate area of inquiry, for in determining the fitness of a nominee, they argue, one must look to the total man—his reasoning process and the reaches of his values and views.

However, let me remind my colleagues that clause (3) of article VI of the Constitution of the United States clearly provides that "no religious test shall be required as a qualification to any office or public trust under the United States."

This clause, as well as the spirit of the freedom of religion clause in the first amendment, should be carefully observed in pursuing any inquiry, whether it be legitimate or not, as to one's personal religious feelings.

I can say with great conviction three things: Judicial activism of the right is to be dreaded, surely as much as activism of the left;

Violence to the principle of stare decisis in a results-oriented rush to a predetermined outcome is to be feared, surely as much as violence in the streets;

An ideological predisposition, or, worse, commitment to roll back the clock on individual equality and personal liberties is abhorrent to our now fundamental precepts of a fair and just society.

Judge Bork, if the committee is convinced that you will balance society's need for law and order with individual rights and personal freedoms; that your jurisprudence is deferential to elected bodies; and that you do not have a proclivity for activism, then your confirmation chances are enhanced.

However, if the evidence shows that you are intelligent but an ideologue—a zealot—that you are principled but prejudiced, that you are competent but closed-minded, then there is considerable doubt as to whether you will be confirmed by the Senate.

Having said all these things, we do not at this stage know what the evidence will adduce. Therefore, to all of my colleagues, and to our respective constituents, I say let us not prejudge. Let us hear the evidence, analyze it, weigh it. I have spoken of feared and dreaded judicial maladies, but the worst judicial or legislative disease is a closed mind.

In determining the fitness of this nominee, let no mind be closed by either blind party allegiance or rigid ideological adherence. Let no Senator approach these hearings with anything less than an awesome sense of responsibility to do what is right in his or her own mind. We each must follow the mandates of our conscience.

A vote to confirm or not to confirm this nominee is more than just a vote. It is a reaffirmation of our commitment to the Constitution, to equality, to a stable democratic society, to liberty, to justice.

Let the hearing process begin. Let the record be made. Let fairness prevail. Let justice be done.

Thank you, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF
SENATOR HOWELL HEFLIN
NOMINATION OF JUDGE ROBERT H. BORK
TO THE UNITED STATES SUPREME COURT

SEPTEMBER 15, 1987

MR. CHAIRMAN:

Often, in these hallowed halls, we say that we are engaged in an historic process. Such statements, sincerely made, are sometimes true. Seldom, however, do we stop to think of the significance of those statements. I would propose we do so today.

Today we are participating in a process to determine the fitness of the nominee to become an associate justice of the highest court of our land.

This process -- historic as it is -- has meaning for men and women ten years from now, twenty years from now, and into the next century -- for, as judicial opinions have real consequences for real people, judicial confirmations, likewise, have real consequences for the men and women of America.

Even though the proceedings of the Supreme Court are not televised, the Supreme Court is really "the People's Court." While it deals, on one level, with abstract legal propositions -- standing, ripeness, due process and the like -- the Court, at heart, deals with people -- their rights, their liberties, their property, their disputes and grievances, and their means of redress and resolution. There is not a single case which comes to the Court which, in some manner, does not involve or affect people.

My point, is a simple one and it is one that underscores the importance of the position, Judge Bork, to which you've been nominated. Judicial opinions, rendered in real cases and controversies involve real people, and thus have actual consequences:

o They determine where, and with whom, people may live, and the legal limits of permissible activity in which people may engage;

o They determine where, and with whom, children may go to school; what textbooks they may use; and what, if any, prayers they may pray;

o They determine the rights of people to be secure in their homes, properties and thoroughfares -- the rights of all persons to enjoy the fruits of their toil and the pursuit of happiness;

o They determine the rights of victims and the rights of the accused;

o They determine delicate questions of personal privacy;

o They also determine what books we may read, what movies we may see, and, by result though not intent, what stories the press may cover and how they may cover them;

These hearings, then, are about justice -- about the rights of individuals and the rights of society as a whole. In essence -- equality under the law. The question then, for us, is whether the ends of justice will be further served, or disserved, by our vote, for or against confirmation.

Let us be intellectually honest with ourselves, and with the American people. Let us put on the table, get out in the open, those things we hear, those allegations made in the media and in the letters, telegrams, and phone calls we receive. Let us air all the arguments, pro and con, about this nominee.

We are told by some that Judge Bork is a brilliant man, an erudite scholar, whose credentials, experience, and fundamental integrity are beyond question.

We are told by others that Judge Bork is intolerant and that he will personally be responsible for the Courts rolling back the clock on advances in the areas of individual rights, racial progress, and personal privacy.

We are told by some that Judge Bork will strictly construe the Constitution -- eschewing activism, and interpreting the law, not substituting his personal opinion for what the law should be.

We are told by others that Judge Bork is an extremist, an ideologue of the first order, a legal zealot who will use his position on the Court to advance a far right radical judicial agenda.

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To all Judge Bork's sponsors and supporters, I say come forward. Let us have the evidence about competence, tolerance, and fairness.

To all Judge Bork's critics and detractors, I likewise say come forward. Let us have the evidence of incompetence, intolerance and unfairness.

While the hearing process should be comprehensive and complete, there is, nevertheless, one area of inquiry which should be approached with caution -- that is the area of the nominee's religious beliefs.

There are those who charge that Judge Bork is an agnostic or a non-believer. These critics contend that such beliefs will affect the opinions of the courts and hence, our churches, our synagogues and, ultimately, our lives. While voicing concern about the propriety of a religious test, some critics contend, nevertheless, that this is a legitimate area of inquiry. For in determining the fitness of a nominee, they argue, one must look to the total man -- his reasoning process and the reaches of his values and views.

However, let me remind my colleagues that clause three of article six of the Constitution of the United States clearly provides that "no religious test shall be required as a qualification to any office or public trust under the United States."

This clause, as well as the spirit of the freedom of religion clause in the First Amendment, should be observed in pursuing any inquiry, whether it be legitimate or not, as to one's personal religious feelings.

I can say, with great conviction three things:

o Judicial activism of the right is to be dreaded, surely, as much as activism of the left;

o violence to the principle of stare decisis in a results-oriented rush to a pre-determined outcome is to be feared, surely, as much as violence in the streets;

o an ideological predisposition, or, worse, commitment, to roll back the clock on individual equality, and personal liberties is abhorrent to our now fundamental precepts of a fair and just society.

Judge Bork:

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However, if the evidence shows, that you are intelligent, but an ideologue -- a zealot; that you are principled, but prejudiced; that you are competent, but closed-minded -- then there is considerable doubt as to whether you will be confirmed by the Senate.

Having said all these things, we do not, at this stage, know what the evidence will adduce. Therefore, to all my colleagues, and to our respective constituents, I say let us not prejudge. Let us hear the evidence, analyse it, weigh it. I have spoken of feared and dreaded judicial maladies, but the worst judicial or legislative disease is a closed mind.

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A vote to confirm or not to confirm this nominee is more than just a vote. It is a reaffirmation of our commitment to the constitution, to equality, to liberty, to justice.

Let the hearing process begin.
Let the record be made.
Let fairness prevail.
Let justice be done.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Senator from New Hampshire, Senator Humphrey.

OPENING STATEMENT OF SENATOR GORDON J. HUMPHREY

Senator HUMPHREY. Thank you, Mr. Chairman.

Before leaving New Hampshire last night, I was interviewed by a television reporter on the Bork nomination, and the reporter asked me a number of questions. One of those questions, notwithstanding the seriousness of these hearings, made me laugh. It was this question:

"Senator, has the Bork nomination gotten wrapped up in politics?" Boy, has it ever. I have been around this city for 9 years, and the charges against Judge Bork are the worst infestation of politics this Senator has ever seen.

How else can you explain the fact that 5 years ago the U.S. Senate unanimously confirmed Robert Bork, this very man, to the second most important court in the nation; and now in 1987, 5 years later, some Senators are acting like they have amnesia about their own voting records. So it is either amnesia, it seems to me, or it is politics. It has got to be one or the other.

Then there are some special interest groups with their loathing for a man who believes in judicial restraint fearful of a judge who believes controversial questions ought to be left to democratically elected legislatures except where there is a violation of clear meaning of the Constitution. To listen to some of these groups, you get the impression that Judge Bork is an extremist, a racist, a sexist; indeed, an archenemy of the Constitution.

The funny thing about this alleged extremist. He's a judge. This fellow Bork is already a federal judge, a high judge, a judge on the Circuit Court of Appeals for the District of Columbia. Most experts—and there are certainly a lot of them when it comes to the law—most experts regard that court as the second most important in the nation, second only to the Supreme Court in its importance.

This fellow Bork, this embodiment of evil—if you believe some of his critics—is a very high judge. And guess who confirmed him judge to the second most important court in the country? The Senate of the United States, that is who. We did it. We made Robert Bork a judge 5 years ago by a unanimous vote; not a negative vote among them.

So the question I have is this: If Robert Bork is the archenemy of the Constitution, alleged by his critics, if he is an extremist, a racist, a sexist, then where in the world were all of the U.S. Senators who voted to confirm him 5 years ago to the D.C. Circuit Court of Appeals? Were they asleep? Were they hallucinating? Were they not paying attention? Were they irresponsible? Didn't they care? Or are they just a bunch of racists and extremists themselves?

I say to those who have raised vicious charges against Judge Bork, come off it, come off it. You insult not only Judge Bork but the U.S. Senate as well. We do not in this body confirm ogres and misfits to the Federal bench.

Now, about the nominee. The first thing I want to point out is that Robert Bork does not need to take all this guff, and we ought to be mighty grateful to him and to his family for their willingness to submit themselves to the guttersnipe gang who have had such play in recent weeks. Here is a man who is brilliant. He attended the University of Chicago Law School, elected Phi Beta Kappa. He could be earning a million bucks a year easily. He had it made. He was in with a prestigious law firm, and then he threw it all overboard to go off to Yale Law School and teach law. Professors do not make that much money, but he saw it as a higher calling.

Even after 11 years of teaching, he took time out for yet an even higher calling, serving as Solicitor General of the United States, the third highest office in the Justice Department. He served exceedingly well there under exceedingly trying circumstances. Then back to Yale Law School for another 4 years, and then he was nominated and confirmed—unanimously by the U.S. Senate, let us remember—to the second most important court in the country, the Circuit Court of Appeals for the District of Columbia.

There he has compiled the most remarkable and exemplary record. Robert Bork has served his country well: two stints in the U.S. Marine Corps to serving as a high official in the Justice Department, to Federal Appeals Court judge. Robert Bork has served this nation well, and we ought to be glad that he is willing to devote his mind and his strength to teaching and to government services, because with his brilliance and his credentials, he could have been a multimillionaire by now.

The question before us is simple: Is the nominee qualified to serve on the Supreme Court? If we were looking for the ideal nominee, we would look for someone who graduated from a prestigious law school with high grades, as did Robert Bork. We would look for someone who taught law at a prestigious university, as did Robert Bork. We would look for someone who served on a circuit court of appeals, preferably the Circuit Court for the District of Columbia, as has Robert Bork.

If you were looking for the ideal nominee, you would look for an experienced judge who had earned accolades from highly respect authorities, as has Judge Bork. Accolades from whom? How about a retired Supreme Court Justice, Chief Justice Warren Burger, who recently said—and it bears repeating; I know others have referred to this, including I think President Ford, but it bears repeating. Warren Burger said, "I do not think in more than 50 years since I was in law school there has ever been a nomination of a man or woman any better qualified than Judge Bork," and that language includes Warren Burger, does it not? I think that is pretty remarkable. Savor that accolade for a moment. The best qualified nominee in 50 years. That speaks a lot louder to this Senator than any dozen noisy special interest groups clamoring for Robert Bork's scalp.

Justice Burger has no axes to grind; neither does Justice John Paul Stevens, still serving on the Supreme Court, who said, "I personally regard Judge Bork as a very well-qualified candidate and one who will be a very welcome addition to the Court."

Bork is very well qualified, according to Justice Stevens, and these are impressive, very impressive accolades to this Senator—unless we are prepared to dismiss Justices Burger and Stevens as extremists, too. Burger and Stevens are not alone in their high praise. Former President Gerald Ford was before us this morning on behalf of Robert Bork; eminent Democrats as well support this nominee, including two of the highest, most senior officials of the Carter administration in the area of law: Lloyd Cutler, President Carter's White House counsel, and former Attorney General Griffin Bell. And they will be here to testify on behalf of the nominee, as will five other Attorneys General of the United States.

So how has Bork earned the confidence of such highly respected authorities? Performance, that is how. Bork's critics will focus on his theoretical writings from as long as 25 years ago, but the real measure of Bork as a judge—not Robert Bork as a college professor, not Robert Bork as a provocative academician probing the establishment—but the real measure of Robert Bork as judge is his record on the D.C. Circuit Court of Appeals. His record.

Let us look at the record. It is impeccable. The Senate acted wisely when it unanimously confirmed this man to the bench in 1982. So sound has been his reasoning, so carefully crafted have been his decisions that not one opinion—not a one—has been overturned by the Supreme Court. Robert Bork has written or joined in over 400 such decisions since he joined the D.C. Circuit Court, and not once has a decision been overturned by the Supreme Court on appeal. That is very impressive to this Senator. Now, we know why so many eminent authorities have such high praise for this judge.

Why, then, the inquisition? Why the scurrilous charges against the man whose fitness for the bench was carefully examined by this body before he was confirmed by a unanimous vote of the Senate 5 years ago? Why the salvos against a judge who has compiled an impeccable record in his opinions?

I think I know the answer. The most extreme opposition to Judge Bork comes from those who consider the Supreme Court, as constituted in recent times, a convenient place to sidestep the democratic process. A judge like Robert Bork, who not only preaches the doctrine of judicial restraint but practices it as well, is a great inconvenience to those who do not trust the values of the American people. Judges like Robert Bork do not substitute their personal views for a neutral reading of the Constitution. Judges like Robert Bork do not act like legislators, creating new law. Instead, they act like judges, scrupulously interpreting the intent of the framers of the Constitution and of the democratically elected legislators here in Congress and in the State legislatures.

We legislators ought to be grateful for that. Judge Bork does not want to take over our turf, as do some of his brethren. I am grateful. Judge Bork believes, along with many of both liberal and conservative persuasion, along with many present and past, that if new rights are to be created, they ought to be created by representatives of the people who are democratically elected by the people and who are accountable to the people every 2 or 6 years as the case may be.

Judges like Robert Bork believe that new rights ought not to be created by judges who are elected by absolutely no one and who, in their appointments for life, are accountable to absolutely no one. I say long live the principle and the practice of judicial restraint.

Is Robert Bork with his judicial restraint out of the mainstream? Over the last 5 years, he has voted with the majority in 94 percent of the cases in which he participated. Ninety-four percent sounds pretty mainstream to this Senator. Or on the other hand, perhaps the D.C. Circuit Court is full of extremists. That is not the answer at all because we know that among the members of that distinguished body are many who are liberal and many who are conservative, and about an equal number who are so-called moderates.

The record shows that Judge Bork voted with the majority 94 percent of the time. That sounds mainstream to this Senator. Remember Antonin Scalia? We confirmed him last year to the Supreme Court by a unanimous vote. There were no charges of extremism against Scalia. So what? Scalia and Bork served together for nearly 4 years on the same Court, and Bork voted with Scalia 98 percent of the time in which they both participated in cases. Ninety-eight percent. Does that make Scalia an extremist, too? Of course not. It means instead that these charges against Bork are political poppycock, pure political poppycock, 99.9 percent pure, so pure it floats.

We will have a good review of Robert Bork's life in the next 2 weeks. This is your life, Robert Bork. And even though we have been through all of this before and found him fit, it will be thorough—as it should be—but let us also make it thoroughly fair because it should be thoroughly fair as well.

I finally have to say this, that I think we have gotten off to a bit of a rocky start by delaying these hearings a record 70 days and by intemperate remarks and irresponsible charges by a small number of members on this panel.

[Prepared statement follows:]

STATEMENT OF SENATOR GORDON J. HUMPHREY, NEW HAMPSHIRE

MR. CHAIRMAN, BEFORE LEAVING NEW HAMPSHIRE LAST NIGHT I WAS INTERVIEWED BY A TV REPORTER ON THE BORK NOMINATION. HE ASKED A NUMBER OF QUESTIONS, BUT ONE OF THEM MADE ME LAUGH. HE ASKED, HAS THE BORK NOMINATION GOTTEN WRAPPED UP IN POLITICS? BOY, HAS IT EVER. I'VE BEEN AROUND THIS LUNATIC TOWN FOR NINE YEARS, AND THE CHARGES AGAINST JUDGE BORK ARE THE WORST INFESTATION OF POLITICS I HAVE SEEN. HOW ELSE CAN YOU EXPLAIN THE FACT THAT FIVE YEARS AGO, THE UNITED STATES SENATE UNANIMOUSLY CONFIRMED ROBERT BORK TO THE SECOND MOST IMPORTANT COURT IN THE LAND, AND NOW, SOME SENATORS ARE ACTING LIKE THEY HAVE AMNESIA ABOUT THEIR OWN VOTING RECORD. EITHER IT'S AMNESIA OR IT'S POLITICS.

THEN THERE ARE THE SPECIAL INTEREST GROUPS, RABID WITH THEIR LOATHING OF A MAN WHO BELIEVES IN JUDICIAL RESTRAINT. FEARFUL OF A JUDGE WHO BELIEVES CONTROVERSIAL QUESTIONS OUGHT TO BE LEFT TO DEMOCRATICALLY ELECTED LEGISLATURES, EXCEPT WHERE THERE IS A VIOLATION OF THE CLEAR MEANING OF THE CONSTITUTION. TO LISTEN TO SOME OF THESE GROUPS, YOU GET THE IMPRESSION THAT JUDGE ROBERT BORK IS AN EXTREMIST, A RACIST, A SEXIST, AND AN ARCH-ENEMY OF THE CONSTITUTION.

FUNNY THING ABOUT THIS ALLEGED EXTREMIST, RACIST, SEXIST ARCH-ENEMY OF THE CONSTITUTION, HE'S A JUDGE. THIS FELLOW BORK IS ALREADY A FEDERAL JUDGE. A HIGH UP JUDGE. HE'S A JUDGE ON THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. MOST EXPERTS --AND THERE ARE A LOT OF THEM WHEN IT COMES TO THE LAW -- REGARD THAT COURT AS THE SECOND MOST IMPORTANT COURT IN AMERICA. SO THIS FELLOW BORK, THIS EMBODIMENT OF EVIL, IF YOU BELIEVE SOME OF HIS CRITICS, IS A VERY HIGH UP JUDGE. AND GUESS WHO CONFIRMED HIM AS A JUDGE ON THE SECOND MOST IMPORTANT COURT IN THE LAND? THE SENATE OF THE UNITED STATES OF AMERICA. THAT'S WHO. WE DID IT.

YES, WE MADE ROBERT BORK A JUDGE. FIVE YEARS AGO. BY A UNANIMOUS VOTE. NO NEGATIVE VOTES. SO THE QUESTION I HAVE, MR. CHAIRMAN IS THIS: IF ROBERT BORK IS THE ARCH-ENEMY OF THE CONSTITUTION ALLEGED BY HIS CRITICS, IF HE'S AN EXTREMIST, A RACIST, AND A SEXIST, THEN WHERE IN THE WORLD WERE ALL THE UNITED STATES SENATORS IN 1982, WHEN THEY VOTED UNANIMOUSLY TO CONFIRM HIM? WERE THEY ASLEEP? WERE THEY DRUNK? WERE THEY CARELESS? WERE THEY NOT PAYING ATTENTION? WE'RE THEY IRRESPONSIBLE? DIDN'T THEY CARE? OR WERE THEY JUST A BUNCH OF RACISTS AND SEXISTS THEMSELVES?

I SAY TO THOSE WHO HAVE RAISED VICIOUS CHARGES AGAINST JUDGE BORK, COME OFF IT! COME OFF IT, YOU INSULT NOT ONLY ROBERT BORK AND HIS FAMILY. YOU INSULT THE SENATE OF THE UNITED STATES. WE DON'T CONFIRM OGRES AND MISFITS TO THE FEDERAL BENCH.

NOW, ABOUT THE NOMINEE, MR. CHAIRMAN. THE FIRST THING I WANT TO POINT OUT IS, ROBERT BORK DOESN'T NEED TO TAKE ALL THIS GUFF, AND WE OUGHT TO BE MIGHTY GRATEFUL HE'S WILLING TO SUBMIT HIMSELF AND HIS FAMILY TO THE GUTTERSNIPE GANG. HERE'S A MAN WHO'S BRILLIANT, ATTENDED THE UNIVERSITY OF CHICAGO LAW SCHOOL, ELECTED TO PHI BETA KAPPA. HE COULD BE EARNING A MILLION BUCKS A YEAR, EASILY. HE HAD IT MADE. WAS WORKING FOR A PRESTIGIOUS LAW FIRM, AND THEN THREW IT ALL OVERBOARD TO GO AND TEACH AT YALE LAW SCHOOL. PROFESSORS DON'T MAKE THAT MUCH MONEY. BUT HE SAW IT AS A HIGHER CALLING.

AFTER ELEVEN YEARS TEACHING AT YALE, HE TOOK TIME OUT FOR YET AN EVEN HIGHER CALLING, SERVING AS SOLICITOR GENERAL OF THE UNITED STATES, THE THIRD HIGHEST OFFICE IN THE JUSTICE DEPARTMENT. DIDN'T MAKE MUCH MONEY THERE EITHER. THEN BACK TO TEACHING AT YALE LAW SCHOOL FOR ANOTHER FOUR YEARS. THEN HE WAS NOMINATED AND CONFIRMED -- UNANIMOUSLY BY THE UNITED STATES SENATE -- TO THE SECOND MOST IMPORTANT COURT IN THE

LAND, THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, WHERE HE HAS COMPILED A REMARKABLE AND EXEMPLARY RECORD. AND JUDGES DON'T MAKE MUCH MONEY EITHER. BUT, THEN, TO ROBERT BORK, THERE ARE MORE IMPORTANT THINGS THAN MONEY.

HE'S SERVED HIS COUNTRY WELL, FROM SEVERAL YEARS IN THE MARINE CORPS, TO SERVING AS A HIGH OFFICIAL IN THE JUSTICE DEPARTMENT, TO FEDERAL APPEALS COURT JUDGE. ROBERT BORK HAS SERVED HIS COUNTRY WELL. AND WE OUGHT TO BE GLAD HE'S BEEN WILLING TO DEVOTE HIS MIND TO TEACHING AND TO GOVERNMENT SERVICE, BECAUSE WITH HIS BRILLIANCE AND HIS CREDENTIALS HE COULD HAVE BEEN A MULTI-MILLIONAIRE BY NOW.

THE QUESTION BEFORE US IS SIMPLE: IS THE NOMINEE QUALIFIED TO SERVE ON THE SUPREME COURT? IF YOU WERE LOOKING FOR THE IDEAL NOMINEE, YOU'D LOOK FOR SOMEONE WHO GRADUATED FROM ONE OF THE BEST LAW SCHOOLS, WITH HIGH GRADES, AS DID ROBERT BORK. YOU'D LOOK FOR SOMEONE WHO TAUGHT LAW IN ONE OF THE PRESTIGE UNIVERSITIES, AS DID ROBERT BORK. YOU'D LOOK FOR SOMEONE WHO SERVED ON A CIRCUIT COURT OF APPEALS, PREFERABLY THE CIRCUIT COURT FOR THE DISTRICT OF COLUMBIA, AS DID ROBERT BORK.

IF YOU WERE LOOKING FOR THE IDEAL NOMINEE, YOU'D LOOK FOR AN EXPERIENCED JUDGE WHO HAD EARNED ACCOLADES FROM HIGHLY RESPECTED AUTHORITIES, AS HAS ROBERT BORK. ACCOLADES FROM WHOM? HOW ABOUT A RETIRED SUPREME COURT CHIEF JUSTICE? WARREN BURGER RECENTLY SAID, "I DON'T THINK IN MORE THAN FIFTY YEARS SINCE I WAS IN LAW SCHOOL THERE HAS EVER BEEN A NOMINATION OF A MAN OR WOMAN ANY BETTER QUALIFIED THAN JUDGE BORK."

SAVOR THAT ACCOLADE FOR A MOMENT. THE BEST QUALIFIED NOMINEE IN FIFTY YEARS. THAT SPEAKS A LOT LOUDER TO THIS SENATOR THAN ANY DOZEN NOISY SPECIAL INTEREST GROUPS CLAMORING FOR ROBERT BORK'S SCALP. CHIEF JUSTICE WARREN BURGER HAS NO AXES TO GRIND. NEITHER DOES JUSTICE JOHN PAUL STEVENS, STILL SERVING ON THE SUPREME COURT, WHO SAID, "I PERSONALLY REGARD (JUDGE BORK) AS A VERY WELL-QUALIFIED CANDIDATE AND ONE WHO WILL BE A VERY WELCOME ADDITION TO THE COURT." BORK IS VERY WELL-QUALIFIED , ACCORDING TO JUSTICE STEVENS. THESE ARE VERY IMPRESSIVE ACCOLADES -- UNLESS WE'RE PREPARED TO DISMISS JUSTICES BURGER AND STEVENS AS EXTREMISTS, TOO.

BURGER AND STEVENS ARE NOT ALONE IN THEIR HIGH PRAISE. FORMER PRESIDENT GERALD FORD IS HERE ON BEHALF OF ROBERT BORK. EMINENT DEMOCRATS SUPPORT ROBERT BORK. THE TWO MOST SENIOR LEGAL OFFICIALS IN IN THE CARTER ADMINISTRATION, FORMER WHITE HOUSE COUNSEL LLOYD CUTLER AND FORMER ATTORNEY GENERAL GRIFFIN BELL ARE HERE TO SUPPORT ROBERT BORK. AND SO ARE FIVE OTHER FORMER ATTORNEYS GENERAL.

HOW HAS BORK EARNED THE CONFIDENCE OF SUCH HIGHLY RESPECTED AUTHORITIES? PERFORMANCE, THAT'S HOW. BORK'S CRITICS WILL FOCUS ON HIS THEORETICAL WRITINGS FROM AS LONG AGO AS TWENTY-FIVE YEARS. BUT THE REAL MEASURE OF ROBERT BORK AS A JUDGE -- NOT ROBERT BORK AS COLLEGE PROFESSOR, NOT ROBERT BORK AS PROVOCATIVE ACADEMICIAN, PROBING THE ESTABLISHMENT -- IS HIS RECORD ON THE D. C. CIRCUIT COURT. HIS RECORD. LET'S LOOK AT HIS RECORD. IT'S IMPECCABLE.

THE SENATE ACTED WISELY WHEN IT UNANIMOUSLY CONFIRMED ROBERT BORK TO THE BENCH IN 1982. SO SOUND HAS BEEN HIS REASONING, SO CAREFULLY CRAFTED HAVE BEEN HIS DECISIONS, THAT NOT ONE OPINION WHICH HE WROTE OR IN WHICH HE JOINED HAS BEEN OVERTURNED BY THE SUPREME COURT -- NOT ONE. ROBERT BORK HAS WRITTEN OR JOINED IN OVER FOUR HUNDRED DECISIONS SINCE HE JOINED THE DC CIRCUIT COURT, AND NOT ONCE HAS SUCH A DECISION BEEN OVERRULED BY THE SUPREME COURT ON APPEAL. THAT'S VERY, VERY IMPRESSIVE. NOW WE KNOW WHY SO MANY EMINENT AUTHORITIES HAVE SUCH HIGH PRAISE FOR BORK.

WHY, THEN, THE INQUISITION? WHY THE SCURRILOUS CHARGES AGAINST A MAN WHOSE FITNESS FOR THE BENCH WAS CAREFULLY EXAMINED BY THE SENATE BEFORE HE WAS CONFIRMED BY UNANIMOUS VOTE OF THE SENATE FIVE YEARS AGO? WHY THE SALVOS OF AGAINST A JUDGE WHO HAS COMPILED AN IMPECCABLE RECORD IN HIS OPINIONS.

WE KNOW THE ANSWER. THE MOST EXTREME OPPOSITION TO JUDGE BORK COMES FROM THOSE WHO CONSIDER THE SUPREME COURT, AS CONSTITUTED IN RECENT TIMES, A CONVENIENT PLACE TO SIDESTEP THE DEMOCRATIC PROCESS. A JUDGE LIKE ROBERT BORK, WHO NOT ONLY PREACHES THE DOCTRINE OF JUDICIAL RESTRAINT, BUT PRACTICES IT AS WELL, IS A GREAT INCONVENIENCE TO THOSE WHO DON'T TRUST THE VALUES OF THE AMERICAN PEOPLE. JUDGES LIKE ROBERT BORK DO NOT SUBSTITUTE THEIR PERSONAL VIEWS FOR A NEUTRAL READING OF THE CONSTITUTION. JUDGES LIKE ROBERT BORK DO NOT ACT LIKE LEGISLATORS, CREATING NEW LAW. INSTEAD, THEY ACT LIKE JUDGES, SCRUPULOUSLY INTERPRETING THE INTENT OF THE FRAMERS OF THE CONSTITUTION AND OF THE DEMOCRATICALLY ELECTED LEGISLATORS IN CONGRESS AND THE STATES LEGISLATURES. WE LEGISLATORS OUGHT TO BE GRATEFUL FOR THAT. JUDGE BORK DOESN'T WANT TO TAKE OVER OUR TURF, AS DO SOME OF HIS BRETHREN.

JUDGE BORK BELIEVES, ALONG WITH MANY, OF BOTH LIBERAL AND CONSERVATIVE PERSUASION, ALONG WITH MANY PRESENT AND PAST, THAT IF NEW RIGHTS ARE TO BE CREATED, THEY OUGHT TO BE CREATED BY REPRESENTATIVES OF THE PEOPLE WHO ARE DEMOCRATICALLY ELECTED BY THE PEOPLE AND WHO ARE ACCOUNTABLE TO THE PEOPLE EVERY TWO YEARS OR SIX YEARS, AS THE CASE MAY BE. JUDGES LIKE ROBERT BORK BELIEVE THAT NEW RIGHTS OUGHT NOT BE CREATED BY JUDGES, WHO ARE ELECTED BY ABSOLUTELY NO ONE AND WHO, IN THEIR APPOINTMENTS-FOR-LIFE, ARE ACCOUNTABLE TO ABSOLUTELY NO ONE. I SAY LONG LIVE THE PRACTICE OF JUDICIAL RESTRAINT.

IS ROBERT BORK, WITH HIS JUDICIAL RESTRAINT, OUT OF THE MAINSTREAM? NOT ON THE D. C. CIRCUIT COURT OF APPEALS. OVER THE LAST FIVE YEARS HE'S VOTED WITH THE MAJORITY IN 94 PERCENT OF THE CASES IN WHICH HE PARTICIPATED. 94 PERCENT. THAT SOUNDS PRETTY MAINSTREAM TO ME. OR IS THE D. C. CIRCUIT FULL OF EXTREMISTS? OF COURSE NOT. AND REMEMBER, THAT COURT IS STILL VERY LIBERAL IN ITS MAKEUP. THE RECORD SHOWS JUDGE BORK VOTED WITH THE MAJORITY 94 PERCENT OF THE TIME.

REMEMBER ANTONIN SCALIA? WE CONFIRMED HIM LAST YEAR TO THE SUPREME COURT BY A UNANIMOUS VOTE. THERE WERE NO CHARGES OF EXTREMISM AGAINST SCALIA. SO WHAT? SCALIA AND BORK SERVED TOGETHER FOR 4 YEARS ON THE D. C. CIRCUIT, AND BORK VOTED WITH SCALIA IN 98 PERCENT OF THE CASES IN WHICH THEY BOTH PARTICIPATED. 98 PERCENT. DOES THAT MAKE SCALIA AN EXTREMIST, TOO? OF COURSE NOT. IT MEANS INSTEAD, THESE CHARGES AGAINST BORK ARE POLITICAL POPPYCOCK. POLITICAL POPPYCOCK THAT IS 99.9 PERCENT PURE. SUCH PURE POPPYCOCK IT FLOATS.

WE'LL HAVE A GOOD REVIEW OF ROBERT BORK'S LIFE DURING THE NEXT TWO WEEKS, EVEN THOUGH WE'VE BEEN THROUGH ALL THIS BEFORE WITH BORK AND FOUND HIM FIT. IT'LL BE THOROUGH AS IT SHOULD BE. BUT LET'S ALSO MAKE IT THOROUGHLY FAIR, BECAUSE THAT'S THE WAY IT SHOULD BE, TOO. I'D HAVE TO SAY, WE'VE GOTTEN OFF TO A BAD START BY DELAYING THESE HEARINGS A RECORD SEVENTY DAYS.

The CHAIRMAN. Thank you, Senator. Last but surely not least, Senator Simon, before you begin, let me suggest that I would appreciate the cooperation of the audience. We have one chore to do immediately after the statement. What we are going to do is go into executive session. If you would all just sit for 30 seconds while we get the nomination of Judge Sessions out to be FBI Director, I would truly appreciate it. If not, that police officer will shoot you on sight if you stand up. [Laughter.] That is a joke. I am only kidding.

The Senator from Illinois.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you, Mr. Chairman.

Judge Bork, we welcome you and your family. It has been said, accurately, that what we are about to decide is going to have a great impact on this nation well into the next century. I would differ with my colleague, Senator Humphrey, on one point. I did not happen to be here when you were approved for the circuit court of appeals. I can very well visualized voting for someone for the circuit court of appeals, but not for the Supreme Court, because here you are really setting the course for the nation.

Over at that building not too many feet from here are the four words "Equal Justice Under Law." I want them to be much more than simply words chiseled on stone. And I say this as a nonlawyer member of this panel. I want those words to live, and I want the Supreme Court Justices to make them live.

I know there are a few, very few, out there who write to me or who contact us and say let us just keep postponing so President Reagan cannot make an appointment. President Reagan was elected. He is entitled to nominate whomever he wishes, and we have the equal responsibility of weighing that nomination. I expect President Reagan to nominate a conservative. Justice Powell is a conservative. Six of the eight members of the Court sitting right now have been appointed by Republican Presidents, the majority approved by Democratic members of the Senate.

I do not find the question quite as simple as some do. I think there are several questions that we have to ask ourselves and that I will be asking myself during the course of your testimony. First, is the nominee open-minded and fair? Your job is not simply to render justice, but also to symbolize justice for the people of this nation.

I want to make sure that really takes place, both the symbolic role and the rendering of justice. I do not want someone with an ideological mission of either the right or the left.

Second, I want a nominee who is sensitive to civil rights. I am 58 years old. I have seen huge progress made in this nation. Not that we do not have a long way to go yet, but much of that progress has been because of the Supreme Court, nine people who sit in that building over there. I want someone who is willing to lead on civil rights, not simply someone who will be dragging his feet.

Third, I want someone sensitive to civil liberties. Freedom is much easier to give away than to protect. I want someone who is going to preserve our freedom, who is willing to stand up, if necessary, against public opinion. Public opinion sometimes can be dramatically wrong. I think of the decision in 1942 on the internment of Japanese-Americans. The Supreme Court knuckled under to public opinion. I want someone who is going to protect the civil liberties of Japanese-Americans, of all Americans, whatever their background.

I want someone who is going to protect the people of this nation against the abuse of power by government, and we know from experience in our country and in other countries that government can abuse that power.

I want someone who is sensitive to our traditions of separation of church and State. My father was a Lutheran minister. I have an understanding of the yearnings that people have for values in our society, and I want to preserve those values. But I also recognize there are things that government can do well, like providing student aid. At the same time there are things that government cannot do well. One of things is to promote religion. I want to make sure the nominee is sensitive to our traditions.

Then, finally, I want someone who has some compassion. I do not expect your heart to overrule your head, but there will be marginal cases that a Supreme Court Justice will have to rule on. And I want a Supreme Court Justice who cares about people, just as I want a government that cares about people.

That sounds like a tall order, those requirements, but I think there are people, conservatives and liberals, Democrats and Republicans, who meet that. I want the letter of the Constitution to be followed, but I also want the spirit of the Constitution to be followed.

Dennis DeConcini, my colleague from Arizona, in his remarks perhaps summarized it best. He said a few minute ago, "The ultimate question I must decide is whether I feel secure putting our individual liberty, freedoms, and the future of our country in his hands." That is an awesome responsibility on our part and on the part of whoever goes to that Court.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

[Whereupon, at 1:09 p.m., the committee recessed, to reconvene at 2:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. Judge, welcome back. The committee will come to order.

Judge, I think quite frankly it might accommodate our brethren between us here if we went slightly out of order here. I am going to ask you to be sworn in now before I give my statement, but after you are sworn I will give the statement.

Judge, do you swear to give at this hearing in response to questions the truth, the whole truth and nothing but the truth so help you God?

Judge BORK. I do, Mr. Chairman.

The CHAIRMAN. Thank you. You are duly sworn.

Judge Bork, I would like to make an opening statement if I may.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

I would like to welcome you back this afternoon and personally welcome you to the Senate Judiciary Committee. You have heard much today—and we have all heard a great deal today—about the bicentennial of our Constitution. But as you and I both know, the convention in Philadelphia was only one very important chapter in the history of our people and in the evolution of our unique form of government.

From that day in Philadelphia to this hour, the heart of the controversy over the Constitution has been over the basic question that is certain to animate the debate that may commence in this committee, and that is the debate about the tensions between the rights of an individual and the will of the majority.

As James Madison, the father of the Constitution said, and I quote: "The great object of the Constitution is to secure the public good and private right against the danger of the majority faction and at the same time to preserve the spirit and the form of popular government," end of quote.

Judge, the seasons have turned to centuries and the document we now celebrate, the world's longest and oldest living constitution, for over the past 200 years, is something that we will formally celebrate tomorrow. And for 200 years each generation of Americans has been called to nurture, defend it, define it and apply it.

Senator Sam Ervin, our late colleague from North Carolina, was fond of reminding all of us and quoting an eloquent educator about the ties between the Magna Carta, the English Petition of Rights, the Declaration of Independence, and the U.S. Constitution.

The quote he used to always use was this: "These are great documents of history. Cut them and they will bleed, bleed with the blood of those who fashioned them and those who nurtured them through the succeeding generations."

Judge, each generation in some sense has had as much to do to author our Constitution as the 39 men who affixed their signatures to it 200 years ago. Indeed, 2 years after its signing, following a bitter national debate over its ratification, at the insistence of the people, the Constitution was profoundly ennobled by the addition of what has come to be known as the Bill of Rights.

Before a hundred years would transpire, a civil war erupted over the meaning of that Constitution and that so-called bill of rights, a civil war which would answer Lincoln's question whether, quote, "any nation so conceived and so dedicated can long endure."

From that civil war would emerge the so-called Civil War Amendments which would settle forever the truth that all men are created equal. It gave definition through those Civil War Amendments to what many thought were meant in the first instance. But before another 100 years would pass our own century would be distinguished by hotly contested struggles to assimilate into the very fabric of the Constitution equal protection for blacks, minorities and women.

As surely as those who waged the Civil War, those who waged the struggle for civil rights infused the Constitution with their own vision. The story of these struggles at its heart, in my view, is the story of what makes America and her people the envy of the world. In each of these struggles which I have made reference to, each of these struggles in each of these times when the individual faced a recalcitrant government, the individual won his or her rights, always expanding; his or her rights always expanding.

America is the promised land because each generation bequeathed to their children a promise, a promise that they might not come to enjoy but which they fully expected their offspring to fulfill. So the words "all men are created equal" took a life of their own, ultimately destined to end slavery and enfranchise women. And the words, "equal protection and due process" inevitably led to the end of the words, "separate but equal," ensuring that the walls of segregation would crumble, whether at the lunch counter or in the voting booth.

So, faithful to that tradition, in the ebbing summer of our bicentennial, the Constitution must become more than an object of celebration. It is to become once again the center of a critical national debate over what it is, what it must become, and how it will be applied in a world that neither you nor I can envision at this moment, a world of biotechnical engineering, a world of burgeoning changes in science, a world where once again the rights of individuals and the right of the government to impact upon them will be put in a different context and in conflict.

So let's make no mistake about it, the unique importance of this nomination is in part because of the moment in history in which it comes, for I believe that a greater question transcends the issue of this nomination. And that question is, will we retreat from our tradition of progress or will we move forward, continuing to expand and envelope the rights of individuals in a changing world which is bound to have an impact upon those individuals' sense of who they are and what they can do, will these ennobling human rights and human dignity, which is a legacy of the past two centuries, continue to mark the journey of our people?

So Judge, as you well know, this is no ordinary nomination, not merely because you are there. And I must say to you that it must be somewhat daunting, as experienced as you are, to sit there with an array of people here about to question you It is not an easy position to be in. I am confident—and I am not being solicitous—you will handle it well, but nonetheless, it is not an easy position.

But this nomination is more—with all due respect, Judge, and I am sure you would agree—than about you. In passing on this nomination to the Supreme Court, we must also pass judgment on whether or not your particular philosophy is an appropriate one at this time in our history.

You are no ordinary nominee, Judge, to your great credit. Over more than a quarter of a century you have been recognized as a leading—perhaps the leading—proponent of a provocative constitutional philosophy, one that when I was in law school—I did not go to Yale; I am not bragging about that but I did not go to Yale—one where our constitutional law professor would say, "and this is such and such," and then, "as Professor Bork at Yale says."

You have been a man of significant standing in the academic community and thus in a special way, a vote to confirm you requires, in my view, an endorsement of your basic philosophic views as they relate to the Constitution. And thus the Senate, in exercising its constitutional role of advice and consent, has not only the right in my opinion but the duty to weigh the philosophy of the nominee as it reaches its own independent decision, a view that I think you share, but I will ask you about that in the question and answer period.

Essentially, the role of this committee as I see it is to provide an opportunity for your advocates and your adversaries, your opponents, the opponents of this nomination and the supporters of this nomination, to present their views for consideration as they come to the witness table at which you sit.

But most of all, it is an important opportunity and it is a required opportunity—and I and my colleagues assure you of the opportunity—to fully offer your views and for members to question you on what you mean by the views that you hold.

My role as Chairman of the Senate Judiciary Committee in my view is not to persuade but to attempt to ensure that the critical issues involved in this nomination are laid squarely before my colleagues and the American people.

As I made clear when Senator Baker contacted me and when Attorney General Meese came to see me prior to your selection, as I told them privately, Judge, that as a matter of principle I continued to be deeply troubled by many of the things you had written. I would have been less than honest then or now to pretend otherwise.

Judge, assuming you mean what you have written, our differences are not personal, they relate to basic questions of principle. I will question you in several areas to determine what our differences mean in terms of real cases with real people, with real winners and real losers.

For example, my areas of concern touch the relationship of people of different races in our land; whether it was wrong for State courts to enforce covenants that prohibited black couples from buying homes in white neighborhoods; whether the court was wrong in not stopping the U.S. Congress from outlawing literacy tests to protect voting rights; and whether in the future as similar situations arise the Court will intervene to protect the rights of the races in this land.

I also touch on the basic right of privacy, privacy in our marriages and in raising our children; whether the government can prohibit a child from going to a private school; whether the government can prohibit parents from having their children taught a foreign language; whether anyone can be subjected to sterilization, be it the government of Oklahoma attempting to forcibly sterilize a thief or by a big business which forces a woman to choose between her job and her right to bear children; or whether the government can prohibit a married couple from using birth control; or whether in the future as populations grow and explode, whether the government can say, you may only have two children.

I also touch on the right of free expression, be it political—for example, whether Martin Luther King could have been prohibited from advocating violation of immoral segregation laws—or be it artistic; for example, can an American be denied the right to create and enjoy literature, painting, sculpture, dance, music, and movies of their choice.

I not only think it was wrong for some of these things to have happened in our country—and they did—but it was also right for the Supreme Court, in my view, to have stepped in in many of the cases that I made reference to without naming them when it did to protect these rights of individuals against the majority.

From much of what I have read—and I honestly believe, Judge, I think I have read everything that you have written, and you have been very cooperative. We asked you to provide it and you have literally provided us hundreds of pages of written material. Based on that material, we appear to disagree about whether the Supreme Court was right or wrong in many of these cases. While there is plenty of room for debate about these issues, each of us must take a stand on whether or not we believe the Court was wrong in these most critical decisions of our time.

I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not denied from any majority. My rights are because I exist. They were given to me and each of my fellow citizens by our creator and they represent the essence of human dignity.

I agree with Justice Harlan, the most conservative jurist and Justice of our era, who stated that the Constitution is, quote, "a living thing" and that "its protections are enshrined in majestic phrases like 'equal protection under the law 'and 'due process' and thus cannot be," as he said, and I quote, "reduced to any formula," end of quote.

It is, as the great Chief Justice John Marshall said, and I quote, "intended to endure for ages to come and consequently to be adopted to the various crises of human affairs, only its great outlines marked," end of quote.

For the next 2 weeks or so, obviously only in your case, I hope, Judge, for the next couple of days or so, my colleagues and I, yourself and others, will be engaged in a historic discussion that could affect the direction of our country. I think it would be a disservice to the American people if we allowed that day to be clouded by strident rhetoric from the far left or the far right.

Such inflammatory statements only distract from the central focus of these hearings. For better than two decades you have been a distinguished scholar, a man whose ideas have been debated in many constitutional law classes in this country. In your writings you have forthrightly stated your principles. To use your own words in your published opening statement, which you have not given yet: "My philosophy of judging is neither liberal nor conservative."

When I have been asked—as I have been after having read your writings this August—whether I thought you were a conservative or a liberal, my response was just as yours; I believe you are neither a conservative nor a liberal. You have a very precise, as I read it, viewing of how to read the Constitution.

You have suggested equally forthrightly what we should examine in reviewing your nomination when you said, and I am quoting you: "You look for a track record, and that means you read any article, any opinions they have written. There is no reason to be upset about that," end of quote.

I agree with you that there is a consistent thread that runs through your writings. You said just 2 years ago that you, quote, "finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece," end of quote. And your most definitive writing to date has been, as I can read it, that piece.

Later you added, "my views have remained about what they were."

In the end, whatever my reaction or anyone else's reaction to your record, the process of confirmation is best served if we hear each other out and use this unique opportunity to educate ourselves and the American people about your record and what it may mean for the Supreme Court and for the future of this country that we both love very much.

Out of respect for you, out of the majesty of the Constitution and the greatness of the American people it seems to me we who preside in this hearing today owe no less.

Judge, I would now invite you, if you would like, to make any opening statement for as long as you would like and then we will begin with the questioning.

I thank you for your indulgence this morning in listening to all of us.

[Prepared statement follows:]

U.S. Senator Joseph R. Biden, Jr.
Confirmation Hearing
Nomination of Robert Bork
Washington, D.C.
Tuesday, September 15, 1987

Text for Distribution

OPENING STATEMENT

Judge Bork, I would like to welcome you to the Senate Judiciary Committee.

We have heard much today about the Bicentennial of the Constitution, but as you and I both know, the convention in Philadelphia was only one very important chapter in the history of our people and in the evolution of our unique government.

From that day in Philadelphia, two centuries ago, down to this day, the heart of the controversy over the Constitution has been over a basic question that is certain to animate the debate we commence in this Committee -- the tension between the rights of the individual and the will of the majority.

As James Madison, the Father of the Constitution, said, "The great object [of the Constitution was] to secure the public good and private right against the danger of [the majority] faction, and at the same time to preserve the spirit and the form of popular government."

The seasons have turned to centuries and the document we celebrate is now the world's oldest living Constitution; and for 200 years, each generation of Americans has been called to nurture, defend and define it.

Senator Sam Ervin, our late colleague, was fond of quoting an eloquent educator about the ties between the Magna Carta, the English Petition of Right, the Declaration of Independence and the United States Constitution -- "These are the great documents of history. Cut them, and they will bleed with the blood of those who fashioned them and those who have nurtured them through the succeeding generations."

Each generation, in some sense, has been as much the author of our Constitution as were the 39 men who affixed their signatures to it, 200 years ago.

Indeed, two years after its signing, following a bitter national debate over its ratification, at the insistence of the people, the Constitution was profoundly ennobled by the addition of what we call today the "Bill of Rights."

Before a hundred years had passed, a Civil War erupted over the meaning of the Constitution and the Bill of Rights, a civil war which would answer Lincoln's question, whether "any nation so conceived and so dedicated can long endure." And from that Civil War would emerge the Civil War amendments which would once and for all settle the question of whether "all men are created equal."

Before another hundred years would pass, our own century would be distinguished by hotly contested struggles to assimilate into the very fabric of the Constitution the equal protection of blacks, other minorities, and women. And as surely as those who waged the Civil War, those who waged the struggle for civil rights infused the Constitution with their vision.

The story of these struggles is at its heart the story of what makes America and her people the envy of the world -- in each of these times the individual faced a recalcitrant government, the individual won, his or her rights always expanding.

America is the promised land, because each generation bequeathed to its children a promise that it might not enjoy but which it fully expected their offspring to fulfill.

So the words, "all men are created equal," took on a life of their own, ultimately destined to end slavery and enfranchise women, and the words, "equal protection" and "due process" inevitably led to the end of "separate but equal," ensuring that the walls of segregation would crumble, whether at the lunch counter or in the voting booth.

And so, faithful to that tradition, in the ebbing summer of our Bicentennial, the Constitution must become more than the object of celebration -- it is once again to become the center of a critical national debate over what it is and what it must become, especially on where the rights of the individual end and the powers of the government begin.

And so let us make no mistake about the unique importance of this nomination, at this particular moment in our history. For I believe that a greater question transcends the issue of this nomination. Will we retreat from our tradition of progress, or will we go forward, ennobling human rights and human dignity, which is the legacy of our two-century journey as a people.

So this is no ordinary nomination. In passing on this nomination to the Supreme Court, we must also pass judgment on whether the nominee's particular philosophy is an appropriate one at this time in our history.

And this is no ordinary nominee. Over more than a quarter-century, Judge Bork has been recognized as a leading, perhaps the leading proponent of a provocative constitutional philosophy. And thus, in a special way, a vote to confirm Judge Bork requires an endorsement of his views as well.

Thus the Senate, in exercising its constitutional role of "advice and consent," has not only the right but the duty to weigh philosophy as it reaches its own independent decision. Essentially, the role of this Committee is to provide an opportunity for advocates and opponents of the nomination to present their views for consideration. Most of all, it is an opportunity for the nominee to fully offer his views and for the members to question the nominee on those views.

My role as Chairman of the Judiciary Committee is not to persuade, but to attempt to ensure that the critical issues involved in this nomination are laid squarely before my colleagues and the American people.

As I made clear to the White House and the Attorney General prior to your selection, and as I told you privately, Judge Bork, as a matter of principle, I was and continue to be deeply troubled by some of your views. It would be less than honest, then or now, to pretend otherwise. Judge, our differences are not personal -- they are over basic questions of principle.

I will question you in several areas to determine what our differences mean in terms of real cases, with real people, with real winners and losers. For example, they touch the relationship among the people of different races in our land --

> whether it was wrong for the state courts to enforce a covenant that prohibited a black couple from buying a house in a white neighborhood;
>
> whether the United States Congress can stop the use of literacy tests to protect voting rights;

And they touch the basic rights of privacy in marriage and in raising children --

whether the government can prohibit children from going to private school;

whether the government can prohibit parents from having their children taught a foreign language;

whether anyone can be subjected to sterilization, be it by the government of Oklahoma, attempting to forcibly sterilize a thief, or by a big business which forces a woman to choose between her job and her right to bear children;

whether the government can prohibit a married couple from using birth control.

And they touch the right of free expresion --

Be it political:

For example, whether Martin Luther King can be prohibited from advocating the violation of immoral segregation laws;

or be it artistic:

For example, whether Americans can be denied the right to create and enjoy literature, painting, sculpture, dance, the movies and music of our choice.

I not only think it was wrong for these things to happen -- and they did happen here in America -- but it was right for the Supreme Court to step in when it did and protect these rights of individuals against the majority.

You appear to disagree about what the Supreme Court did in these cases. While there is plenty of room for debate about these issues, each of us must take a stand on whether we believe the Court was wrong in these most crucial decisions of our time.

I believe all Americans are born with certain inalienable rights. As a child of God, my rights are not derived from the majority, the state or the Constitution, but they were given to me and to each of our fellow citizens by the Creator and represent the essence of human dignity.

I agree with Justice Harlan, the most distinguished conservative Justice of our era, who stated that the Constitution is a "living thing." And that its protections are enshrined in majestic phrases like "equal protection under the law" and "due process," and thus can not be, as he said: "reduced to any formula."

It is, as the great Chief Justice John Marshall said, "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs...only its great outlines...marked."

For the next two weeks or so, my colleagues and I, yourself and others, will be engaged in an historic debate that could affect the direction of our country, and it would be a disservice to the American people if we allowed that debate to be clouded by the strident rhetoric of the far right or the far left. Such inflammatory statements only detract from the central focus of these hearings.

For better than two decades, you have been a distinguished scholar, a man whose ideas have been debated in many constitutional law classes in this country. In your writings, you have forthrightly stated your principles. In your own words, you have said, "My philosophy of judging is neither liberal or conservative."

And you have suggested, equally forthrightly, what we should examine in reviewing a judicial nomination, when you said, "You look for a track record, and that means that you read any articles they've written, any opinions they've written....There's no reason to be upset about [that]."

I agree with you that there is a consistent thread throughout your writings.

You said just two years ago that you "finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece" -- your most definitive writing to date -- and later added "my views have remained about what they were."

In the end, whatever my reaction or anyone's reaction to your record, the process of confirmation is best served if we hear each other out and use this unique opportunity to educate ourselves and the American people about your record and what it may mean to the Supreme Court and to the future of this country we both love. Our respect for you, the majesty of our Constitution and the greatness of the American people require no less.

OPENING STATEMENT OF ROBERT H. BORK, TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge Bork. Mr. Chairman, thank you very much, and distinguished members of the Judiciary Committee.

I would like first to introduce my family if I may.

The Chairman. Please. I apologize. I had an opportunity to meet them and the hearing has been going on so long I failed to mention that. Please do.

Judge Bork. Well, one person I cannot introduce to you is my mother, Mrs. Elizabeth Bork, who is, I am confident, watching on television. My wife, Mary Ellen Bork, in the gray suit; my daughter, Ellen Bork in the burgundy, my son Charles, and my son Robert, Jr. And as Senator Hatch mentioned, Mrs. Potter Stewart, who is a neighbor of ours, is with us today.

The Chairman. Welcome all. Thank you for being here.

Judge Bork. I want to begin by thanking the President for placing my name in nomination for this most important position. I am flattered and humbled to have been selected. If confirmed, I assure the Senate that I will approach the enormous task energetically and enthusiastically and will endeavor to the best of my ability to live up to the confidence placed in me.

I also want to thank President Ford and Senators Dole and Danforth and Congressman Fish for their warm remarks in introducing me to the Senate and to this committee.

As you have said, quite correctly, Mr. Chairman, and as others have said here today, this is in large measure a discussion of judicial philosophy, and I want to make a few remarks at the outset on that subject of central interest.

That is, my understanding of how a judge should go about his or her work. That may also be described as my philosophy of the role of a judge in a constitutional democracy.

The judge's authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for.

The judge, to deserve that trust and that authority, must be every bit as governed by law as is the Congress, the President, the State Governors and legislatures, and the American people. No one, including a judge, can be above the law. Only in that way will justice be done and the freedom of Americans assured.

How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments.

Where the words are precise and the facts simple, that is a relatively easy task. Where the words are general, as is the case with some of the most profound protections of our liberties—in the Bill of Rights and in the Civil War Amendments—the task is far more complex. It is to find the principle or value that was intended to be protected and to see that it is protected.

As I wrote in an opinion for our court, the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."

If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate power.

He or she then diminishes liberty instead of enhancing it. That is why I agree with Judge Learned Hand, one of the great jurists in our history, when he wrote that the judge's "authority and his immunity depend upon the assumption that he speaks with the mouths of others: the momentum of his utterances must be greater than any which his personal reputation and character can command if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate." To state that another way, the judge must speak with the authority of the past and yet accommodate that past to the present.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted it and applied it in prior cases. That is why a judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is *Brown* v. *Board of Education,* the case which outlawed racial segregation accomplished by government action. *Brown* overturned the rule of separate but equal laid down 58 years before in *Plessy* v. *Ferguson.* Yet *Brown,* delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.

Nevertheless, overruling should be done sparingly and cautiously. Respect for precedent is a part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes. That does not mean that constitutional law is static. It will evolve as judges modify doctrine to meet new circumstances and new technologies. Thus, today we apply the first amendment's guarantee of the freedom of the press to radio and television, and we apply to electronic surveillance the fourth amendment's guarantee of privacy for the individual against unreasonable searches of his or her home.

I can put the matter no better than I did in an opinion on my present court. Speaking of the judge's duty, I wrote: "The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances."

But I should add to that passage that when a judge goes beyond this and reads entirely new values into the Constitution, values the framers and the ratifiers did not put there, he deprives the people of their liberty. That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda through the processes of democracy.

Conservative judges frustrated that process in the mid-1930's by using the concept they had invented, the 14th amendment's supposed guarantee of a liberty of contract, to strike down laws designed to protect workers and labor unions. That was wrong then and it would be wrong now.

My philosophy of judging, Mr. Chairman, as you pointed out, is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the 50 States, and to the American people.

I welcome this opportunity to come before the committee and answer whatever questions the members may have. I am quite willing to discuss with you my judicial philosophy and the approach I take to deciding cases. I cannot, of course, commit myself as to how I might vote on any particular case and I know you would not wish me to do that.

I note in closing, though it has been mentioned by President Ford, that I have been fortunate to have a rich variety of experience in my professional career in the major areas of private practice, the academic world, government experience, and the judiciary. I have been an associate junior partner and senior partner in one of the nation's major law firms. I have been a professor at the Yale Law School, holding two named chairs, as Chancellor Kent Professor, once held by William Howard Taft, and as the first Alexander M. Bickel Professor of Public Law.

For almost 4 years I served as Solicitor General of the United States, in which capacity I submitted hundreds of briefs and personally argued about 35 cases before the Supreme Court of the United States.

Finally, for the past 5½ years I have been a judge in the U.S. Court of Appeals for the District of Columbia Circuit, where I have written, according to my count—counts have varied here this morning—about 150 opinions, and participated in over 400 decisions. I have a record in each of these areas of the law and it is for this committee and the Senate to judge that record.

I will be happy to answer the committee's questions.

[The statement of Judge Bork follows:]

STATEMENT OF ROBERT H. BORK

I want to begin by thanking the President for placing my name in nomination for this extremely important position. I am both flattered and humbled to have been selected. If confirmed, I assure the Senate that I will approach the enormous task ahead energetically and enthusiastically and will endeavor to the best of my ability to live up to the confidence placed in me.

I also want to thank President Ford and Senators Dole and Danforth and Congressman Fish for their warm remarks in introducing me to the Senate and this Committee.

I would like to add a few remarks at the outset on a subject of central interest in this hearing: my understanding of how a judge should go about his or her work. That may also be described as my philosophy of the role of the judge in a constitutional democracy.

The judge's authority derives entirely from the fact that he is applying the law and not his own personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify laws a majority of the electorate or of their representatives voted for. The judge, to deserve that trust and authority, must be every bit as governed by law as is Congress, the President, the state governors and legislatures, and the American people. No one, including the judge, can be above the law. Only in that way will justice be done and the freedoms of Americans assured.

How should a judge go about finding the law? The only legitimate way is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern, whether the lawmakers are the Congress of the United States enacting a statute or those who ratified our Constitution and its various amendments. Where the words are precise and the facts simple that is a relatively easy task. Where the words are general, as is the case with some of the most profound protections of our liberties in the Bill of Rights and the Civil War amendments, the task is far more complex -- it is to find the principle or value that was intended to be protected and see that it is protected. As I wrote in an opinion, the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."

If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate authority. He or she diminishes liberty instead of enhancing it.

That is why I agree with Judge Learned Hand, one of the great jurists in our history. He wrote that the judge's "authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it -- if it is to stand against the passionate resentments arising out of the interests he must frustrate." To state that another way, the judge must speak with the authority of the past and yet accommodate that past to the present.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted and applied it in prior cases. That is why a judge must give great respect to precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is Brown v. Board of Education, the case which outlawed racial segregation accomplished by government action. Brown overturned the rule of separate but equal laid down 58 years before in Plessy v. Ferguson. Yet Brown, delivered with the authority of a unanimous court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.

Nevertheless, overruling should be done sparingly and cautiously. Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes.

That does not mean that constitutional law is static. It will evolve as judges modify doctrine to meet new circumstances and new technologies. Thus, today we apply the first amendment's guarantee of the freedom of the press to radio and television and we apply to electronic surveillance the fourth amendment's guarantee of privacy for the individual against unreasonable searches of his or her home.

I can put the matter no better than I did in an opinion on my present court. Speaking of the judge's duty, I said:

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances.

But I must add that when a judge goes beyond this and reads entirely new values into the Constitution, values the framers and ratifiers did not put there, he deprives the people of their liberty. That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda through the processes of democracy. Conservative judges frustrated that process in the mid-1930's, by using the fourteenth amendment's supposed guarantee of a liberty of contract to strike down laws designed to protect workers and labor unions. That was wrong then and it would be wrong now.

My philosophy of judging is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to Congress, the President, the legislatures and executives of the fifty states, and to the American people.

I welcome this opportunity to come before the Committee and answer whatever questions the members may have. I am quite willing to discuss with you my judicial philosophy and the approach I take to deciding cases with this Committee. I cannot, of course, commit myself as to how I might vote on any particular case and I know you would not wish me to do that.

Let me note in closing that I sit here today as one who has been fortunate to have enjoyed in my professional career a rich experience in four major areas of the law: private practice; the academic world; government experience; and the judiciary. I have been an associate, junior partner, and senior partner in one of the nation's major law firms. I have been a professor of law at Yale University, holding two named chairs, as Chancellor Kent Professor, once held by William Howard Taft, and as the first Alexander M. Bickel Professor of Public Law.

For almost four years I served as Solicitor General of the United States, in which capacity I argued about 35 cases before the Supreme Court of the United States. Finally, for the past five and one-half years I have been a judge on the United States Court of Appeals for the District of Columbia Circuit, where I have written over 150 opinions and participated in over 400 decisions. I have a record in each of these areas of the law and it is for this Committee and the Senate to judge that record.

I will be happy to answer the Committee's questions.

The Chairman. Thank you very much, Judge.

Let me suggest to my colleagues that so people can plan when they will be questioning, we would have this first round of questioning at 30 minutes apiece and we would go in the same order as with the opening statements, and then make a judgment as we go, Judge, as to—we should have a break somewhere in here, and after several rounds we will break briefly to give everyone an opportunity to stretch their legs, and if at any point you would like to break, you let me know.

Judge Bork. Thank you, Mr. Chairman.

The Chairman. Let me begin. I want to begin to try to understand better and lay out your record in this round of questioning that I have. I want to talk a little bit about what you have said and what you believe about the role of the courts and what that role is in society, and as you said, your judicial philosophy.

Judge Bork, I am sure you know the one question to be raised in these hearings is whether or not you are going to vote to overturn Supreme Court decisions, which is obviously your right as a Supreme Court Justice, if you are confirmed.

In 1981 in testimony before the Congress, you said "there are dozens of cases" in which the Supreme Court made a wrong decision. This January, in remarks before the Federalist Society, you implied that you would have no problem in overruling decisions based on a philosophy or a rationale that you rejected.

In an interview with the District Lawyer magazine in 1985, you were asked if you could identify cases that you think should be reconsidered. You said, and I again quote, "Yes, I can but I won't."

Would you be willing for this committee to identify the "dozens of cases" that you think should be reconsidered?

Judge Bork. Mr. Chairman, to do that I am afraid I would have to go out and start back through the casebooks again to pick out the ones.

I do not know how many should be reconsidered. I can discuss with you the grounds upon, the way in which I would reconsider them.

Let me mention that Federalist Society talk which was given from scribbled notes. I had some notes, but I scribbled something in the margin which I got up and said in response to another speaker. It was that a non-originalist decision—by which I mean a decision which does not relate to a principle or value the ratifiers enacted in the Constitution—could be overruled.

If you look at the next paragraph of that talk, which was a written out part and not the extemporized part, it contradicts that statement. The very next paragraph states that the enormous expansion of the commerce power, Congress' power under the commerce clause of the Constitution, is settled, and it is simply too late to go back and reconsider that, even though it appears to be much broader than anything the framers or the ratifiers intended.

So there is, in fact, a recognition on my part that stare decisis or the theory of precedent is important. In fact, I would say to you that anybody who believes in original intention as the means of interpreting the Constitution has to have a theory of precedent, because this Nation has grown in ways that do not comport with the intentions of the people who wrote the Constitution—the commerce clause is one example—and it is simply too late to go back and tear that up.

I cite to you the *Legal Tender* cases. These are extreme examples admittedly. Scholarship suggests that the framers intended to prohibit paper money. Any judge who today thought he would go back to the original intent really ought to be accompanied by a guardian rather than be sitting on a bench.

The CHAIRMAN. I could not agree with you more, Judge, but when you and I had our brief discussion a month or so ago, a similar question was raised by me or by you—I cannot recall who—and you pointed out that you cite the commerce clause and the legal tender decisions as examples.

Can you give us any other examples of the numerous decisions you have criticized that might fall in that category of being settled doctrine now and would cause such upheaval to change? Because you know there have been many decisions you have criticized that have been decided from 1942 on after the commerce clause.

Judge BORK. I can, Senator. I think maybe it would be easier—I have criticized some. Let me say this: I am a judge and I am acutely aware that my authority, unlike yours, arises only if I can explain why what I am doing is rooted in the Constitution or in a statute. The cases I criticized, and I have criticized a lot in my time, but then law is an intellectual enterprise and it grows from argument back and forth and criticism, strong criticism.

The CHAIRMAN. I am not criticizing your right to criticize.

Judge BORK. All right. I criticized these cases on the basis of the reasoning or lack of reasoning that the courts offered. For example, the case that has come up and was mentioned, I think, in your opening statement, *Shelley* v. *Kraemer*. *Shelley* v. *Kraemer* was a case decided under the 14th amendment. The 14th amendment, as we all know, applies only when government acts, when government coerces and denies equal protection of the laws or due process.

That was a racial covenant, restrictive racial covenant case, and the Court held that when a State court enforced that contract, that was action by the government; and, hence, the 14th amendment applied to private action.

I have never been for racially restrictive covenants. I argued in the Supreme Court that racially discriminatory private contracts were covered by Section 1981, a famous post-Civil War enactment, and outlawed as such by that statute. That was *Runyon* v. *McCrary*.

The CHAIRMAN. What year was the statute, Judge? Do you know?

Judge BORK. No, I do not offhand.

The CHAIRMAN. Did it ante-date the *Shelley* case?

Judge BORK. Oh, yes. But it just had not been applied. It was a post-Civil War statute.

The difficulty with *Shelley* was not that it struck down a racial covenant, which I would be delighted to see happen, but that it adopted a principle which, if generally adopted, would turn almost all private action into action to be judged by the Constitution.

Let me give you an example. If people at a dinner party get into a political argument, and the guest refuses to leave when asked to do so by the host, and finally the host calls the police to have the unwanted guest ejected, under *Shelley* v. *Kraemer* that would become State action, and the guest could raise the first amendment. His first amendment rights would have been violated because a private person got sick of his political diatribe and asked him to leave and the police assisted him.

In that way, any contract action, any tort action, any kind of action can be turned into a constitutional case. Now, I am not alone in criticizing *Shelley* v. *Kraemer*. I think I have here Professor Herbert Wechsler who has criticized it. Professor Tribe has said that, "[t]o contemporary commentators . . . *Shelley* and [another case] appear as highly controversial decisions. In neither case, the critical consensus has it, is the Court's finding of State action [Government coercion] supported by any reasoning which would suggest that the 'State action' [doctrine] is a meaningful requirement rather than an empty formality."

There have been some suggestions that my constitutional philosophy or my reasoning about these cases is in some sense eccentric. It is not in the least bit. All of these cases have been criticized. In fact, *Shelley* v. *Kraemer* has never been applied again. It has had no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. It did what it did; it adopted a principle which the Court has never adopted again. And while I criticized the case at the time, it is not a case worth reconsidering.

The CHAIRMAN. Well, let's talk about another case. Let's talk about the *Griswold* case. Now, while you were living in Connecticut, that State had a law—I know you know this, but for the record—that it made it a crime for anyone, even a married couple, to use birth control. You indicated that you thought that law was "nutty," to use your words and I quite agree. Nevertheless, Connecticut, under that "nutty" law, prosecuted and convicted a doctor and the case finally reached the Supreme Court.

The Court said that the law violated a married couple's constitutional right to privacy. You criticized this opinion in numerous articles and speeches, beginning in 1971 and as recently as July 26th of this year. In your 1971 article, "Neutral Principles and Some First Amendment Problems," you said that the right of married couples to have sexual relations without fear of unwanted children is no more worthy of constitutional protection by the courts than the right of public utilities to be free of pollution control laws.

You argued that the utility company's right or gratification, I think you referred to it, to make money and the married couple's right or gratification to have sexual relations without fear of unwanted children, as "the cases are identical." Now, I am trying to understand this. It appears to me that you are saying that the government has as much right to control a married couple's decision about choosing to have a child or not, as that government has a right to control the public utility's right to pollute the air. Am I misstating your rationale here?

Judge BORK. With due respect, Mr. Chairman, I think you are. I was making the point that where the Constitution does not speak—there is no provision in the Constitution that applies to the case—then a judge may not say, I place a higher value upon a marital relationship than I do upon an economic freedom. Only if the Constitution gives him some reasoning. Once the judge begins to say economic rights are more important than marital rights or vice versa, and if there is nothing in the Constitution, the judge is enforcing his own moral values, which I have objected to. Now, on the *Griswold* case itself——

The CHAIRMAN. Can we stick with that point a minute to make sure I understand it?

Judge BORK. Sure.

The CHAIRMAN. So that you suggest that unless the Constitution, I believe in the past you used the phrase, textually identifies, a value that is worthy of being protected, then competing values in society, the competing value of a public utility, in the example you used, to go out and make money—that economic right has no more or less constitutional protection than the right of a married couple to use or not use birth control in their bedroom. Is that what you are saying?

Judge BORK. No, I am not entirely, but I will straighten it out. I was objecting to the way Justice Douglas, in that opinion, *Griswold v. Connecticut,* derived this right. It may be possible to derive an objection to an anti-contraceptive statute in some other way. I do not know.

But starting from the assumption, which is an assumption for purposes of my argument, not a proven fact, starting from the assumption that there is nothing in the Constitution, in any legitimate method of constitutional reasoning about either subject, all I am saying is that the judge has no way to prefer one to the other and the matter should be left to the legislatures who will then decide which competing gratification, or freedom, should be placed higher.

The CHAIRMAN. Then I think I do understand it, that is, that the economic gratification of a utility company is as worthy of as much protection as the sexual gratification of a married couple, because neither is mentioned in the Constitution.

Judge BORK. All that means is that the judge may not choose.

The CHAIRMAN. Who does?

Judge BORK. The legislature.

The CHAIRMAN. Well, that is my point, so it is not a constitutional right. I am not trying to be picky here. Clearly, I do not want to get into a debate with a professor, but it seems to me that what you are saying is what I said and that is, that the Constitution—if it were a constitutional right, if the Constitution said anywhere in it, in your view, that a married couple's right to engage in the decision of having a child or not having a child was a constitutionally-protected right of privacy, then you would rule that that right exists. You would not leave it to a legislative body no matter what they did.

Judge BORK. That is right.

The CHAIRMAN. But you argue, as I understand it, that no such right exists.

Judge BORK. No, Senator, that is what I tried to clarify. I argued that the way in which this unstructured, undefined right of privacy that Justice Douglas elaborated, that the way he did it did not prove its existence.

The CHAIRMAN. You have been a professor now for years and years, everybody has pointed out and I have observed, you are one of the most well-read and scholarly people to come before this committee. In all your short life, have you come up with any other way to protect a married couple, under the Constitution, against an action by a government telling them what they can or cannot do about birth control in their bedroom? Is there any constitutional right, anywhere in the Constitution?

Judge Bork. I have never engaged in that exercise. What I was doing was criticizing a doctrine the Supreme Court was creating which was capable of being applied in unknown ways in the future, in unprincipled ways. Let me say something about *Griswold* v. *Connecticut*. Connecticut never tried to prosecute any married couple for the use of contraceptives. That statute was used entirely through an aiding and abetting clause in the general criminal code to prosecute birth control clinics that advertised. That is what it was about.

The Chairman. But, in fact, they did prosecute a doctor, didn't they, for giving advice?

Judge Bork. Well, I was at Yale when that case was framed by Yale professors. That was not a case of Connecticut going out and doing anything. What happened was some Yale professors sued to have that—because they like this kind of litigation—to have that statute declared unconstitutional. It got up to the Supreme Court under the name of *Poe* v. *Ullman*. The Supreme Court refused to take the case because there was no showing that anybody ever got prosecuted.

They went back down and engaged in enormous efforts to get somebody prosecuted and the thing was really a test case on an abstract principle, I must say.

The Chairman. Well, let me say it another way then, without doing it in case. Does a State legislative body, or any legislative body, have a right to pass a law telling a married couple, or anyone else, that behind—let's stick with the married couple for a minute—behind their bedroom door, telling them they can or cannot use birth control? Does the majority have the right to tell a couple that they cannot use birth control?

Judge Bork. There is always a rationality standard in the law, Senator. I do not know what rationale the State would offer or what challenge the married couple would make. I have never decided that case. If it ever comes before me, I will have to decide it. All I have done was point out that the right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials. That is all I have done.

The Chairman. Judge, I agree with the rationale offered in the case. Let me just read it to you and it went like this. I happen to agree with it. It said, in part, "would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with the right of privacy older than the Bill of Rights. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. The association promotes a way of life, not causes. A harmony of living, not political face. A bilateral loyalty, not a commercial or social projects."

Obviously, that Justice believes that the Constitution protects married couples, anyone.

Judge BORK. I could agree with almost every—I think I could agree with every word you read but that is not, with respect, Mr. Chairman, the rationale of the case. That is the rhetoric at the end of the case. What I objected to was the way in which this right of privacy was created and that was simply this. Justice Douglas observed, quite correctly, that a number of provisions of the Bill of Rights protect aspects of privacy and indeed they do and indeed they should.

But he went on from there to say that since a number of the provisions did that and since they had emanations, by which I think he meant buffer zones to protect the basic right, he would find a penumbra which created a new right of privacy that existed where no provision of the Constitution applied, so that he——

The CHAIRMAN. What about the ninth amendment?

Judge BORK. Wait, let me finish with Justice Douglas.

The CHAIRMAN. All right.

Judge BORK. He did not rest on the ninth amendment. That was Justice Goldberg.

The CHAIRMAN. Right. That is what I was talking about.

Judge BORK. Yes. And I want to discuss first Justice Douglas and then I would be glad to discuss Justice Goldberg.

The CHAIRMAN. OK.

Judge BORK. Now you see, in that way, he could have observed, equally well, the various provisions of the Constitution protect individual freedom and therefore, generalized a general right of freedom that would apply where no provision of the Constitution did. That is exactly what Justice Hugo Black criticized in dissent in that case, in some heated terms—and Justice Potter Stewart also dissented in that case.

So, in observing that *Griswold* v. *Connecticut* does not sustain its burden, the judge's burden of showing that the right comes from constitutional materials, I am by no means alone. A lot of people, including Justices, have criticized that decision.

The CHAIRMAN. I am not suggesting whether you are alone or in the majority. I am just trying to find out where you are. As I hear you, you do not believe that there is a general right of privacy that is in the Constitution.

Judge BORK. Not one derived in *that* fashion. There may be other arguments and I do not want to pass upon those.

The CHAIRMAN. Have you ever thought of any? Have you ever written about any?

Judge BORK. Yes, as a matter of fact, Senator, I taught a seminar with Professor Bickel starting in about 1963 or 1964. We taught a seminar called Constitutional Theory. I was then all in favor of *Griswold* v. *Connecticut*. I thought that was a great way to reason. I tried to build a course around that, only I said: we can call it a general right of freedom, and let's then take the various provisions of the Constitution, treat them the way a lawyer treats common law cases, extract a more general principle and apply that.

I did that for about 6 or 7 years, and Bickel fought me every step of the way; said it was not possible. At the end of 6 or 7 years, I decided he was right.

The CHAIRMAN. Judge, let's go on. There have been a number of cases that flow from the progeny of the *Griswold* case, all relying on *Griswold,* the majority view, with different rationales offered, that there is a right of privacy in the Constitution, a general right of privacy, a right of privacy derived from the due process, from the 14th amendment, a right of privacy, to use the Douglas word—the penumbra, which you criticize, and a right Goldberg suggested in the *Griswold* case, from the ninth amendment. It seems to me, if you cannot find a rationale for the decision of the *Griswold* case, then all the succeeding cases are up for grabs.

Judge BORK. I have never tried to find a rationale and I have not been offered one. Maybe somebody would offer me one. I do not know if the other cases are up for grabs or not.

The CHAIRMAN. Wouldn't they have to be if they are based on the same rationale?

Judge BORK. Well, it may be that—I have written that some of these cases were wrongly decided, in my opinion. For some of them I can think of rationales that would make them correctly decided but wrongly reasoned. There may be other ways, that a generalized and undefined right of privacy—one of the problems with the right of privacy, as Justice Douglas defined it, or did not define it, is not simply that it comes out of nowhere, that it does not have any rooting in the Constitution, it is also that he does not give it any contours, so you do not know what it is going to mean from case to case.

The CHAIRMAN. Let's talk about another basic right, at least I think a basic right, the right not to be sterilized by the government. The Supreme Court addressed that right in the famous case, *Skinner* v. *Oklahoma.* Under Oklahoma law, someone convicted of certain crimes faced mandatory sterilization. In 1942, Mr. Skinner had been convicted of his third offense and therefore, faced sterilization, brought his case to the Supreme Court. The Court said that the State of Oklahoma could not sterilize him. Let me read something from the Court's opinion.

"We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of a race. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."

Judge, you said that Supreme Court decision is improper and intellectually empty. I would like to ask you, do you think that there is a basic right, under the Constitution, not to forcibly sterilized by the State?

Judge BORK. There may well be, but not on the grounds stated there. I hate to keep saying this, Mr. Chairman, much of my objection is to the way some members of the Court, not always the whole Court, has gone about deriving these things. In *Skinner* v. *Oklahoma,* I think it might have been better to say that the statute does not have a reasonable basis because there is no scientific evidence upon which to rest the thought that criminality—that was, not then, I do not know anything about the state of scientific evidence now—that criminality is really genetically carried.

The CHAIRMAN. But if there was, they would be able to sterilize?

Judge BORK. Well, I do not know. The second thing about that statute, in this case, is that Justice Douglas did say something which is quite correct and he did not need to talk about procreation and fundamental rights to do it. That is, he noted that the statute made distinctions, for example, between a robber and an embezzler. The embezzler was not subject to this kind of thing.

Had he gone on and pointed out that those distinctions really sterilized, in effect, blue collar criminals and exempted white collar criminals, and indeed, appeared to have some taint of a racial basis to it, he could have arrived at the same decision in what I would take to be a more legitimate fashion.

The CHAIRMAN. I thought that under the equal protection clause, that was the essence of it and you have written—I may be mistaken—I thought you had written that there is no basis under the equal protection clause for having arrived at that conclusion.

Judge BORK. Not the way he did it. What the Court was doing with the equal protection clause for many years, and to which I objected more generally in this article, is that they would decide whether a whole group was in or out and then they would decide what level of scrutiny they would give to the statute to see whether it was constitutional or not.

I think that derives—and I hate to get into a technical question—but I think it derives from a footnote in the *Carolene Products* case, in which they were supposed to look at groups, as such. It would be much better if instead of taking groups as such and saying this group is in, that group is out, if they merely used a reasonable basis test and asked whether the law had a reasonable basis. I think the statute, in *Skinner* v. *Oklahoma,* the sterilization statute, would have failed under a reasonable basis test.

The CHAIRMAN. So you have to find a reasonable basis. If there is one, you could sterilize. If there is not one, you cannot. It seems to me that it comes down to a basic difference. You do not believe the Constitution recognizes what I consider to be a basic liberty, a basic liberty not to be sterilized.

Judge BORK. I agree that that is a basic liberty, and I agree that family life is a basic liberty and so forth. But the fact is we know that legislatures can, constitutionally, regulate some aspects of sexuality.

The CHAIRMAN. True.

Judge BORK. We know that legislatures do and can constitutionally regulate some aspects of family life. There is no question, I think, that these things are subject to some regulation. We have divorce laws, custody laws, child beating laws and so forth. The question always becomes, under the equal protection clause, has the legislature a reasonable basis for the kind of thing it does here.

The sterilization law would probably require an enormous or perhaps impossible degree of justification.

The CHAIRMAN. I hope so.

Judge, my time is about up, but with regard to the *Griswold* case, you are quoted in 1985—you were a judge at this time, although this statement was not made in your judicial capacity—as saying, "I don't think there is a supportable method of constitutional reasoning underlying the *Griswold* decision."

So obviously, you thought about it, and you at least at that point concluded you could not find one.

It seems to me, Judge—and as I said, there are many more cases I would like to talk to you about, and I appreciate you engaging in this dialogue—that you say that a State can impact upon marital relations and can impact upon certain other relations, and it seems to me that there are certain basic rights that they cannot touch. And what you seem to be saying to me is that a State legislature can theoretically, at least, pass a law sterilizing, and we will see what the courts say. It is not an automatic, it is not basic. Right now, if any State legislature in the country asked counsel for the legislature, "Could we pass a law, sterilizing?" I suspect the immediate response from counsel would be, "No, you cannot do that"—not only politically, but constitutionally.

Have any State legislative bodies said, "Can we decide on whether or not someone can or cannot use contraceptives," not any reasonable basis, I imagine all counsel would say "No" flatly; cannot even get into that area.

And it seems to me you are not saying that. You are saying that it is possible that can happen, and in *Griswold* you are saying that there is no principle upon which they could reach the result—not the rationale, you say; you say the result.

Judge BORK. Well, I think I was talking about the principle underlying that one. But I should say——

The CHAIRMAN. Well, wait, let me stop you there, Judge, because I want to make sure I understand. The principle underlying that one is the basic right to privacy, right, and from that flows all these other cases, all the way down to Franz, which you spoke to; all the way down to *Roe* v. *Wade*. They all are premised upon that basic principle that you cannot find.

I am not saying you are wrong. I just want to make sure I understand what you are saying.

Judge BORK. Well, I do not think all those cases necessarily follow. They used the right of privacy in some of those cases, and it was not clear why it was a right of privacy.

I should say that I think not only Justices Black and Stewart could not find it—and Gerald Gunther, who is a professor at Stanford and an authority in these matters, has criticized the case; and Professor Philip Kurland has referred to *Griswold* v. *Connecticut* as a "blatant usurpation."

The CHAIRMAN. But most did find it; the majority did find it, though, didn't they?

Judge BORK. Yes. But I am just telling you, Senator, that a lot of people have thought the reasoning of that case was just not reasoning.

The CHAIRMAN. My time is up. Judge, I want to make it clear, I am not suggesting there is anything extreme about your reasoning. I am not suggesting it is conservative or liberal. I just want to make sure I understand it. And as I understand what you have said in the last 30 minutes, a State legislative body, a government, can, if it so chose, pass a law saying married couples cannot use birth control devices.

Judge BORK. Senator, Mr. Chairman, I have not said that; I do not want to say that. What I am saying to you is that if that law is to be struck down, it will have to be done under better constitutional argumentation than was present in the *Griswold* opinion.

The **Chairman**. Again I will end, to quote you, sir, you said, "The truth is that the Court could not reach the result in *Griswold* through principle." I assume you are talking about constitutional principle.

Judge **Bork**. I do not know—what is that from?

The **Chairman**. I am referring to your 1971 article. That is the quote in the 1971 article. And then you said——

Judge **Bork**. Do you have a page number for that, Senator?

The **Chairman**. I will get the page. Sorry—a 1982 speech while you were Judge, speaking at Catholic University. You said, "The result in *Griswold* could not have been reached by proper interpretation of the Constitution." End of quote. We will dig it out for you here to show you—I believe you all sent it to us, so that is how we got it.

Judge **Bork**. OK. Yes.

The **Chairman**. Well, my time is up. I appreciate it. We will do more of this.

I yield—I see Senator Byrd is here. Did you have an opening statement you wished to make, Senator?

Senator **Thurmond**. I was just going to say I will yield to Senator Byrd if he wishes to make an opening statement.

The **Chairman**. Senator Byrd. We are going to cease the questioning for a moment while Senator Byrd makes his opening statement.

OPENING STATEMENT OF SENATOR ROBERT C. BYRD

Senator **Byrd**. Mr. Chairman, I thank you for allowing me to intervene at this point to make my opening statement—or, to make a statement; this may be the opening and the closing statement.

And I thank Senator Thurmond and my other colleagues on the committee for allowing me to proceed.

I join with all of my colleagues in welcoming Judge Bork back before the Judiciary Committee and in welcoming him to these hearings; and I apologize for not being present to hear your opening statement. I assume you will be making further statements, so I can use the word "opening" advisedly.

I compliment you, Judge Bork, on this nomination, and I not only wish to express a hearty welcome to you, but also to your lovely wife and your sons and daughter, who I am told are seated here in the audience today.

As I have stated so many times in the past, the Senate has both the right and the duty to scrutinize as carefully as possible the individuals who are nominated to serve on the Supreme Court of the United States.

Unlike the case when we consider legislation, the Senate has no second chance in passing on lifetime appointments. As an equal partner with the President in making these appointments, the Senate should consider the nominee's integrity, candor, temperament, experience, education, and judicial philosophy.

So we meet here today to begin the exercise of that responsibility.

For my own part, I have certain questions, which I hope that if I am not here to ask them, that the committee will endeavor to secure answers for them, and certainly to explore them. I am interested in your apparent belief in the concept of judicial restraint.

Let me say also at this early point in my statement that it does not bother me that you are a conservative. I am a conservative. Everybody knows that from the shirts that we are wearing today. I did not wear a blue shirt, nor did you, nor did I see Strom Thurmond nor Orrin Hatch. But not so facetiously, I am not troubled that you are a conservative. I am not even troubled that the nomination and confirmation of a conservative to fill this position which will become vacant will tilt the Court in the direction of a conservative Court.

I think that the Supreme Court of the United States should be a conservative Court. I think the Court should be conservative. I happen to believe that the body in our constitutional system that should be liberal, if at all, is the legislative body, in which I serve. But I do not construe the intent of the writers of our Constitution—I do not believe that they intended for the Supreme Court of the United States to be a "travelling Constitutional Convention", as the late Mr. Justice Hugo Black referred to at one point in a statement.

I think that the legislature is here to make the laws; that is what the founders said in the first sentence of the first article of the Constitution of the United States. So I intend, as far as I am concerned, to not make my final judgment, and it is not made if I had to answer before God right at this moment, as to how I would vote on your nomination; I could not say.

The fact that you are a conservative does not bother me, and it does not bother me if the Court becomes what is called a conservative court because I was very critical of the court in earlier years. When Chief Justice Warren held that position, I was very critical of the Court.

And this is one vote for or against you at some point, but I will just say that to make it very clear that I do not personally want to see another Warren Court in my lifetime.

But I am interested in your apparent belief in the concept of judicial restraint. You have used this term in many instances, both in your writings—which are very extensive—in your teachings, and in your service as a Member of the U.S. District Court of Appeals of the District of Columbia.

You have called for judges to defer to the will of the people as expressed through their elected representatives. This makes good sense.

I shall ask a question which is a rhetorical question, but which I am sure this committee will explore and which I very much need the answer to in making my own decision on your nomination.

Where in your embrace of majority rule is the protection for the rights of the minority? Now, as the majority leader of the Senate and one who has been the minority leader of the Senate, I am very conscious of the rights of the minority, and I chafe often because I feel that the rights of the majority are being abused by the minority, and I feel that the majority should rule. But at the same time, I feel that the minority has some rights, too, in the Senate of the United States.

So I am sure it can be appreciated that I would ask this question. We are both interested in majority rule, but where do you embrace in your concept of judicial restraint the rights of the minority?

You have written extensively as a legal theorist about deference to majority will. But are your views on standing so restrictive that the little guy, or even the U.S. Senate, has no hope of ever getting his or her or its day in court?

I read a great deal about you, and as I have indicated, I have a tremendous amount of respect for you, and I admire you. I believe that the committee should explore your beliefs, your philosophy, in several areas.

As majority leader, my duties will often require my presence on the Senate floor, and I will not be able to attend these hearings as much as I would like to attend them. I wish I could be here. I will read the record carefully, not just turn it over to a staff member before I reach my final decision on your nomination, and I will be watching the tapes as much as I can in the evenings so that I truly can keep abreast as much as possible of these hearings.

I hope that the committee will be able to ask you and other witnesses to address these concerns, some of which I am mentioning here.

First and perhaps most fundamentally, the committee should inquire about your understanding of and adherence to the principle of judicial restraint. It has been argued that you apply this philosophy selectively. One report even suggests that it is possible to determine the outcome of your decisions depending on the parties to a case.

Now, having been in the political arena for 42 years, I know how charges are made, and often made without substantial good reason. But this is the purpose of these hearings, to determine in our own viewpoints and in answer to our own consciences, where do you stand. Is it true that you apply the philosophy of judicial restraint selectively? And is it true that depending on whether or not the participants are the government and a utility or some other business, that you will decide this way or that way; depending upon whether or not it is a government agency and an individual or a public interest group, you will decide this way or that way, and it can almost be foretold before you speak as to where you will come down?

I do not know. But I have read that, and I have read some cases that would indicate that at least there is some good reason to think that.

So I hope that the committee will discuss with you whether these reports are mere coincidence or an integral part of your philosophy as you apply it. I hope that the committee will consider your understanding of the separation of powers. Here is where I become very, very much involved. As a proponent of judicial restraint, you have on some occasions, I believe, stated that the judiciary should not usurp the authority of the executive or legislative branches of the government. And I believe that, too; I think that the judiciary has at times usurped the role and the powers—I should say the role, certainly—of the legislative branch.

Yet some of your theories and decisions suggest that you consistently favor the supremacy of the executive over the legislative when these two authorities are at odds. That may be true; maybe it is not. That is what we should try to find out. I am disturbed if that is indeed the case.

For example, you testified in 1973 against legislation to establish an independent special prosecutor, despite the fact that experience shows that trusting the executive to investigate itself is a resounding reaffirmation of the fable of the fox guarding the chicken coop. And in a case decided only this year, I believe you suggested that what is commonly referred to as executive privilege may be delegated by the President to others.

I am interested in knowing more about just how far your views go as to such delegation because of the fear that such a view could have had a devastating impact on the public's right to know and the public's right to discover the abuses of Watergate and the Iran Contra affair.

In the case of *Barnes* v. *Kline,* you stated that Congress has no right to bring a court challenge to the improper use of the veto power by the executive, maintaining that such issues should be decided in the give and take of politics. Now, if I am wrong in anything I have said, you will correct me, and I will respect the correction.

But I ask a rhetorical question: Why should the country have to suffer the effects of stalemate and acrimony between two branches of government?

As Alexander Pope said, "Who shall decide when doctors disagree?"

So, when the President, when the executive and the legislative disagree, who shall decide? And my understanding is that nobody else should decide other than the Supreme Court or the courts, ultimately, the Supreme Court; and of course, if it is a political thicket, I can understand how in instances it is appropriate to look upon that as a political question. But we are talking about the pocket veto or the veto power of the President of the United States, vetoing a piece of legislation that has been written by the elected representatives of the people of this country. And a pocket veto is not something to be taken lightly. And what are the powers of the President of the United States under this Constitution when it comes to exercising the pocket veto? What is his authority? Where does his authority end?

This is not a mere political question. This is a question that may involve the health and welfare for the national defense, for the national security of the people of this country.

Why should the unconstitutional act, if it be one, of one branch of the government go unchecked? Who will decide such disputes if not the Court?

I am in agreement with the results of many of your policies as I understand them, particularly in the area of criminal law—the exclusionary rule. So my feelings very much comport with what I think I have observed as having been in your position in certain cases. In my view, some courts have failed to give appropriate consideration to the rights of the majority and the victims of crimes and the potential victims of crimes in criminal cases. Laws designed to be tough on criminals are necessary and should be enforced, as you have pointed out.

It is difficult to appreciate the argument that the death penalty is unconstitutional when it is referred to in the Constitution. Capital punishment is referred to time and time again in the amendments to the Constitution.

There is another area of your philosophy that is of particular interest to me—your criticism of the election campaign laws. Following a period of abuse, Congress passed laws limiting the amount of campaign contributions and requiring disclosure of such contributions. Even though the whole Supreme Court upheld the major provisions of these election laws, I believe you have stated that you believe these provisions are unconstitutional as a violation of the freedom of speech.

We have had campaign financing reform legislation, now before the Senate, for months. We had the seventh cloture vote on it today, and failed to get cloture, so this is very much on my mind at the moment. But how can one reconcile his aggressiveness against this reform legislation with a general philosophy that judges should exercise restraint in finding legislation to be unconstitutional?

I look forward to your testimony. I know that it will be useful to me in making up my mind on your nomination.

I believe that the Court should exercise judicial restraint and that judges should not substitute their personal views for the will of the people or the Constitution.

As Justice Hugo Black observed in 1970 failure of the Court to adhere to the language of the Constitution makes it dangerously simple for courts to operate as a continuing Constitutional Convention. I am troubled by the thought, however, of judicial restraint if it is carried to the extreme, that it can become its own peculiar kind of judicial activism.

Therefore our role in the Senate is to determine whether your theory of judicial restraint is simply that of a constitutional conservative or whether it cloaks a private agenda as some have said, to overturn those court decisions with which you openly disagree.

As we celebrate the bicentennial of our Constitution, it is entirely fitting that we discuss the allegiance to and regard for the Constitution of a person to whom we are contemplating and trusting major responsibility for its interpretation and application. I do not question your allegiance to that Constitution. I do not have to ask you any questions on that point. I do not have to question your regard for the Constitution. But the Constitution is no ordinary document, and this is no ordinary appointment. And these are not ordinary times.

The foundation of our Government is that Constitution, and we should insist on a standard no less than that of the first Chief Justice, John Marshall, who admonished that we must never forget that it is the Constitution that we are expounding.

Mr. Chairman, I was told that the Senators would have 30 minutes for their opening statements. That constitutes my opening statement. I would be happy to hear Judge Bork's response. I would like to hear him respond if he cares to respond, since I saw him taking some notes or making some notes. I would be happy to hear his response. And then, may I assure Judge Bork that if I have to leave, it will not be through any discourtesy or intention to run away, but I shall follow his appearances here and read with great interest the words that he speaks into the record as he responds to this committee's questions.

The CHAIRMAN. I say to the majority leader it is slightly different than what we have been doing, but Judge, just as you can appreciate the Court has certain rules, when the majority leader of the United States Senate sits down and says he understood it to be 30 minutes, we all understand it to be 30 minutes. And I may be chairman of this committee, but I am not slow. [Laughter.]

So what I would suggest is—I understand if I ask unanimous consent, since it is not the way in which we were going to go, if we should suggest that we would proceed to allow the witness to respond if he wishes to to anything that Senator Byrd said.

Let me check with my ranking member.

Senator THURMOND. That will be all right, Senator.

The CHAIRMAN. So if you would like to, Judge, please respond; if not——

Judge BORK. Senator, I should say that I was jotting down some notes for further investigation, but I guess I will talk about them now.

The CHAIRMAN. You need not talk about them now.

Judge BORK. No, no; I would be glad to. The response I will give now will not be as full as I might give as we get into this.

My criticism of the Federal Election Campaign Act was really, as I recall, largely that the contribution limits were too low and the disclosure limits were too low. And I think I pointed out that Eugene McCarthy's campaign in New Hampshire, which persuaded President Johnson not to run again, could not have been financed under limits that low, and that the disclosure limits were so low that a lot of people who would like to support a position or a candidate, but who were in sensitive positions—like a president of a university or something of that sort—effectively could not contribute.

I think, as I understand it, for example, inflation had shrunk the contribution limit by the time I spoke from $1,000, I think it was, to $700 or $800. As I understand it, you have now indexed that so that inflation will no longer eat it away.

I think my difficulties are more with the levels at which they were set as being unrealistic enough to raise a problem; and indeed, I think various judges had different—on the Supreme Court, I think Chief Justice Burger had that problem with the statute, among other things.

On *Barnes* v. *Kline,* which is my view of congressional standing, that view, Senator, is dictated by my view of judicial restraint.

Now, the pocket veto case that you mentioned: I agree, I took the position in the executive branch, which I think this committee now has in its hands, that a pocket veto is not valid where Congress, the Senate and the House, have left an agent to receive that return veto—even though the House and the Senate are out, adjourned.

But the difficulty with allowing in that case Congressmen to sue the President, saying that this pocket veto is unconstitutional action, is simply this—the theory was that the Congressmen had official office which was somehow diminished by the President's action. By parity of reasoning, the President could sue the Congress very easily. If the Congress passes a bill over his veto, requiring the President to do something which he regards as unconstitutional, there is no reason under the reasoning of the other case why he could not come into the Court down the hill and start a lawsuit to declare the Congress' bill unconstitutional.

Indeed, if you adjust judges' duties in any way, there is no reason why a judge could not sue, and in fact it has gotten to this point. The Court of Appeals for the Seventh Circuit reversed two District Court judges out there, and the judges petitioned for certiorari on the grounds that their functions had been damaged. That is what worries me. If everybody can sue everybody in the government on the grounds of functions, then every governmental issue will come into court instantly and be decided by courts, which would be an enormous expansion of the power of the courts over the other two branches.

In the pocket veto case, I did say explicitly not only that the President and the Congress could fight it out, but that if a private party brought an action—in fact, that is the way the original pocket veto cases arose; Indian tribes claiming that they had lost money that was due them because of an invalid pocket veto sued. In that kind of a case, I have no problem at all with standing to challenge a pocket veto. It is only when the Court gets into just general issues between the branches so that every issue comes immediately into court, and the courts decide every aspect of governmental power; I think that is unfortunate. And I think that is consistent with not only my standing rule, but my view of judicial restraint.

I cannot recall the case in which I talked about the President—I did not think I said the President could delegate executive privilege to others; I think I said—I would have to check this—I think I said that there was reason to believe that those officials who are part of the Presidency and who communicate with the President might have executive privilege to that extent. I did not decide the issue. What I was doing was protesting that the majority which did decide the issue, decided it the other way, and I did not think it was up before us, and I just suggested that it might go the other way from the way they went if it were before us.

But I will have fuller answers to all of these questions, Senator. I am not even sure I got all of your points down here.

Senator BYRD. Mr. Chairman, I am sorry if I have transgressed on the understandings that were set forth at the beginning, and if I have gone over my time, I am sorry.

The CHAIRMAN. No, you have not.

Senator BYRD. I will not take the time of the committee in responding to the response at this time.

The CHAIRMAN. We understand the responsibilities as the Leader of the Senate make it difficult for you to be here.

I am going to trespass 60 more seconds on the ranking member's time here, just so you have time, or your staff—you asked about the quote from *Griswold* and where I got it. It was on page 9 of the neutral principles article, in the Indiana Law Journal, and I will quote it:

> *Griswold,* then, is an unprincipled decision, both in the way in which it derives a new constitutional right and the way in which it defines the right or, rather, fails to define it, where, left with no idea of the sweep of the right to privacy and have no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between minorities claiming freedom and majorities claiming power to regulate involves a choice between gratifications of two groups. When the Constitution has not spoken, the Court will be able to find no scale other than its own value preferences upon which to weigh the respective claims of pleasure."
>
> Compare the facts in *Griswold* with the hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical. In *Griswold,* a husband and wife assert that they have a right to sexual relations without fear of unwanted children. The law impairs their gratification,

et cetera. That is page 9.

And then——

Judge BORK. Senator, the entire discussion, I think, is premised on the notion that the Constitution does not speak—that the Court has not demonstrated that the Constitution speaks in this area. And if that is true, that Justice Douglas' demonstration fails, then that is where we are.

The CHAIRMAN. I will not read the quote, but in your speech provided by your office, at Catholic University in Washington, D.C., March 31, 1982, entitled, "Catholic University Speech", on page 4 is the other quote that I referred to.

Judge BORK. OK.

The CHAIRMAN. I thank my colleague from South Carolina, and please proceed.

What we will do, Judge, because I know time is getting late, we will do Senator Thurmond, Senator Kennedy, then take a break, and then we will come back for as much time as you like.

Thank you.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Bork, we have a great many people here who have a great many questions. I will propound these questions rather fast. You can answer them fast, unless you want to take more time; I will leave that entirely to your judgment.

Judge Bork, in view of some of the comments concerning your criticizing past Supreme Court decisions, I think it would be appropriate to have a statement from you on how you view the precedents of the Supreme Court.

Would you please comment on what criteria you think are important in deciding whether to re-examine past Supreme Court decisions?

Judge BORK. Yes, Senator. I think precedent is important, and as I have explained, anybody with a philosophy of original intent requires a theory of precedent.

What would I look at? Well, I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine.

And it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes.

So those are some of the factors I would consider as reasons to uphold a prior decision. There are also reasons to overrule it. I could list those factors, too.

Senator THURMOND. Judge Bork, much of the criticism lodged against you stems from articles and speeches attributed to you over the years which are critical of various rulings of the Supreme Court. Do you feel a distinction should be drawn between your private writings and any responsibilities you would have as a Supreme Court Justice?

Judge BORK. As a professor, I felt free to—and indeed was encouraged to—engage in theoretical discussion. I primarily aimed my writing at Supreme Court decisions which I thought were not adequately explained—and explanation is the heart of judging.

As a judge, you cannot be as speculative. And I once said to one of the members of this committee, when I was asked whether I would behave in a courtroom the way I would in a classroom, and I said no; in a classroom, nobody gets hurt. In a courtroom, somebody always gets hurt, which calls for a great deal more caution and circumspection than you are required to show when you give a speech at Indiana or some other place.

Senator THURMOND. Judge Bork, some have said that you are a conservative activist. My impression is that your writings and your opinions on the Court indicate that you are a strong proponent of judicial restraint.

Would you briefly explain to the committee what you believe is the role of a judge in interpreting the Constitution and the laws of this country?

Judge BORK. Well, as I said in my opening statement, Senator Thurmond, I think the obligation is to do the will of the lawmaker. If the lawmaker is Congress, writing a statute, or whether the lawmakers are the ratifying conventions of the Constitution, you determine the will, the value, that was intended in a number of ways—from the text, which may not be all that clear sometimes; from the legislative history and the expectations and public discussions surrounding the enactment of the law or the Constitution; from the way people at the beginning interpreted it, people who could be expected to know more about it than we know now. In a variety of ways, you manage to define a principle that you can apply to modern circumstances.

Senator THURMOND. Judge Bork, in 1985, you stated,

> If the Justices become convinced that a decision cannot be squared with the Constitution, they ought to consider overruling it, but the Court should be careful. If a particular decision has become the basis for a large array of social and economic institutions, overruling it could be disastrous.

Now, the question is could you give me an example of a constitutional decision that you would not be willing to overrule, even if you concluded that decision was wrong?

Judge BORK. Well, I have to include some decisions that I do not think are wrong, but I would not consider overruling them.

I gave the example already of the enormous scope of the commerce clause. I think it is much too late to overrule any of that.

Senator **Thurmond**. By the way, do not drop your voice too low, please.

Judge **Bork**. I am sorry.

I think I also gave the example of the legal tender cases about paper money. But for example, there have been Bill of Rights cases, the freedom of the press cases—a whole industry is built up around an understanding of the freedom of the press. It is too late to try to, even if one wanted to—and I have no desire to; I think those cases are correct—even if one wanted to, one simply could not go back and tear up the communications industry of this country.

Senator **Thurmond**. Judge Bork, you have written that, and I quote,

> One of our constitutional freedoms or rights clearly given in the text is the power to govern ourselves democratically. Every time a court creates a new constitutional right against government or expands without warrant an old one, the constitutional freedom of citizens to control their lives is diminished.

Now, the question is, could you elaborate on why this reasoning leads you to conclude that activist judges will not truly expand rights and freedoms, but instead will merely redistribute them?

Judge **Bork**. All right, Senator. I will be glad to talk about that.

The Constitution clearly gives majorities the right to rule large areas of life simply because they are majorities. And that is a freedom, that is a liberty, of the majority. The Constitution also says there are some things no majority should be allowed to do to a minority or to an individual. That is fine. That is known as the resolution of what has been called "James Madison's dilemma".

But if a judge steps into an area that the Constitution says is for majorities and says the majority may not do these things, despite what the Constitution says, then he has taken away a majority freedom and placed it in the minority. That is merely a redistribution of liberty, not an increase of it.

Senator **Thurmond**. Judge Bork, the ninth amendment to the Constitution provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. What do you believe the ninth amendment means?

Judge **Bork**. That is an extremely difficult question, Senator, because nobody has ever to my knowledge understood precisely what the ninth amendment did mean and what it was intended to do. And throughout almost all of our history, no court ever relied upon it. And in fact, the Supreme Court has yet to rely on it. Justice Goldberg did in one case.

I have seen—not mastered, but seen—some historical research appearing in the Virginia Law Review which suggests that what this amendment means is that the enumeration of Federal rights in the Bill of Rights shall not be construed to deny or disparage the rights retained by the people in their State constitutions. And that is the only explanation that has any plausibility to it that I have seen so far.

Senator **Thurmond**. Judge Bork, comments have been made that you take a restrictive view of the first amendment and that many years ago, you were of the opinion that only political speech was protected. Have your views changed in this area, and would you briefly tell the committee what areas of speech you think fall within the protection of the first amendment?

Judge **Bork**. Well, Senator, I should point out I am a little surprised that what was an academic exercise and engaging in a debate and trying out a theory has become somehow the core of my philosophy. The article itself said at the end that these remarks are intended to be tentative and exploratory. At the moment, I do not see how I can avoid them.

My views have changed for the simple reason—I was looking for a bright-line test by which judges could decide which speech was protected and which was not. I have since become persuaded—in fact, I was persuaded by my colleagues very quickly—that the bright-line made no sense; it would be impossible to follow. There is no reason, if somebody wants to engage in moral discourse to say it is not protected unless he ends it by saying, "and therefore, I propose that we pass a law."

So my bright-line eroded, and I now think—I have for some time—first amendment protection applies to moral discourse, it applies to scientific speech, it applies to news, it applies to opinion, it applies to literature. I gave up my attempt to construct a new theory there.

Senator **Thurmond**. Judge Bork, I have read that your critics say that you would deprive a divorced, noncustodial parent of visitation rights with his children. I believe the criticism arose because of views you expressed in *Franz* v. *United States,* a case involving an individual in the government's witness protection program. Would you tell the committee your position in this case?

Judge **Bork**. In that case, Senator, Congress had passed a witness protection statute which, as I recall, did not deal with this issue. In this case, it was a witness who married a divorced woman with children, and they disappeared in this program—and the divorced husband could not find his children. Now, it seemed to me there were two solutions to that. One, which was my idea, was to get that issue back in Congress, because Congress had not faced it, and I do not know, really, whether it wanted to do that. And therefore, I said I am not at all sure that this program does not violate Pennsylvania domestic relations law, and it is not clear that Congress intended to preempt the domestic relations laws of the States.

I thought a holding along those lines would put the issue back in Congress where it could be considered and a legislative solution worked out, and it also gives this fellow his rights.

But a majority of my Court decided to create a new constitutional right, right there. I think you reach a constitutional right, new or old, only if—you do not reach it if you can first get the Congress of the United States to decide whether they really want to do this thing or not; then you face the constitutional question.

Senator **Thurmond**. Judge Bork, as you know, the Supreme Court's decision in *Brown* v. *Board of Education* is one of the landmark decisions of the century. You have said that you think Brown was correctly decided, and you have praised Brown as an example of the Court applying an old principle according to a new understanding of a social situation.

Judge Bork, does this conflict with your views on how the constitutional law should be read?

Judge BORK. No, I do not think it does, Senator, but let me make a preparatory remark.

I have seen some evidence that the likelihood that the amendment was intended to stop segregation is greater than I had originally thought, and that *Plessy* v. *Ferguson* and the later segregation laws came afterwards, when the Supreme Court had changed and the legislatures had changed in the South. So that as a matter of original intent, I am not at all sure that segregation was not intended to be eliminated.

But let me proceed on the assumption that separate but equal was intended by those who framed the 14th amendment. The rule they wrote was no individual shall be denied the equal protection of the law. They may have written that rule on the assumption—a background assumption—that you could get equal protection or equality with separation or segregation.

If they did, then by 1954 it had become abundantly clear that the background assumption was false. You cannot get equality with segregation. At that point the Court is faced with a choice: Does it enforce the rule—equal protection—or enforce the background assumption that the framers and ratifiers made. I think it is clear that you have to enforce the rule, the background assumption being false, and that leads directly to no segregation, and it leads to *Brown* v. *Board of Education*.

Senator THURMOND. Judge Bork, it has been reported that because of comments you have made in the *Bakke* case that you oppose affirmative action programs. Is that in fact your position?

Judge BORK. There are two kinds of affirmative action. The original version of affirmative action, which I fully supported, was that institutions should reach out to inform minorities and so forth that opportunities of certain sorts existed that they may not know existed, and to reach out and try to identify and help qualified individuals into those.

Later on, those programs begin to change into programs about specified numbers of people being brought in differently. That began to worry me. I certainly would not have minded preferential treatment by private institutions for a period of time, until we could bring blacks and other racial minorities into the American mainstream.

It did begin to worry me, however, if those preferences became permanent, because that leads to resentment from other groups. It will lead to demands for preferences from other groups; it will lead to individuals feeling that they earned something and will never get it because they are not of the right ethnic group. That worries me.

Senator THURMOND. Judge Bork, comments have been made that you oppose certain rights of women. Justification for this attack is founded on your purported views that the equal protection clause should not be used to protect a woman's rights.

Do you feel that the equal protection clause is appropriate for the protection of women's rights, and would you please address this criticism?

Judge **Bork**. Yes, certainly, Senator. At the time I wrote about the equal protection clause, the Court had never extended the clause to women. But in addition to that, as I think I said in reply to another Senator—perhaps, the Chairman—the Court was in the process of saying it applies to blacks, it applies to illegitimate children, it applies to somebody else, and they were picking groups—which I thought was a wrong way to apply it. I think you apply it by requiring a reasonable basis for any distinction made between individuals or groups.

Now, in the case of race, it will be impossible, virtually, to find a reasonable distinction that will justify discrimination.

In the case of gender, it will depend on the particular issue. While it is possible to say in the area of race, no difference of treatment, it is not entirely possible to say that in the case of gender, simply because of physical differences. Combat—maybe the equal protection clause does not require that.

But in that sense, requiring a reasonable basis for any distinction made—yes, the clause applies to women; it applies to every person.

Senator **Thurmond**. Judge Bork, some have said that you would deny individuals and groups access to the courts. I realize that the area of determining standing to maintain an action is very complex. However, would you briefly comment on this area?

Judge **Bork**. Yes, Senator. Standing—I will comment briefly, as you suggest.

I think you will find my decisions are squarely in line with the decisions of the Supreme Court on standing, which is an important concept. And in particular, I think my views are almost entirely those that are expressed in his opinions by Justice Lewis Powell. I do not think there is anything more restrictive about me than about most judges.

Senator **Thurmond**. Judge Bork, recently a report was received that a senior U.S. judge had raised a question about your integrity. Apparently after hearing the case of *Vander Jagt* v. *O'Neill*, it was reported that after an agreement on the disposition of the case, you were chosen to write the opinion for the panel. However, the opinion you wrote, while upholding the result, did so on grounds other than those which had been discussed and agreed to by the other judges.

As a result, a different opinion was issued by the other two judges, and you wrote a concurring opinion. The implication is that you tried to force your views on the panel. Would you tell us what actually happened?

Judge **Bork**. Yes, Senator. I do not understand what happened with this Judge Gordon, who wrote that letter. The fact is any judge, when he sits down to write, sometimes has the experience that it will not write that way; you agreed on a ground, and it will not write that way. That is what happened in this case.

I then went back to Roger Robb, who was the senior judge on the panel, and talked to him about it and explained to him I thought a standing issue would go much better than a political question doctrine issue or a speech and debate issue. And I gave him the reasons—I will not spell them all out here, but they are in the papers.

He agreed—I thought. I left, and drafted it. I should have written to Judge Gordon then. He was down in Kentucky. I did not. I redrafted it.

The fact is that Judge Robb's secretary remembers me coming in to have that conversation; my clerks remember me going up and coming back and saying that Judge Robb had agreed.

I then sent the—I have some documents about this here, Senator, if I can find them—I then sent the draft around to Judge Robb, who was in the hospital with a broken hip—he had fallen—and to Judge Gordon.

The letter I sent with the draft to Judge Gordon says, "It occurs to me too late, that I should have notified you in advance that I had changed the rationale in the *Vander Jagt* case to one of lack of standing. After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in *Valley Forge,* on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings [rehearings of our full Court] coming up in this circuit for which the other two grounds might have implications."

I did not want to seem to be deciding the en banc court's cases for them in advance.

"That would have complicated the writing of the opinion based upon political question or Speech and Debate."

"In any event, I regret not having apprised you of my thinking earlier in the process of writing."

"Best wishes, sincerely."

So we went on. Then Judge Gordon was assigned the task of writing the opinion on yet a fourth ground, one that had not been discussed at the conference, and there is a memorandum from me here to both of those judges which is too long to read at the moment——

Senator THURMOND. What is the date of that letter?

Judge BORK. The letter to Judge Gordon is September 24, 1982; it is when I transmitted the—oh, I am sorry—I appear to have misstated. I sent the draft to both Judge Robb and Judge Gordon, and then a week later I sent this letter explaining why I had changed the rationale to Judge Gordon. Judge Gordon then redrafted the opinion on a new basis and sent it around and I wrote a concurring opinion. Now, after all of this had happened and after an experience, which Judge Gordon now says caused him to think that I was trying to sneak an opinion past him. He sent his draft back—and there was never any discussion of this—he sent his draft back and closed the letter with "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season," which did not alert me to the fact that he thought he had, in any way, been run around.

But the accusation is preposterous in any event, Senator, because when I circulate a draft, the other two judges read it and their clerks read it. There is no way to write a draft that they are going to miss and will go out and become the law. In addition to that, there is a rule in our circuit that when the other two judges have concurred in your draft, you circulate the draft to the full Court, which I think was 11 judges at that time, and their clerks all read it.

So, the thought that anybody would try to run a minority opinion through that full Court is just preposterous. There is nothing to the charge. The memories of the people involved, the documentation, and the practicalities of the circumstances indicate that it is just—I do not know what it is but it is certainly a misunderstanding.

Senator THURMOND. Judge, would you like those letters to be placed in the record?

Judge BORK. Yes, I will do that.

Senator THURMOND. I ask unanimous consent that those letters be placed in the record.

The CHAIRMAN. Without objection, they will be placed in the record.

[Material follows:]

James F. Gordon
Senior United States District Judge
422 Sprite Road, Unit 5
Louisville, Kentucky 40207

August 24, 1987

The Honorable Joseph Biden
United States Senator
Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

You may, after reading this communication, have no interest in pursuing the same further; however, I feel duty bound to communicate the facts set forth herein for your consideration.

Perhaps I should first make clear what this letter is not. It is not a complaint against the legal position taken by Judge Bork in the litigation hereinafter discussed, for he had the perfect right to take any position in the matter legally he wished. Nor is this letter a complaint arising from Judge Bork's well known conservative legal views, for even I am sometimes referred to in the local media as the "crusty old conservative."

Rather, it is a story of actions taken by Judge Bork which I believe reflect serious flaws in his character. So serious, in my judgment, that they go to his basic honesty.

This is the story. On several occasions between 1972 and 1983, I was designated, pursuant to 28 U.S.C. 294(d), to sit on the United States Court of Appeals for the District of Columbia in order to render assistance to them in a more speedy disposition of their appellate caseload. One such occasion was in the spring of 1982 when I was designated to sit with, among others, Judges Roger Robb and Robert Bork, to hear, among other appeals, the important case of Guy Vander Jagt, et al. v. Thomas P. "Tip" O'Neill, Jr., et al., 699 F.2d 1166, cert. denied, 464 U.S. 823 (1983). Copy attached. I believe this was the first appeal Judge Bork heard after his appointment to the federal bench, for I recall that on the morning of March 19, 1982, I found him understandably lost in the hallway and directed him to the robing room of the Court.

After hearing the arguments in the Vander Jagt case, Judges Robb, Bork and I retired to the conference room to voice our individual beliefs as to what the Court's final holding should be. All three of us were in instant agreement that the relief be denied Appellants Vander Jagt. Judge Robb directed our attention to the fact that he had written the prior opinion of the D.C. Circuit in Riegle v. Federal Open Market Committee, 556 F.2d 873 (1981), which he, Judge Robb, considered to be the law of the Circuit. I agreed.

After discussion, it was agreed by all and ordered by Judge Robb that Judge Bork would write the unanimous opinion of the Court, denying relief to the Appellant Vander Jagt on the ground of "remedial discretion," relying on the Riegle case. We then turned our attention to the other appeals heard that morning, their decision and opinion writing assignments thereof.

As we were departing the room at the end of our conference, I recall Judge Bork alluding to the "lack of standing doctrine," to which both Robb and I, particularly Robb, took immediate vigorous exception and reiterated our views that the Riegle case controlled and was the opinion of the majority of the Court. There is no way Judge Bork could have misunderstood Robb's and my position.

Ten days later, I returned to Kentucky and heard nothing further from Judge Bork in the way of his proposed majority opinion in the Vander Jagt case. Months passed, and I began to become concerned lest the Court would not get its order released before the Congress adjourned December 31, 1982 when, though the issue would not become moot, it seemed to me it would be "undercut" in importance and result in somewhat unfair delay toward the Appellants Vander Jagt, who were basing the thrust of their case on the facts existing in the House of Representatives as it was constituted in that session.

Though I was concerned, I took no steps of inquiry, as that was Judge Robb's responsibility as the presiding Judge of our panel. I did not then know that Robb had taken senior status May 31, 1982, and Bork had become the ranking Judge of our panel.

Finally, around the first part of November, 1982, I received a proposed majority opinion from Judge Bork, denying relief to the Appellants on the narrow ground of "no standing." There was no note or cover letter, just the bare bones opinion. I was shocked, to say the least, at the tenor of the opinion; however, my first thought was that perhaps Judge Bork had, since my departure for Kentucky, changed Judge Robb's opinion as to the doctrine of "no standing."

Of course, Judge Bork was freely entitled to his individual judicial opinion as to "no standing" but he was not entitled to make it my opinion or Robb's opinion without our individual consents.

Recognizing that if, in fact, Bork had changed Robb's thinking, I would be required, in truth to my own beliefs, to write a sole concurring opinion denying relief to Appellants Vander Jagt on the ground of "remedial discretion," I concluded to telephone Judge Robb to ascertain the true situation. When I did so, I discovered Judge Robb to be hospitalized with what I was advised was a serious cancer condition and that he was unavailable for a telephone conversation with me. I then learned, for the first time, that Judge Robb had taken senior status. Immediately, I instructed my law clerk to contact Judge Robb's senior law clerk and instruct him or her in my name to visit Judge Robb if possible, and acquaint Judge Robb generally with Judge Bork's submitted proposed majority opinion and ascertain his (Robb's) reaction thereto.

Several days later I received a call from another Judge of the D.C. Circuit Court of Appeals advising me that Judge Robb was upset by developments in the Vander Jagt case and instructing me, on Judge Robb's behalf, to immediately prepare for the two of us a majority opinion on the basis of "remedial discretion" and to advise Judge Bork to that effect. I was admonished to accomplish this task so that our final order could be issued before the end of the calendar year 1982.

I accomplished this task and the final order was signed by Robb and me on December 23, 1982, and the opinions were issued February 4, 1983, being delayed by the process of preparing a majority opinion and circulating it to Judges Robb and Bork. Judge Bork wrote anew his individual concurring opinion on "no standing" after receiving the majority opinion on "remedial discretion."

In sum, I now recall (a) Judge Bork's actions by way of changing his original position, unknown to Judge Robb and me; (b) Bork's delay in preparing his so-called majority opinion until late in 1982; (c) Bork's failure to dispatch his opinion with some explanatory cover letter; (d) my absence as the junior Judge in Kentucky; (3) Judge Robb's illness from cancer, from which he subsequently died; (f) the creation of a "time of the essence" situation. These considerations give me grave reason to suspect that perhaps Judge Bork intended to have his narrow "no standing" view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion.

As a man who has been honored by appointment to and service as a Judge of the United States, I do not believe one who would resort to the actions toward his own colleagues and the majesty of the law as did Judge Bork in this instance, possesses those qualities of character, forthrightness and truthfulness necessary for those who would grace our highest Court.

Senator, you and your Committee may give this such weight as you wish, but I shall be forever convinced that there was a design and plan in Judge Bork's actions and activities. I apologize for the great length of this communication, but I could not conceive of any less lengthy way to give you the entire story for your consideration.

With highest personal respect and with every good wish, I remain,

Sincerely,

James F. Gordon
Senior United States
District Judge

JFG:gel

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D C 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 1, 1982

Attached is the letter I sent to Judge Gordon.

Falmouth, Mass.
October 5, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

My post-conference memorandum in this case said:

> At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

Now I am surprised to have Judge Bork's proposed opinion holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the result I regret that I cannot concur in the opinion. I would apply the Riegle theory to this case. The Valley Forge case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the Riegle theory in a congressional plaintiff context.

I think it can be argued here that in many ways plaintiffs have suffered injury. Although the proposed opinion says their votes have not been nullified, it is certainly true that the power or weight of their votes has been substantially diminished. I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.

If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork RHB

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in Riegle. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

United States District Court
FOR THE
Western District of Kentucky
Owensboro, Kentucky 42302

Chambers of
James F. Gordon
Judge

December 17, 1982

The Honorable Robert H. Bork
Judge, U. S. Court of Appeals
District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Washington, D. C. 20001

RE: Vander Jagt v. Speaker O'Neill, No. 81-2150

Dear Judge Bork:

I have not as yet received your most recent rewrite in the above-styled matter; however, in the interest of time, I enclose herewith two copies of the final draft of my opinion.

The final draft attached hereto contains some changes on pages 3 and 8 of the opinion and on Footnote pages 9, 10, and 11, plus the further fact I have rewritten the same so that it becomes now only my opinion as opposed to mine and Judge Robb's opinion.

Inasmuch as you are now, in Judge Robb's absence, the presiding Judge, I assume that you will see to the proper processing of my opinion through the Clerk's office there, and that there is nothing further for me to do. I would however appreciate it if you would have your law clerk give us a ring here when you have received this.

May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season.

Sincerely,

James F. Gordon

JAMES F. GORDON

JFG/ddt

Attachment

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

September 24, 1982

The Honorable James F. Gordon
United States District Court
Western District of Kentucky
P.O. Box 435
Federal Building
Owensboro, Kentucky 42301

Re: No. 81-2150 -- *Guy Vander Jagt, et al.* v. *Thomas O'Neill, Jr.*

Dear Judge Gordon:

It occurs to me too late that I should have notified you in advance that I had changed the rationale in the *Vander Jagt* case to one of lack of standing.

After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in *Valley Forge*, on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate.

In any event, I regret not having apprised you of my thinking earlier in the process of writing.

Best wishes.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/hh

Senator THURMOND. Judge Bork, I understand it in your writings on antitrust, you have suggested a fairly lenient standard for horizontal mergers. Nevertheless, would you explain how, as a judge, you have supported the enforcement of the stricter prevailing standard of horizontal mergers?

Judge BORK. I have had, I think, Senator, only one merger case. It was by the Federal Trade Commission against a couple of makers of aircraft transparencies. The market share was fairly high. I cannot recall exactly what it was. I ruled for the Federal Trade Commission.

Senator THURMOND. Judge Bork, my time is almost up. I just have about 3 or 4 minutes. Judge Bork, some of our critics have accused you of taking a very broad view of the President's powers and a narrow view of the powers of the Congress. With that in mind, I would like you to comment on the memorandum you wrote to Attorney General Levi in 1976, in which you offered that some uses of the pocket veto were constitutionally suspect and should not be allowed or followed by President Ford.

Is this an example in which you are for a narrower view of Presidential power than some of your colleagues in the Ford administration and is it true that President Ford eventually issued a statement essentially adopting your position?

Judge BORK. That is all true, Senator. Senator Kennedy was the plaintiff in a case known as *Kennedy* v. *Sampson,* challenging—I think it was a pocket veto, wasn't it, Senator, and I was then Solicitor General. I chose not to appeal that case or try to get that case into the Supreme Court because I thought it was a terrible case and we would lose it.

I then communicated my decision on that to the Attorney General and executive branch. The White House knew about it. I cannot remember who I talked to. They began to use some form of an intermediate veto which said that something like this is a return veto but if it is not, it is a pocket veto, or vice versa, something like that. I got disturbed by that because, since I had not taken the other case up or tried to get it up, I did not think they were free to use it.

The Attorney General, Mr. Levi and I, discussed it, in which discussion I told him that if the administration insisted upon going ahead with those cases and took them to the Supreme Court, I would not participate. I would not sign the brief and I would not argue the case. We then, in my office, prepared a legal memorandum to the White House explaining that the pocket veto ought to be interpreted according to the purpose for which it was designed.

It was clearly designed to prevent a Congress from passing a law and leaving town so that the President had no opportunity to give a return veto. When the Congress leaves behind an agent to receive a return veto, it seems to me that purpose is satisfied and the pocket veto should not be used. That was a position I took inside the administration, over some opposition, but ultimately we persuaded the President to that position.

Senator THURMOND. Judge Bork, in a recent interview on June 10, 1987, you indicated that and I quote, "The commerce power of the federal government had been expanded well beyond probably what the ratifiers intended. I think it had to expand beyond that as this Nation grew and became more unified. But the change in the commerce clause is almost entirely a Supreme Court development." The question is, do you believe that this expansion by the Court was proper?

Judge BORK. Well, Senator, I have not been in that position. I really do not know. It was inevitable, let me put it that way. The nation needed a strong federal government with strong powers. For a time, justices of the Supreme Court objected to that. But the fact is, the appointment power means that sooner or later, the commerce clause was going to be interpreted in a way that met the needs of the Nation. That seems to me to be just the way this Nation grew. It seems to me an inevitable development.

Senator THURMOND. Judge Bork, during your confirmation hearing on your nomination to the second court in 1982, you testified as to the events surrounding the firing of Archibald Cox and assurances that you made to those involved in the investigation by the special prosecutor's office. Now, there are individuals who have expressed a different version regarding the assurances you made concerning the investigation. Would you please comment on this matter?

Judge BORK. Well, rather than go through the entire episode, I think they are focusing upon one meeting. After the firing, on Saturday, October 20th, we met either the next day on Sunday or the next day on Monday—I used to think it was Sunday because I remembered the Department of Justice was empty, but now I find out Monday was a holiday so maybe it was empty for that reason—in any event, Assistant Attorney General Henry Peterson and I met with Mr. Cox's deputies, Mr. Ruth and Locavara.

As I understand the difference in recollection, it is whether or not tapes were specifically mentioned at that meeting. It was my recollection they were. The others say not. But I think there is a common recollection, at least it is shared by a lot of people at that meeting, that I said they were to go forward as before and that if we were interfered with, we would all resign. That seems to me to include tapes, whether or not they were specifically mentioned, because I thought they had been.

Senator THURMOND. Judge Bork, I have one brief question and I will be through. It appears to me that much of the attack on you is based on selective citation and taking your statements out of context. Is there any particular area where this has occurred on which you would like to comment?

Judge BORK. Senator, I think there has been a lot of it. I think I will get to comment on it as we go through these hearings. I do not think I have time to discuss all of them right now but thank you for the opportunity.

Senator THURMOND. You can save it for later if you want to.

Judge BORK. Pardon me?

Senator THURMOND. Save it for later if you want to.

Judge BORK. All right. Thank you for the opportunity, but I think I will wait a little bit.

Senator THURMOND. Thank you very much, Judge, and that completes my questions. Mr. Chairman, thank you.

The CHAIRMAN. Thank you, Senator. I think maybe it might be appropriate here to take a short break. Before we do, let me tell you what I would like to try to finish tonight and if you would consider it, Judge. I would like to get three more of my colleagues in, Senator Kennedy, Senator Hatch, and Senator Metzenbaum.

Senator **Metzenbaum**. Senator Biden, I would prefer not to do that.

The **Chairman**. All right.

Senator **Metzenbaum**. I prefer to start in the morning.

The **Chairman**. Well, then, that is apparently what——

Senator **Metzenbaum**. Paul Lucas and I always agree.

The **Chairman**. I apologize. Is that agreeable with you, Judge?

Judge **Bork**. Yes, it is, Senator.

The **Chairman**. Good. You helped me out a lot there. What we will do is we will break until 5 and then we will come back and we will do at least two more rounds of questioning. The hearing is recessed until 5.

[Recess.]

The **Chairman**. The hearing will come to order. We left off with Senator Thurmond and now it is Senator Kennedy's opportunity to question. Senator Kennedy.

Senator **Kennedy**. Thank you very much, Mr. Chairman. Judge Bork, I wanted to pick up, for a moment, one aspect of the line of questioning of the Chairman. As I understand your discussion of the *Griswold* case, your view is that there is no right to privacy in the Constitution. It is up to the legislature. Doesn't that lead you to the view that you would uphold a statute requiring say, compulsory abortion, if a legislature enacted it by majority?

Let me just continue. Some of your strongest supporters have made an issue of the allegation that there may be compulsory abortion in the People's Republic of China. As I understand it, under your peculiar constitutional philosophy, you would be prepared to uphold compulsory abortion in America if some future legislature enacted it. We have just heard you say that the State of Connecticut had the right to pass a law prohibiting married couples from using birth control.

I think the real question is, Where do you draw the line? I think you have opened up a whole can of worms, quite frankly, here. What about a State statute that says families with more than two children cannot send their children to public schools? What about all sorts of other statutes that a legislature might enact with some theoretically-plausible rationale, such as the Connecticut statute, but which would obviously violate the people's most fundamental rights, including the right to privacy?

I believe, Mr. Bork, that in your world, the individuals have precious few rights to protect them against the majority and I think this is where the Bill of Rights comes in and what the Bill of Rights is all about, that there are some things in America which no majority can do to the minority or to the individuals. The provisions of the 14th amendment under section 1, include "nor shall any State deprive any person of life, liberty or property without the due process of law."

Isn't included in the concept of liberty, the right to privacy? In reading that term with the ninth amendment, which provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," I would be interested in your reaction or response because it seems to me that the issues of privacy have been carefully enshrined within the Constitution by court decisions over the period of the last 60 years.

They are rights which are enshrined in such a way and respected and valued so importantly that I would think Americans would have serious questions, I certainly do, about placing someone on the Supreme Court that is willing to find some kind of a rationale, or appears to find some rationale, not to respect it.

Judge BORK. Senator Kennedy, at the outset let me say this. I have the greatest respect for the Bill of Rights and I will enforce the Bill of Rights. I have enforced the Bill of Rights. What we were talking about here was a generalized, undefined right of privacy which is not in the Bill of Rights. Now, as I said in my opening statement, a judge has to apply the law and the law comes from the text, the history and the structure of the Constitution.

There are important aspects of privacy in the Bill of Rights. This Congress has increased privacy in many ways by statute. As a society, we value it, but as a judge, I do not think I can tell the American people they may not have a law that in no way conflicts with the written and historical Constitution. Now, you raise the question of——

Senator KENNEDY. I want you to complete your answer. What I was really springing from is your response to the chairman's questions with regard to the *Griswold*. We remember that the majority in that case found that the provisions in a State statute that restricted married couples from using contraception would be violative of their right to privacy. You've indicated that you took issue with the rationale.

I think you continued and said, well, perhaps someone can come up with a different rationale so that you might be able to reach a different decision. But in response, I think, to the chairman's question, you talked about the importance of the majority in the State legislatures. You did not find, at least at this time, that you were prepared to state a philosophy or legal justification for the overruling of that Connecticut statute. I believe, quite frankly, following that rationale, that you could lead yourself into the kinds of situations which I've posed here. If I am wrong, I would like to hear from you on that.

Judge BORK. Well, let me repeat about this created, generalized and undefined right of privacy in *Griswold*. Aside from the fact that the right was not derived by Justice Douglas, in any traditional mode of constitutional analysis, there is this. The right was not—we do not know what it is. We do not know what it covers. It can strike at random. For example the Supreme Court has not applied the right of privacy consistently and I think it is safe to predict that the Supreme Court will not.

For example, if it really is a right of sexual freedom in private, as some people have suggested, then *Bowers* v. *Hardwick*, which upheld a statute against sodomy as applied to homosexuals, is wrongly decided. Privacy to do what, Senator? You know, privacy to use cocaine in private? Privacy for businessmen to fix prices in a hotel room? We just do not know what it is.

Senator Kennedy. Well, there are some things that people would understand—they would feel that government intrusion, in terms of the married couple in the *Griswold* case, in terms of their use of contraceptives, did go across that line; and in the kind of examples that I have given you, it would seem to me that that would be equally clear, that a State statute that required compulsory abortion would certainly violate what I think most Americans would feel would be the right to privacy. And I believe as well that, once you have the State dictating the size of families, it would do so as well.

What I am interested in is how you reach that conclusion, if that would be the conclusion, under your rationale, that if a State has got a majority and it has got a basis for passing that statute, then it is not up to Judge Bork to look behind that.

Judge Bork. It is not up to Judge Bork to look behind that unless he has got law to apply. I was going to say, furthermore, that I do not think—I have never found it terribly useful, in testing constitutional theories, to use examples that we know the American people will never enact. The founders of this nation banked a good deal upon the good sense of the people, as well as upon the courts.

Senator Kennedy. I would just say here, Judge Bork, that one State did enact such a law with regard to sterilization. One State did with regards to sterilization and I think that that reaches the same kind of abhorrence, in terms of what I would imagine most Americans, and certainly the Court did, would find abhorrent. I do not think that our Founding Fathers might have imagined that as well. But I think you have made the point. I would be glad to give you further time on it.

Judge Bork. Well, if you want to talk about *Skinner* v. *Oklahoma*—

Senator Kennedy. I was basically interested, rather than getting into the cases, just to get at the rationale, the reasoning, the way that you do move to reach a decision. Let me go to the issues of equality.

I think most Americans are proud that our Supreme Court, for its leadership in the past 30 years in securing the promise of equal justice under law for all Americans, for striking down the Jim Crow laws, vindicating the right to vote, and prohibiting discrimination against women.

The Court has helped to bring to an end the reign of prejudice and, I think, create a better America. You have written a great deal, over the years, about legislation and court decisions designed to ensure equal justice under law and I would like to examine some of these views.

Perhaps the most significant moral test of the country in this century occurred in the struggle to end race discrimination. I appreciate your support for the school desegregation decision in 1954, but I am troubled because I believe that your clock on civil rights seems to have stopped in 1954. You opposed the passage of the Civil Rights Act of 1964, which prohibited discrimination in public accommodations and employment.

The terrible burden of segregation in that period was described by Attorney General Robert Kennedy, in his testimony before this committee in support of the Civil Rights Act of 1963, I just quote very briefly, "Consider also the enumerable difficulties that face a Negro just travelling from State to State in our country, something the rest of us have taken for granted. He makes a reservation in advance. They may not be honored. If he seeks accommodations along the way, he's likely to be rejected time after time until, just to obtain lodging and food, he must detour widely from his route, and if he does find accommodations available to him, they are likely to be inferior."

That was the reality in America in 1963. That was the evil that the Civil Rights Act was intended to prohibit, but, Mr. Bork, you did not just criticize, you harshly criticized, the public accommodations provisions of the Civil Rights Act of 1964 in your 1963 "New Republic" article, printed rather interestingly in August of 1963 at the time of Dr. King's march to Washington, where he stirred the nation.

In your "New Republic" article, you referred to the principle underlying those provisions as "a principle of unsurpassed ugliness." And then in your article of March 1, 1964, in the Chicago Tribune, you also expressed your opposition to the public accommodations provision and to the title of the proposed Civil Right Act that would end discrimination in employment as well. Isn't that correct?

Judge BORK. I do not recall about the employment, Senator. I wonder if I might have a copy of those two pieces?

Senator KENNEDY. Sure. I will ask the staff to get those. Do you remember, or you do not remember, the use of words "a principle of unsurpassed ugliness."

Judge BORK. I remember that. I also remember, Senator, that I said that racial segregation, by law, was also of unsurpassed ugliness. Well, let me back up and tell you how this article came about and why——

Senator KENNEDY. Let me just frame the question, if those quotes are correct, about when you first publicly changed your position on the Civil Rights Act. That would be the question. Given the two articles which you offered in 1963 and in 1964, when did you first publicly change your position on the Civil Rights Act?

Judge BORK. I do not know if I did it in the classroom or not. I know that the first time——

Senator KENNEDY. Publicly.

Judge BORK. Well, publicly.

Senator KENNEDY. Publicly, you have written two important declarations. I think we are entitled to know if you were prepared to make those comments in public. I would be interested in when you made some public comment or statement. I think our friend from Pennsylvania indicated you had made many speeches all during this period of time and I would be interested in when you might be able to indicate to us that you changed your position on the Civil Rights Act.

Judge BORK. Well, I think it is implicit in some of the things that I wrote earlier, but I first said it, I think, where it was written down at least, in a confirmation hearing in 1973. But, one has to know the evolution of my thinking about political matters to understand where that article came from and why I no longer agree with it and have not agreed with it for a long time.

One has also to know that as Solicitor General, I enforced the rights of racial minorities, in court, often further than the Supreme Court was willing to go. You should also know, Senator, that on my present court, I have frequently voted for black plaintiffs in various kinds of civil rights or voting rights cases.

Senator KENNEDY. Just on this point—as Solicitor General, you are really representing your client, are you not? Are you not representing the United States in those cases?

Judge BORK. I am indeed. Indeed, I did not have to go that far if I did not want to. I think it is important to know how this came about. I had come to Yale as an avid free market type. I had gotten into classical economics, which teaches that by and large, it is much better to let people arrange their own affairs and their own transactions than to try to govern them by law. I made, what I now regard as a not uncommon intellectual mistake of trying to apply those principles to social interactions. I do not think it works there because you have not got a marketplace to discipline people.

But, it is not uncommon for free market economists to display libertarian principles. This article came about because I was arguing with Alex Bickel about this subject. I, at that time, thought that any coercion of the individual by government, had to be justified by a principle that did not lead government into all kinds of coercion that should not be there and I could not see a general philosophical principle here that justified this coercion.

I also could not see a general philosophical principle that would justify segregation by law. I was leaning on the side of individual freedom. I think that was wrong because I do not think any general principle is available. I now take what I would call—at least what Bickel described as—the Edmund Burke approach, which is, you look at each measure—this is a political matter, not a judicial matter—you look at each measure and ask whether it will do more good than harm.

Had I looked at the civil rights proposals in that way, I would have, as I later came to, recognize that they do much more good. In fact, they make everybody much happier and they help bring the nation together in a way that otherwise would not have occurred.

Senator KENNEDY. Well, the point, I believe, is a simple one. At a time when men and women in the South and North, Republicans and Democrats, recognized that race discrimination had to be outlawed in America, you strongly and publicly opposed civil rights legislation, calling its underlying principle one of "unsurpassed ugliness." It was not until 10 years later, when you were nominated to be Solicitor General, that you publicly repudiated those views.

Judge BORK. Senator, I do not usually keep issuing my new opinions every time I change my mind. I just do not. If I re-visit the subject, I re-visit it, but I do not keep issuing looseleaf services about my latest state of mind.

Senator KENNEDY. The point that I would make here is that you felt it was sufficiently important to publish your views at a time when we were having a national debate in the early part of the 1960's on civil rights legislation. We were having a national debate in 1968 on the whole issue of fair housing. We were having a national debate in 1972 on other civil rights legislation and you did not feel, even though these were matters that were right before the

American people and the Congress of the United States, sufficiently aroused in terms of your altered or changed views, that you were prepared to publish those views. I would just say I wish you had been as quick to publicize your change of heart as you were to broadcast your opposition.

Judge BORK. Well, the broadcasting of the opposition took place entirely because I got into an argument with Alex Bickel. He wrote frequently for the "New Republic" and he asked me to write it up. I must say that when he saw it, he said, your article is a version of liberal thought. Let me say one other thing. The concern about the rights of liberty, as well as equality, was by no means an unusual one then. When Congress came to face the fair housing laws, Congress began to make exceptions for Mrs. Murphy's boardinghouse because they were worried about coercing the individual in that way.

A few years after I wrote this article, Justice Harlan dissented in a lunch counter sit-in case, talking about the freedom of the individual and the rights of equality as being competing constitutional considerations. I think I was wrong there. I do not think I was in bad company, with Justice Harlan and this Congress, but those are serious matters and it is no small thing to coerce generally.

Now, I was afraid that the principle of this legislation could lead to coercion of association everywhere. I now realize that we legislate partially and never legislate on a general principle so that there is no danger that this kind of thing would expand into other areas of coercion.

Senator KENNEDY. Were you not worried about the coercion that was happening to the blacks in this country because of lack of opportunity for equal employment? Were you not equally concerned about that type of coercion, Judge Bork?

Judge BORK. You mean private coercion?

Senator KENNEDY. Yes.

Judge BORK. Sure.

Senator KENNEDY. Public, as well as governmental activities.

Judge BORK. Well, governmental activity, I said in this article, was wrong. If you segregate by race, I said that was a principle of unsurpassed ugliness, too, and you will read my writings from beginning to end and you will never find a mark of racial of ethnic hostility and you will find consistent support for some——

Senator KENNEDY. I was talking about the coercion that comes in public accommodations, at lunch counters, in hotels, in those places which I illustrated before. I wish, quite frankly, you had demonstrated as much concern about the coercion that was happening to those black citizens that were being coerced as you apparently were concerned about others.

Let me go to the issue of poll taxes. The right to vote is the cornerstone of a free society. For decades poll taxes were used to keep poor Americans, often of racial minorities, from exercising the franchise. In *Harper* v. *Virginia Board of Elections,* which was decided in 1966, the Supreme Court struck down the poll tax because it deprived poor Americans of equal protection of the laws by barring them from exercising their fundamental right to vote.

In its majority opinion the court stated: "Wealth or fee paying has, in our view, no relation to voting qualifications. The right to vote is too precious, too fundamental to be so burdened or conditioned."

Judge Bork, is it not true that in your confirmation hearings to be Solicitor General in 1973 you testified that you thought that *Harper,* and I quote, "as an equal protection case seemed to be wrongly decided."

You were asked whether as far as the welfare of the nation was concerned the *Harper* case was correctly decided. Am I correct that you answered, "I do not really know about that. As I recall it was a very small poll tax. It was not discriminatory and I doubt it had much impact on the welfare of the nation one way or the other."

And then you were asked about the constitutional issue, and you responded, "I think that is a question of degree. It depends on the size of the poll tax."

Do you remember? Is that accurate?

Judge **Bork**. As I recall it, Senator, yes.

Senator **Kennedy**. Now, am I correct that in 1985, in your forward to The Constitution and Contemporary Theory, you again suggested the Supreme Court had been wrong to strike down the poll tax in the *Harper* case?

Judge **Bork**. Sir, I am willing to discuss that case, fully, Senator.

Senator **Kennedy**. I am just wondering if you have changed your view that the Supreme Court was wrong in the *Harper* case to hold that poll taxes are unconstitutional?

Judge **Bork**. I think it was, and I will tell you why, and I have no desire to bring poll taxes back into existence. I do not like them myself. But if that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just a $1.50 poll tax.

This Congress had just recently drafted and proposed to the States and had adopted an anti-poll tax amendment to the Constitution which this Congress carefully limited to federal elections so as to leave State poll taxes in place if States chose to have them. That seemed to me a little odd, therefore, that the Court would come along and mop up something that Congress did not bother to amend the Constitution to accomplish. Not did not bother; deliberately did not.

The poll tax was familiar in American history and nobody ever thought it was unconstitutional unless it was racially discriminatory. Now, in *Harper* itself Justice Black—who was hardly a man who was insensitive to voting rights—Justice Harlan and Justice Stewart all dissented from the majority holding. Justice Black said the Court was using the old natural law due process formula to write into the Constitution notions of what it thinks is good government policy.

Harper overruled a prior case in which the majority had upheld the poll tax and in that case Justices Black, Frankfurter, Jackson and others upheld the poll tax. Archibald Cox has said, and I quote, "the opinion seems almost perversely to repudiate every conventional guide to legal judgment," although he liked the result. I like the result too. I just do not see the legal judgment there.

Alexander Bickel made much the same criticism. It is a decision that is hard to square with out constitutional history.

Senator KENNEDY. Well, it was not only on the basis of race. It was also on the question of discrimination against the poor. I remember very well, because I offered that amendment on the Voting Rights Act. I suppose the question is, how high a price should a poor person have to be able to pay to exercise the fundamental right to vote. You and I may not have to worry about where each dollar goes but there are a lot of Americans who do. To suggest that a poll tax, if it is small enough, does not deprive a poor person of a fundamental aspect of citizenship, well that reminds me of Anatole France's famous remark that "the law in its majestic equality forbids the rich as well as the poor to sleep under bridges and to beg in the streets and to steal bread."

The oath every judge and justice takes requires them to do equal right to the poor as well as to the rich. I just think we have to be sensitive to the realities, not just legal technicalities.

Let me go to one man, one vote. In years past, one of the great obstacles to real democratic representation in the country occurred when State legislatures apportioned themselves in ways that systematically reduced the voting strength of particular constituencies, drawing election districts with different size populations to enable some groups to maintain more of their share of power at the expense of others.

Judge Bork, in the *Reynolds* v. *Sims* case back in 1964, the Supreme Court held that the Constitution requires election districts in States and localities to be apportioned in a way that meets the one man, one vote standard so that each legislative district contains roughly equal population.

Is it not true that in 1968 you wrote in Fortune Magazine, and I quote: "On no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed."

Judge BORK. I think, Senator, I not only wrote that, I still think I was right, and I will discuss it with you.

For one, we might start off by observing that the Senate of the United States would be an unconstitutional body if that rationale of one man, one vote were applied here.

Senator KENNEDY. Well, that is entirely different, as you are too good a professor not to understand. There was a different requirement agreed to at the time the Constitution was adopted, and that was the New Jersey Plan and that was accepted by the Founding Fathers, and that is a different kind of situation and you know that as well.

Judge BORK. That is entirely true. On the other hand, the reason for allowing certain units to have equal votes, even though their populations are not equal, applies as well in a State legislature or State senate as it does here. But passing that, it should be said that I agreed with *Baker* v. *Carr,* which was the case which first held—over the dissent of Justices Frankfurter and Harlan—which first held that the courts could get into reapportionment. It was a subject matter they could take up. I agreed with that because the legislature in that case was so mal-apportioned that a majority of the voters had no opportunity to get a new apportionment plan.

Now, it should be said that my position was the position that Justice Stewart took in *Lucas* v. *44th General Assembly* in dissent. There you had a reapportionment plan with a State senate based on counties, I believe, which had been adopted by a referendum with a majority vote in every county in the State.

Justice Stewart wrote, and I explicitly agree with it, that a State should be free to apportion as it sees fit, so long as the apportionment plan has rationality and so long as a majority has a way to change the apportionment whenever it wants to. That seems to be my point, and I must say it is a point that has been agreed to by a great number of law professors.

There is nothing in our constitutional history that suggests one man, one vote is the only proper way of apportioning. There is nothing in our political theory. Indeed, the executive veto, the committee system, districting, all of those things are really inconsistent with one man, one vote.

Senator **Kennedy**. Well, I must say that you have indicated that position that you have expressed here on many different occasions. You said in 1973 before the Congress one man, one vote "was too much of a straightjacket" and that you, quote, "did not think that there is a theoretical basis for it." And then you indicated on June 10th of this year, you said in an interview, "well, I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the equal protection clause."

I think the people of this country, Judge Bork, accept the fundamental principle of one man, one vote even though they are not burdened with a law school education.

Judge **Bork**. Well, Senator, if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it does not come out of anything in the Constitution and if the people of the country want it, they can adopt that apportionment any time they want to.

Senator **Kennedy**. Judge Bork, I do not think you have to be a law professor to know a little about simple justice. After hearing you just on these issues—we will get into others during the course of our hearing—the bottom line is clear: When it counted you opposed the key provisions of the Civil Rights Act banning race discrimination in employment, in public accommodation, and you did not publicly repudiate your opposition for some 10 years.

You criticized the Supreme Court's decision banning the enforcement of racially restricted covenants. In a response to earlier questions you said you could not find a rationale about how you would be able to continue banning those——

Judge **Bork**. Senator, may I correct that? I said that decision stands. Nobody is going to overturn it, but it is fortunate the rationale upon which it was decided was not extended to other things because it would have made the courts the ultimate legislature on all private relationships in our society. I think a vast majority of professors who have examined that have agreed.

Senator **Kennedy**. I did not hear this afternoon the rationale about how those racially restricted covenants could be struck down.

Judge **Bork**. I argued against racially restricted contracts in *Runyon* v. *McCrary* under Section 1981 and won the case. They can be struck down that way. Congress has struck them down, as I understand it, in the Fair Housing Law as well, which is fine, is good.

Senator KENNEDY. But you disagreed with the Supreme Court decision striking down the poll tax which prevented poor people from exercising their fundamental right to vote; and you also opposed the Supreme Court decision upholding the one man, one vote principle which requires that every citizen's vote be counted equally. With all your ability, I just wish you had devoted even a little of your talent to advancing equal rights rather than criticizing so many of the decisions protecting rights and liberties.

Lawyers can always make technical points, but a justice ought to be fair.

Judge BORK. Senator Kennedy, I do not think your characterization of one man, one vote as a civil liberties case is correct. In fact, I think it is the opposite. But we can discuss that at greater length.

The CHAIRMAN. If you would like to go on, because the Senator has more time, also.

Judge BORK. He has more time? I thought he was summing up.

The CHAIRMAN. I think he was. I am not suggesting he should go on, which he can, because his time is not up.

My point is, anytime you feel you want to expand on an answer, you are not bound by the time, so you just go on any time you wish to expand on an answer. That is my point.

Senator LEAHY. Mr. Chairman, I might note just on that last one, just as Judge Bork left it, I, for one would find it very helpful to hear an expansion on his last sentence.

Judge BORK. On one man, one vote, Senator?

The CHAIRMAN. Whatever you were going to say. The whole point is, Judge, any time you want to say anything, just go ahead.

Senator LEAHY. I wish you would. I understood you to say you did not see it as a civil liberties case but quite the opposite and I would just be interested to hear the explanation.

Judge BORK. Well, for this reason Senator, let us talk about a State like Colorado, all of whose—not all of—the majority of whose citizens in every county want a State senate structured like the federal Senate. Why is it an advancement of civil liberties to say they cannot have it. I think it cuts into the liberties of the voters who want to have a senate structured in that way. But more fundamentally, you cannot apply the principle of one man, one vote across the board unless you think that we could do away with the committee systems, we could do away with the executive veto, we could do away with districting instead of at-large elections, and so forth and so on.

These points are all made with great precision in advance of the Court adopting the point in Dean Phil C. Neils article in the Supreme Court Review that came out just about a year before the *Reynolds* case, I guess, and was made at great length. Nobody doubts that an apportionment which is discriminatory can be struck down. Nobody doubts that an apportionment which a majority cannot change should be struck down. The only question is whether this rigid formula is good or not.

And let me tell you one other thing, Senator. For my sins I was approached by a three-judge district court in Connecticut and said they had just struck down the plan put in by the legislature and would I serve as a special master to redistrict Connecticut. I said, Judge Blumenfeld, I have just written that one man, one vote is a fiasco—and that was my word, I am afraid—but I will do it. I will follow the rules if you want me to do it that way, despite the fact that I have written that, and he said, yes.

So I then went out and got all of the census tracks and began to try to remake Connecticut. Well, I was not too well received up in Hartford because when I went into the legislatures they were terrified it was a Yale professor with a beard that they had never heard of before. I remember they looked at a map on the wall and said somewhat caustically, that is Connecticut, professor. And I said, for now. [Laughter.]

But I did it. I did it on a one man, one vote basis and within 1 percent deviation from district to district, which means you have got to cut town lines and carve communities up in the strangest ways. And I did it blind, just on the numbers without any understanding of the political impact and I first understood the political impact when I went up to testify at the hearing. I went to a restaurant without being told it was the Democratic parties hangout. I was sitting there eating when a man I did not know came up and said, that is a wonderful plan, professor; you are a good man; my name is John Bailey, Democratic national committeeman. He was chairman of the Democratic national committee.

Well, the court accepted my plan and the Republicans appealed. But I know from that experience just how artificial one man, one vote leads you to be in cutting up communities and natural groups and so forth. A little more leeway in the apportionment rules, which—as a matter of fact in that case the Court came to allow more leeway so that it is not one man, one vote in state elections anymore. And I think that was a good relaxation.

Senator KENNEDY. Mr. Chairman, I do not know how much time I have.

The CHAIRMAN. Senator, you had 5 minutes remaining.

Senator KENNEDY. Just one final area. On the issue of sex discrimination, Judge Bork, as you know, the equal protection clause of the 14th amendment prohibits a state from denying any person within its jurisdiction the equal protection of the laws. You said this afternoon that your statement that the equal protection clause does not apply to women came in your Indiana Law Journal article.

Judge BORK. Do you have a page citation there, Senator?

Senator KENNEDY. Excuse me?

Judge BORK. Do you have a page citation?

Senator KENNEDY. Which? Of the Indiana Law Journal?

Judge BORK. Yes.

Senator KENNEDY. Page 17. I am glad to move along just in terms of the concept. I am not going to stop here. I want to get to the broader question in terms of the test, so I will go beyond the—I am not looking for the quote here, just to mention that as the Indiana Journal.

Judge BORK. I was just trying to find that statement.

Senator KENNEDY. You had said that cases of racial discrimination aside, it is always a mistake for the Court to try and construct substantive individual rights under the due process clause—or the equal protection clause.

If I could just go on, there is something else I am driving at.

Is it not true that in an interview with United States Information Agency in June of this year, 10 years after the Court applied a rigorous standard test to sex discrimination, you said, and I quote, "I do think the equal protection clause probably should have been kept to things like race and ethnicity."

This is after the Supreme Court changed its basic test. It is clear from your public comments as recently as 3 months ago that you disapprove of the Supreme Court's recognition in the past 10 years that laws which discriminate on the basis of sex must be subject to heightened scrutiny under the 14th amendment. Because under the rational basis test, the Supreme Court upholds a classification if it is rationally related to any government interest. That is a very lenient standard used by the courts in judging routine economic regulations that treat different persons and businesses differently.

That distinction was mentioned by the Chairman. In 1976, the Supreme Court rejected the rational basis test and applied a stricter standard for sex discrimination. And yet, in June of this year, you said that decision trivialized the Constitution. In this day and age men and women stand equal before the law. Women are first-class citizens, Mr. Bork, and your views would take us back to the days when women were second-class citizens and the Supreme Court winked at discrimination and denied equal rights for women.

Judge Bork. Well, let me talk about that, Senator. In looking at the 14th amendment, race is the paradigm case. Race is the core of the amendment. That is what the post-Civil War amendments were basically aimed at. They wanted to help and prevent discrimination against the newly freed slaves. And of course, race and ethnicity—that is the way the amendment was applied for a long time. It was applied to Chinese Americans in *Yick Wo* v. *Hopkins.*

At least for the last 90 years, roughly, the Court has also been doing two things. It has been using a reasonable basis test, but it has also engaged in the activity you described, by saying this group is in under the 14th amendment, that group is out.

Then they would develop multi-tier levels of scrutiny. That is, racial discrimination or distinction required strict scrutiny by the courts and a compelling governmental interest. Gender began to get intermediate scrutiny or something of that sort. I think that approach is highly artificial and not sufficient. I think you do not have to say this group is in, that group is out. You say that all persons are in, as the amendment does, and then you apply a reasonable basis test.

The reasonable basis test got a bad name because it simply is not applied with any degree of severity at all in the case of economic cases, and maybe it should not be. Maybe those are interest group politics cases. But if you look at—ask yourself whether a reasonable basis for distinction exists, the answer will be in a race case, almost never; in a gender case you will get something that resembles intermediate scrutiny, but you do not have to go through putting groups in and out and you do not have to have different tiers of scrutiny.

And indeed, I think Justice Stevens made a similar point, or maybe the same point, in a recent opinion of his. It gives women—women were not thought of as protected in particular when the 14th amendment was applied. There was a lot of what we now call discrimination against women which seemed to them a very natural way for civilization to be organized. But as the culture changes and as the position of women in society changes, those distinctions which seemed reasonable now seem outmoded stereotypes and they seem unreasonable and they get struck down.

That is the way a reasonable basis test should be applied.

Senator KENNEDY. Well, the point as I see it, Judge Bork, is that talking about the rational basis test, it was the test the Supreme Court used for a 100 years to deny equality for women. Some years ago the Court altered that to a rigorous standard for sex discrimination. As I understand the rational basis test, it is the same test which is used in terms of economic regulations and pollution ordinances. You have restated earlier in your response to Chairman Biden that this is still your test whereas the Court itself has moved to a much more rigorous standard to sex discrimination.

Judge BORK. I do not think in the case of gender, Senator, that my test—or what you call my test, which is a test the Court has been applying in one way or another for 90 years—would come out that much different than an intermediate scrutiny standard.

Senator KENNEDY. Well, it was still the test that was used when women were discriminated against back in 1896. That was the basis and I think you get a very substantial body of legal opinion, plus the Justices, that believe that the test has been altered and changed to a rigorous standard test and that does provide a great deal more protection to women.

What I hear you saying here now is that the test that was used about 90 years ago and which was the basis for discrimination against women is the standard that you would use. You might be able to elaborate on it, but that is, at least, what I am hearing.

Judge BORK. I do not know that it was the basis for discrimination against women. I think that society saw all kinds of distinctions, legal distinctions between men and women as entirely reasonable and rational. This society no longer sees them that way, and that is fine.

Senator KENNEDY. Well, I just will take 30 more seconds, Mr. Chairman. On numerous occasions over the last 16 years, Mr. Bork, you have suggested the equal protection clause of the Constitution does not ban discrimination against women. Now you are suggesting the Supreme Court should apply the same lax standard to sex discrimination cases that it applies to challenges to air pollution ordinances or economic regulations.

You have also disapproved the equal rights amendment, and finally you also suggested in a 1985 opinion that the Civil Rights Act offers little if any protection against any one of the ugliest forms of gender discrimination, individual sexual harassment on the job. We have made great progress in the country in the last 20 years in giving women equal status under law and I think the controversy has largely been settled. But you would have the Supreme Court, evidently, roll back the clock and reopen old wounds.

Judge BORK. Senator, I think I must reply to that. I have never said anything about the ERA except that it seemed to me odd to put all of the decisions about how women may be treated—what they may do and what they may not do and so forth—into the hands of judges without any guidelines from a legislative history or anything else. Had the ERA said, Congress may make such laws as it sees fit to remove gender inequality, I would have no objection.

My objection to ERA—which I never campaigned against, I just dropped a footnote someplace—was essentially the same as my objection which I have voiced to this administration's balanced budget amendment. In one case you put all the relationships between the sexes in the hands of judges where it should be in the hands of legislatures, except when it violates the Constitution. In the other case, you are going to put this government's finances in the hands of judges, or the budget in the hands of judges.

It does not seem to me that judges are fit for either of those tasks without a lot more guidance than either amendment gives them.

Senator KENNEDY. The point is, in a May 1974 Mayflower Hotel speech, you indicated that the fact that the adoption of ERA would ratify and forward a dangerous constitutional revolution is the one feature of it that is rarely if ever criticized.

Judge BORK. That is right.

Senator KENNEDY. I would ask that the full speech be put in the record.

[Speech follows:]

MAYFLOWER HOTEL SPEECH

The title given this talk -- "The Consequences of Judicial Imperialism" -- may suggest that part of what ought to be the argument is tucked neatly into the premise, that is the proposition that the judiciary have exceeded the bounds of their legitimate authority. Though the title was assigned, it is only fair to say I did not protest.

It seems to me that in many areas, not merely that of the role of the judiciary, we are more in need of constitutional thinking than at any time since the framing of the Constitution and the period before, during, and after the Civil War. Our society is changing drastically, and the changes to be observed in the judiciary are merely one of the alterations that require thinking about.

Walter Bagehot summed it up best when he said,

> The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created.

One of the greatest of the creations of the American nation is a federal judiciary empowered to set aside the acts of democratic majorities in the name of the enduring values named in the Constitution. It is unique, it has undoubtedly contributed greatly to our freedom and to our sense of nationhood, our sense that America is founded upon the idea of an untouchable core of human freedom. But judicial power is not invariably beneficent. I invite you to compare two reflections by one of America's greatest legal scholars before and after judicial activism had reached its present proportions.

In 1962 Alexander M. Bickel was able to write a book about the federal judiciary entitled, *The Least Dangerous Branch*, in which he quoted Hamilton's words that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution" because it has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."

Not long before his tragically early death in 1974, Bickel wrote in another vein. In discussing civil disobedience in America, an attitude toward law and rules that had its culmination in Watergate, he said:

> The assault upon the legal order by moral imperatives wasn't only or perhaps even most effectively an assault from the outside. It came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. . . . More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities?

That judiciary had, for Alex Bickel, become a dangerous branch because it increasingly violated a fundamental value of our society. "It is the premise of our legal order," he wrote, "that its own complicated arrangements, although subject to evolutionary change, are more important than any momentary objective."

It is that lesson, that comprehension of this great institution, that we are in danger of losing, and with it much else central to our civilization.

In the time available, I can but briefly outline the dangerous consequences of the era of judicial activism that began with the Warren Court and has not ended yet.

If pressed to prove that courts have become activist I would respond in two ways. First, they have expanded the scope of their authority dramatically in the past twenty years. Activism has appeared before in our history, but it must be admitted that courts legislate more freely and more frequently now, and they have displayed an unprecedented willingness to take over major executive functions. If it has not become routine, it has certainly become common for courts to enter into the detailed administration of prisons, mental homes, police and fire departments, and to review administrative agency decisions with a severity and particularity that replaces agency discretion with judicial discretion.

An alternative measure of judicial activism is the degree to which courts have freed themselves from any meaning to be found in the Constitution by conventional modes of legal interpretation, the degree to which meaning is assigned the Constitution which is not to be found in its text, history, and structure and is often contradicted by text, history, or structure. Hardly anyone denies that is an accurate description of what occurs.

Instead the scholarly debate swirls, or perhaps stagnates, around the issue of whether judicial rewriting of the Constitution is justified. In fact, the debate is less about that than the question of which justification for rewriting the Constitution is better. One popular argument is that courts must cure the failures of democracy by protecting groups identified as "discrete and insular minorities," a notion suggested by footnote four of the Carolene Products decision. I am thinking of putting errata sheets in every copy of volume 304 of the United States Reports stating that footnote four was a typographical error, thus wiping out an entire jurisprudential industry and bringing two dozen academic careers to an abrupt conclusion.

The difficulty with the argument that courts should undertake to repair the defects of democratic processes is that the demonstration of a defect usually consists in pointing to a law that the scholar in question would have vetoed had he been the governor. The process is not really shown to be defective; the result is simply disliked.

The other approach is that of moral philosophy. The law schools are awash with social contractarians, utilitarians, linguistic analysts, and jurisprudes of every persuasion. It has gotten so you can't swing a cat in the faculty lounge without damaging some stern young philosopher though there may be room for argument about the social utility of that. Among the more thoughtful attempts to justify a judiciary that departs from the fair meaning of the Constitution is that of Harry Wellington, the dean of the Yale Law School, a man whom I have no desire to hit with a cat for many reasons, some of them not connected with self-interest. He contends that constitutional courts may legitimately enforce against legislatures the conventional morality of our society. The conventional morality is not the judges' morality but ours, the society's. Courts, he believes, are the proper agency for the imposition of principles derived from morality because, being isolated from interest group politics, they are institutionally better equipped than legislatures, to discern conventional morality. He states, "the way in which one learns about the conventional morality of a society is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the method of philosophy."

Among the many reasons for dubiety about this approach is that there does not appear to be a single morality. The morality of complex societies tends not to be monolithic and to be filled with inconsistencies. The method of philosophy, which Wellington prescribes, and which is the method advocated by most friends of an activist judiciary, is a prescription for discerning not the morality of the society at large, but, at least, the morality of the upper middle class and, at most, probably, because of the materials from which it will be drawn, primarily the morality of the intellectual-academic segment of that class. The morality of other segments of the community is likely to be largely unpublished, inarticulate, and phrased in ways intellectuals dislike. In any event, the notion that the generality of judges have the time or inclination for rumination and philosophical analysis is at odds with reality. If that is what we want, and I don't, we will have to choose our judges in different ways and drastically reduce their workloads.

These considerations are sufficient, I think, to show that there is no philosophical rudder for judges and that once they depart from the conventional legal modes of constitutional interpretation they are not merely at sea but adrift. That is the fate of activist courts who abandon the confining safeguards of law in order to achieve laudable momentary objectives.

The consequences of judicial activism seem to me damaging in three areas: the effects upon law, upon society, and upon our political arrangements.

The implications for law are fairly obvious. It will display, in greater or less degree, the following characteristics: law will be political, it will display strong signs of [illegible] incoherence, it will manage affairs increasingly incompetently, and much of it will become trivialized.

The matters with which constitutional law deals are of intense political interest. They are made subject to law and courts precisely to remove them from politics. But that requires other rules to bind the judge. Courts who have moved away from conventional legal materials have no such rules and can only decide politically. It is, moreover, an unsatisfactory form of politics, one hidden from public view, because the inhibitions of the traditional judicial process remain in place so that interest groups have little or no access to the process and no power to censure those responsible for the outcome. As legislatures, in other words, courts are inaccessible and unresponsive.

The body of law produced by a political court will be intellectually incoherent because individual judges will have different hierarchies of political values. I remember a poignant evening when a young, highly philosophical professor from another school came to Yale to talk about his study of the Supreme Court. He had indentified a long list of values that seemed important in the Court's opinions -- equality, freedom, education, leisure, and so on. He had worked his way through the cases to find the philosophical stance of the Court, and he diagrammed the results for us on the blackboard. Unfortunately, what the diagram showed was that value A was preferred to B, B to C, C to D, but D was ranked higher than A. He said he could not believe it and was going back to the drawing board to see what he had missed. What he had missed is that political groups do not produce consistent votes.

Incoherent law is virtually a denial of the idea of law. It works upon litigants, fails to give fair warning, and educates us to see law as essentially manipulative and cynical. At Yale, for reasons we cannot remember, we teach constitutional law in the first semester of the first year, and, try as one will to counteract its baleful influence, the contents of the casebook overwhelm the teacher. It is said that some years ago a politically-oriented version of legal realism flourished at Yale and the faculty taught it to the courts. If that is so, the courts are having their revenge, because now the casebook teaches it to the Yale students.

Political courts will also overload themselves because they push law into areas it had not previously reached. Congress has a great deal of responsibility for overloaded court systems, but I wonder if even that is not partly due to the fact that courts have displayed a willingness to take on policy issues in a legislative manner. In any event, overload diminishes the competence of courts because they deal more rapidly with more problems, more institutions, and more subjects.

Activism also tends to trivialize the Constitution. Once legal interpretation is abandoned in order to produce good results, it is almost impossible to find a stopping point. For example, once the Court expanded the equal protection clause beyond the subject of race, standards for demanding or not demanding equality blurred, and we have arrived at the situation where the Court solemnly addresses itself to the question of what the Constitution of the United States has to say.

setting the age for drinking 3.2 beer for males at 21 and females at 18. It turned out that the Constitution forbade such treatment of that discrete and insular minority, males, and the dispute generated seven different opinions, suggesting that the issue was of roughly the same portent for the Republic as the Steel Seizure Case. I cannot bring myself to comment upon the recent discovery that the framers of the fourteenth amendment required female reporters in the Yankees' locker room.

I want to turn next to some of the effects of judicial activism upon the society. Two come to mind: the infliction of inefficiency upon social and economic processes, and damage to the community's morale and self-confidence in its moral standards.

The infliction of inefficiency upon economic processes has occurred primarily through the expansive reading of anti-trust and regulatory statutes. That is a subject so familiar that I pause only to mention it. The imposition of added costs on other institutions and processes occurs through the judiciary's tendency to regard judicial processes as the model to which other processes should tend, so that in a variety of contexts the Court requires some form of due process, some kind of a hearing, before action can be taken. This is often quite inappropriate to the processes involved, whether school discipline or the repossession of a television set for nonpayment of installments. So powerful is the influence of that lesson that private institutions such as universities begin to judicialize their processes for discipline and other matters, and the adversary process often polarizes the members of the community in ways that older, more informal processes did not. Increased costs also occur when the courts undertake to prescribe in detail the behavior of institutions such as mental hospitals. In the name of the Constitution, a particular standard of care and theory of therapy is chosen and imposed upon institutions that have some claim to know better how to operate.

More worrisome in many respects is the impact of an activist judiciary upon social morale and self-confidence. Constitutional law as enunciated by the Supreme Court is an enormously powerful moral teacher. Too often its teachings are a rebuke to the traditional moral standards of the community. Local communities are told that their schools may not inflict even light punishment for disciplinary infractions without following procedures prescribed by courts and must then fact possible judicial review of their decisions. The authority of adults, teachers, and institutions other than courts is made suspect and weakened. Local communities are frequently informed that even slight episodes of racial segregation, often well in the past, are so heinous that entire school systems must be reorganized and run by courts. Students must be bused from their neighborhoods in order to achieve specified degrees of racial integration, the lesson being that free social processes and individual choices that did not achieve that integration are blameworthy. This is naturally viewed as rebuke and punishment.

Communities are further informed that their attempts to control pornography and obscenity, to prevent the deterioration of the moral atmosphere in which they live, are in fact benighted violations of First Amendment freedoms. They are often told in fact that the Constitution enshrines moral relativism. When the Court denied state power to punish the public display of an obscenity, the opinion said, with stunning casualness, that "one man's vulgarity is another's lyric." That doctrine would deny society the right to enforce any moral standards against dissenters. We have the judiciary to thank for the current condition of Times Square and the plague of pornography around us.

The subject of the public's frustration with a judicial system that seems unwilling to punish criminals with the severity that the public's moral sense demands is too well known to require extended comment. It is epitomized in the judiciary's whittling away at the death penalty, a punishment explicitly contemplated by the Constitution and obviously desired by a majority of the electorate.

Such judicial behavior cannot but frustrate society, make it doubtful of its own healthiest moral standards, and weaken its morale. That is one of the more serious consequences of judicial imperialism.

I come at the end to consideration of the impact of judicial activism upon our politics. The first and most obvious is that activism requires a degree of disingenuousness. The Court's authority derives largely from the public belief that it really is the Constitution and not the politics of a majority of nine lawyers that requires democratic choices to be overturned. The Court, justifiably concerned about the possibly tenuous base of its power, is careful to insist that its most political decisions are in fact compelled by the Constitution. The opinion in *Harper* v. *Virginia Board of Elections* is typical of many. The Court struck down a poll tax, though it was entirely clear that the framers of the fourteenth amendment had no such result in mind. That difficulty was addressed with this rhetoric: "the Equal Protection Clause is not shackled to the political theory of a particular era... (W)e have never been confined to historic notions of equality." Which is to say that a majority of the Court has substituted a new notion of equality for that of the framers. But then the opinion states, "Our conclusion...is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." The second assertion cannot be true if the first is.

There are worrisome signs, however, that we are coming to political governance by the judiciary. Perhaps, under its tutelage, we have come to believe that democratic processes are suspect, essentially unprincipled and untrustworthy, and that judicial governance is to be preferred. Perhaps prolonged judicial activism is not entirely responsible for that; there are other possible sources of weariness with democracy and self-government. It is also possible that the rise of pervasive, intrusive, and unresponsive bureaucracies has made politics seem relatively ineffectual. The desire for judicial government is dramatically illustrated by the proposed Equal Rights Amendment. It would confirm the courts in their worst tendencies by hand~~l~~ing them, without legislative guidance of any sort, the task of making the infinite number of political decisions required in deciding when men and women must be treated alike, when they need not be, and, perhaps, when they may not be. The fact that the courts have already started down that path on their own is no reason to legitimize it. But the fact that adoption of ERA would ratify and forward a dangerous constitutional revolution is the one feature of it that is rarely, if ever, critized.

Finally, it should be noted that an activist judiciary, in our time, will increase the already disproportionate influence of intellectuals upon our politics. Judges have no electorate to face. What they have to face is opinion shaped by the intellectual class, primarily academics and journalists. Judges themselves are members of that class, they tend to respond to its values, and a steady stream of clerks fresh from the law schools reinforce that tendency. Moreover, a judge's current reputation as well as his place in history is likely to be determined by journalists and academics. Over time, a judge who was not influenced by the dominant intellectual and moral climate in which he lives would have to be a very hardy or insensitive character [illegible]

For complicated reasons, which it is no part of my assignment to trace here, the intellectual class tends to be left of center on the American political spectrum, and more egalitarian and morally relativistic as well. It displays the characteristics we see in the movement of constitutional law. This puts a somewhat more somber light than perhaps he intended upon Anthony Lewis' observation that "If American judges are the most powerful on earth, so too American law schools and legal writers are the most influential."

The point I am making is not refuted but reinforced by the reputation of the current Supreme Court as very conservative. It is actually a mildly liberal Court. Though such matters are impressionistic to some degree, most people I have talked to, including those of a liberal persuasion, tend to agree that on issues where the Court has a free vote, where there is no constitutional compulsion, the Court rather regularly produces results more liberal than those you would get after full debate in a national referendum. The Court is viewed as conservative only because of an error of parallax: we see it through the [illegible] ~~lens provided by~~ the legal academies and the media, and hence from their perspective.

No one can doubt the Court's great educative power, and the fact that it tends to respond to intellectual class values means that its influence is rather steadily pressing our views and our politics to the liberal side of the spectrum. That is one reason that liberals and intellectuals of this generation applaud and encourage judicial imperialism just as businessmen and conservatives of other generations once did.

At the end a pair of caveats are in order. I do not for a moment suggest that the trends I have been describing are solely or even primarily caused by judicial activism. I do suggest that activism contributes to them. Nor do I yield to anyone in admiration of the role the federal courts have played and do play in our polity. Without their constitutional function we should be a very much less happy nation than we are. But to say that is not to say that some tendencies are not deeply disturbing. Activism is not the same as judicial enforcement of constitutional guarantees. The consequences of activism by the judiciary are such that they deserve prominence in public discussion. We have created a great institution in the federal judiciary, and we ought not to fail it and ourselves by not comprehending the institution's strengths and the limitations.

Judge BORK. The dangerous constitutional revolution was handing an entire important area of our life, of our culture, and our relationship between the sexes to nine justices. I think the Congress and the State legislatures should initially make those adjustments about whether women should go into combat, about whether we should have unisex toilets and all of this business you are going to leave to judges.

That was my only objection to the unstructured grant of power to the judiciary.

The CHAIRMAN. Senator, your time is up.

Senator Hatch, and this will be—Judge, it is a long day for you—this will be our last questioner for today and we will reconvene tomorrow at 10 o'clock.

Senator HATCH. Judge, sorry to keep you a little bit longer but I think it is important to cover some of these areas that you have been discussing with Senator Kennedy and others.

I might say, Mr. Chairman, in response to a question from Senator Thurmond, Judge Bork referred to recommendations he made in connection with the pocket veto case brought by our colleague Senator Kennedy.

In this memorandum, Judge Bork, who was the then Solicitor General, advised the Attorney General and President Nixon that the pocket veto could only be used under limited circumstances, so I ask unanimous consent that this memorandum be placed in the record at this point.

[Material follows:]

Office of the Solicitor General
Washington, D.C. 20530

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL RHB

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a Summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their Adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

Senator HATCH. Judge, Senator Kennedy said when it counted you were not there on some of these items, but I think what you have been able to show here today is that these major issues are not easily explained in 30-second bites that we people in Congress are used to popping off about; is that correct?

Judge BORK. Well, Senator, if you are suggesting that I have proved that I cannot explain them, I do not want to accept that. It is hard to discuss a complex issue in 30 seconds. That is correct.

Senator HATCH. The fact of the matter is most of these are very complex issues and there are people on both sides of them and they do not particularly get stereotyped easily in conservative or liberal categories.

Judge BORK. Senator, let me say something I should have said before, and that is, I am willing to engage in an abstract discussion of large principles and generic classes and so forth. However, when you are a judge, the cases do not come to you that way. They come in gray areas with difficult facts, and so forth. So I think this discussion is useful but it by no means is the way a judge goes about his business.

Senator HATCH. Well, what I am concerned about is the way your record is being distorted, some of the inflammatory rhetoric; some of the, I think, unuseful and really false methodology being used; the inappropriate use of statistics, for instance, only examining cases where there is disagreement, which is only 14 percent of your total case load; ignoring all of the other things that you have done and ignoring what you stand for and using language like, well, when it counted you were not there, because you have been there.

On restricted covenants, one of the big issues that has been raised by your detractors or opponents, it is because you criticized *Shelley* v. *Kraemer*. You were criticizing it because you questioned the process—your main question was what was State action, is that correct?

Judge BORK. That is correct.

Senator HATCH. That's a very important legal issue, isn't it?

Judge BORK. Yes. It's a crucial legal issue because——

Senator HATCH. You weren't for restricted covenants, were you?

Judge BORK. I never have been.

Senator HATCH. As a matter of fact, as Solicitor General, you argued against restricted covenants in the *Runyon* v. *McCrary* case, is that correct?

Judge BORK. That is correct.

Senator HATCH. Well, a lot of these are explained that way, if you take the time to look into them and you don't just take 30-second bites, and you look at it fairly and you treat these fairly. I think that's what you're bringing across here today, is that literally these are complex cases; they aren't easy to decide. There are legitimate viewpoints on both sides, and in almost every case that you have given us today you have listed some of the most outstanding luminaries in the field of law, including former Supreme Court Justices and sitting Supreme Court Justices with whom you agreed and who agreed with you; is that right?

Judge BORK. That is correct.

The CHAIRMAN. Senator Hatch, let me just make a comment.

Judge, do you feel you have been required to answer in 30-second bites?

Judge BORK. No, but I think that's a temptation I sometimes fall into.

The CHAIRMAN. I just want to make it clear, you have as much time as you want. I literally mean that. If you want to take 20 minutes to answer a single question, or an hour, you have the time.

Senator HATCH. I would like to be able to use my time.

The CHAIRMAN. No, it will not be taken out of your time.

I just want you to know that, Judge. Do not feel at all constrained. Take as much time as you want.

Judge BORK. I think there's a natural tendency, knowing that a Senator wants to go on with further question, not to bog him down with a long answer. I will try to get over that natural tendency.

The CHAIRMAN. Go ahead and bog us down. We are trying to find out what you think, and you may use as much time as you want.

Senator HATCH. Judge, you're doing very fine in your concise and cohesive answers. As a matter of fact, I don't see how anybody watching this could doubt that you're an eminent scholar, with a brilliant mind, who is in the mainstream of judicial life, who in sitting in more than 400 cases on the Circuit Court of Appeals for the District of Columbia has never been reversed, who has been within the mainstream with his liberal colleagues on the Courts, if that's an appropriate term, as you have with your conservative colleagues, having agreed 90 percent of the time with Judge Ruth Bader Ginsburg, 83 percent of the time with Judge Mikva, right on down to Judge Skelly Wright around 75 percent of the time.

That doesn't sound to me like you're outside of the mainstream, since you're agreeing with your liberal colleagues. But they have chosen in some of these critical articles to criticize you on 14 percent of your cases, where there is tremendous controversy. That's unfair, and we have a tendency up here, as Senators, because we don't have the time to go into the nuances of these cases as you judges do, to look at everything in terms of 30-second bites for us on television. That's my point, not you.

Now, in recent years we have heard a great deal of commentary about the problems of judicial activism. How would you define judicial activism, because this seems to be really one of the central core matters here.

Judge BORK. I think I would define it as a judge reading into a statute or into the Constitution his personal policy preferences—and let me be clear about this.

No human being can sit down with words in a statute, with history and the other evidence he uses, and not to some extent get his personal moral view into it, because each of us sees the world, understands facts, through a lens composed of our morality and our understanding.

But there is an enormous difference between that inevitable bias that gets in and a judge who self-consciously tries to keep his biases out and tries to be as impartial on the evidence as he can be. There's an enormous difference between that and a judge who incorporates his idea of wise policy into the Constitution or into a statute and, as a matter of fact, if you're familiar with the academic legal debate, most of those writing in the law schools these days seem to prefer the latter kind of a judge, one who does not confine himself to the historical principles of the Constitution.

Senator **Hatch**. In other words, in simple terms, judicial activism is when judges make law rather than interpret the law?

Judge **Bork**. That is a good shorthand description.

Senator **Hatch**. The fact of the matter is that you, as a federal judge, weren't elected to that position; is that right?

Judge **Bork**. That is correct.

Senator **Hatch**. You're not elected to make laws.

Judge **Bork**. I'm not. If I were, if I were going to make laws, then this hearing should consist of me making campaign promises on how I will vote on various cases.

Senator **Hatch**. That's what these hearings will be if we continue to politicize——

Judge **Bork**. I'm afraid of that.

Senator **Hatch**. This may occur as well when judges make a general statement of law and stretch it to cover instances beyond that which the authors really intended; is that right?

Judge **Bork**. That is correct.

Senator **Hatch**. And that's what you mean by original intent?

Judge **Bork**. That's correct.

Senator **Hatch**. And it doesn't just mean original intent of the Founding Fathers or the original meaning of what they meant; it means the original intent of us Members of Congress who are elected representatives to make these laws to the people, is that right?

Judge **Bork**. That is correct, Senator.

Senator **Hatch**. Now, I realize that you have been long known as a most eloquent, consistent and brilliant exponent of the classic theory of judicial restraint.

What is meant by judicial restraint?

Judge **Bork**. It means that a judge—I've never liked the word judicial activism. I prefer something else. Because a restrained judge should be active in defending those freedoms and powers that are actually in the Constitution—should give them liberal construction. But he should not go beyond that, and that is judicial restraint. It is the morality of the jurist who self-consciously renounces power and tries to enforce the will of the lawmaker.

Senator **Hatch**. When courts read into the Constitution or particular pieces of legislation policies and rights that are not there, what happens to the ability of the legislatures of the respective States or of the Congress itself to make laws according to the needs of the people?

Judge **Bork**. The people and their representatives have suddenly been ousted from an area that was legitimately theirs and the courts begin to set a social agenda instead of the people setting their social agenda.

Senator **Hatch**. When I talk about judicial activism, you don't like the term, but let me at least use that term because we have defined it here.

Judge **Bork**. All right. I'll accept it.

Senator **Hatch**. Can judicial activism be employed just as easily as conservative—to reach illegitimate conservative as well as illegitimate liberal end results?

Judge BORK. Up until the mid-1930s, as we all know, Senator, a conservative majority on the Supreme Court was reading its economic preferences into the Constitution.

Senator HATCH. That's why we had the child labor laws in the Lochner era and all those difficulties.

Judge BORK. Labor laws were being struck down, laws protecting workers were being struck down. That changed. I don't think activism is any more proper for a conservative than it is for a liberal. That's why I don't think my philosophy of judging has anything to do with liberalism or conservatism.

Senator HATCH. The thing that is interesting to me is that you have a reputation for being squarely against both forms of judicial activism.

I remember—and I sat there in the hearings when you testified against the so-called human life bill, or human life amendment. That bill basically would have allowed the Congress of the United States to overrule *Roe* v. *Wade* by simple statute. You came in and testified against that. Why?

Judge BORK. Because I think it is unconstitutional for the Congress to try to change a Supreme Court decision by statute. It has been allowed once or twice by the Supreme Court, but I don't think it's proper.

I criticized *Roe* v. *Wade* at that time, but I also opposed any effort to change it by statute or to take away the Supreme Court's jurisdiction over the subject.

Senator HATCH. I agree with you. At the time I voted to put it out of subcommittee, but I was going to vote against it in full committee but it never came up again, and it was precisely because of your arguments that it was basically defeated. I don't think conservatives are any more justified in trying to impose their conservative activism than liberals are in the courts.

Now, in this context, I think it is helpful to re-examine this case for a few minutes, *Griswold* v. *Connecticut*. And this case, as you defined it, was when the Supreme Court invalidated a Connecticut law banning the use of contraceptives.

In the first place, do you, as a personal matter, have anything against the use of contraceptives of the personal choice of individuals to use them or not?

Judge BORK. Nothing whatsoever. I think the Connecticut law was an outrage and it would have been more of an outrage if they ever enforced it against an individual.

Senator HATCH. But they never did.

Judge BORK. No.

Senator HATCH. You will not be surprised to know that your personal feelings about the Connecticut law are similar to those of Justice Hugo Black, the primary dissenter in the *Griswold* case. He said, "I feel constrained to add that the law is every bit as offensive to me as it is to my brethren in the majority." Nonetheless, Justice Black, who certainly was one of the great all time Justices in our age, who was joined by Justice Stewart, whose wonderful wife is here with us today—and, of course, he was another judicial giant, in my opinion—they both dissented in that case.

Now, can you explain why these great jurists could have allowed that law banning contraceptives to stand?

Judge BORK. Justice Stewart called it an uncommonly silly law, which I think it certainly was, at a minimum. I think they would have allowed it to stand simply because they could find no warrant in the Constitution for them, as judges, to override a legislative enactment.

Senator HATCH. In other words, there was no source of authority within the Constitution to rule the way they ruled?

Judge BORK. That is what they concluded.

Senator HATCH. So these two principal jurists, both of whom derided the particular law, agreed with you—or should I say you agreed with them?

Judge BORK. I think the latter is the better form, Senator.

Senator HATCH. I can certainly understand that there is a privacy protection in the Constitution, in the sense of guarantees against unreasonable searches of one's home, and the prohibition of laws that abridge free speech and the free exercise of religion. Those are areas where there is no question about the right of privacy, is there?

Judge BORK. None whatsoever.

Senator HATCH. But what did Justice Black say about the general right of privacy discussed in that case?

Judge BORK. Well, as I recall, didn't he say it was the old natural law theory of judging? You write your own policy prescriptions into the statute.

Senator HATCH. That's basically what he said.

What did Justice Black say about the scope of the so-called privacy right that is no where found in the Constitution?

Judge BORK. I think he said it was utterly unpredictable. I don't recall his exact words, but nobody knows what the scope is.

Senator HATCH. He indicated that it was incapable of being limited or defined, other than by arbitrary judicial fiat; isn't that correct?

Judge BORK. That's true, and that is——

Senator HATCH. And that's what you were concerned about?

Judge BORK. That's what I meant when I said that, you know, privacy to do what? We don't know. Privacy to take cocaine in private; privacy to fix prices in private; privacy to engage in incest in private? The Supreme Court is not going to do those things, but we don't know why.

Senator HATCH. We all have to agree that privacy is a very attractive concept. We all want privacy, don't we?

Judge BORK. We do.

Senator HATCH. Is the legal doctrine in question here about the kind of privacy we all desire, or is it actually a term used to deal with some questions with very public implications?

Judge BORK. Well, it certainly deals with some cases with public implications, that's right.

Senator HATCH. Once again, what would happen if judges began to discover or create new rights in the Constitution, such as the right to be let alone, or the right to be free of taxation, or the right to a balanced budget?

Judge BORK. That's right. I remember some judges who sued under the Constitution for the right to an indexed salary.

Senator HATCH. I agree that——

Judge BORK. And they quite properly lost.

Senator HATCH. Actually, some of those rights would seem very attractive. A right to be let alone. You know, some judge could just say "well, we all ought to have that right", if he wanted to, but it isn't in the Constitution.

Judge BORK. Judging requires careful thought and the making of close distinctions. Once you just put rhetoric into the constitutional adjudication, you don't know where it will go or what it will do.

Senator HATCH. What happens if the courts start creating rights that are not found in the Constitution?

Judge BORK. In my view, it's illegitimate.

Senator HATCH. Well, we're going to be a government not of laws but of the whimsies of the courts; isn't that right?

Judge BORK. Yes.

Senator HATCH. Isn't that basically your criticism?

Judge BORK. That's basically what I have been objecting to for 16 years, and throughout these hearings.

Senator HATCH. It has got to be a little irritating to you as it has to be to anybody who is fair-minded, to be criticized for having criticized *Griswold* v. *Connecticut* on the grounds that you might possibly have wanted to sustain that statute, any more than it was the desire of Hugo Black or Mr. Justice Potter Stewart to have done that.

Judge BORK. It is, Senator, as you know, a regular form of rhetoric to say that, if you would say a statute is not unconstitutional, that must be because you like the statute. That is not right. The question is never whether you like the statute; the question is, is it in fact contrary to the principles of the Constitution.

Senator HATCH. I think I'm starting to understand why you have never been reversed, Judge. I hope the people in this country are, too, because you're right down the middle on these things. You just want the laws to be made by elected representatives and the judges to interpret those laws in accordance with appropriate constitutional application.

Judge BORK. That is true, Senator.

Senator HATCH. I don't know how anybody could find fault with that. And in every one of these cases, I think when you get into the complexities, I think the American people would basically say "I might disagree with Judge Bork on the philosophy on some of these cases, but I cannot disagree on the jurisprudence or the actual application of law." I think most people would feel that way.

By the way, this discussion leads to another important case governed by the so-called privacy doctrine, and that is the case of *Roe* v. *Wade*. You have been criticized for having been critical of this abortion case called *Roe* v. *Wade*.

Can you explain your apprehensions about this particular case?

Judge BORK. It is not apprehension so much, Senator, as it is—If *Griswold* v. *Connecticut* established or adopted a privacy right on reasoning which was utterly inadequate, and failed to define that right so we know what it applies to, *Roe* v. *Wade* contains almost no legal reasoning. We are not told why it is a private act—and if it is, there are lots of private acts that are not protected—why this one is protected. We are simply not told that. We get a review of the history of abortion and we get a review of the opinions of various groups like the American Medical Association, and then we get rules.

That's what I object to about the case. It does not have legal reasoning in it that roots the right to an abortion in constitutional materials.

Senator **Hatch**. Well, let me just say this.

By the way, I presume your concerns about the reasoning of the *Roe* v. *Wade* case do not necessarily mean that you would automatically reverse that case as a Justice of the Supreme Court?

Judge **Bork**. No. If you want to hear me on that, I will tell you exactly what I would consider.

Senator **Hatch**. We would be glad to hear it.

Judge **Bork**. If that case, or something like it, came up, and if the case called for a broad up or down, which it may not, I would first ask the lawyer who wants to support the right, "Can you derive a right of privacy, not to be found in one of the specific amendments, in some principled fashion from the Constitution so I know not only where you got it but what it covers."

There are rights that are not specifically mentioned in the Constitution, like the right to travel. You know, it's conceivable he could do that, I don't know. If he could not do that, I would say, "Well, if you can't derive a general right of privacy, can you derive a right to an abortion, or at least to a limitation upon anti-abortion statutes legitimately from the Constitution?"

If after argument, that didn't sound like it was going to be a viable theory, I would say to him, "I would like you to argue whether this is the kind of case that should not be overruled." Because, obviously, there are cases we look back on and say they were erroneous or they were not compatible with original intent, but we don't overrule them for a variety of reasons.

A moment ago, in response to a question, I ran through some of the factors. So I would listen to that argument.

As I have said before, a judge with an original intent philosophy, which goes back, by the way, to Marshall and Joseph Story, needs a strong theory of precedent to keep from getting back into matters that are long settled, even if incorrectly settled.

Senator **Hatch**. So as a judge, you would have to take into consideration such factors as continuity, predictability of the law, facts of the case and so forth.

Would it be safe for me to assume, or members of this committee to assume, that you do not know yourself how you would rule on an abortion case if it came before the Supreme Court until you have all the facts?

Judge **Bork**. That is true. I have discovered that, to my chagrin, on my present court. You think you know something about a subject, until you get the briefs and hear the argument and you decide it is much more complex than you thought it was. But I have tried to indicate the general factors that I would look at. There may be some lawyer that will suggest some that I haven't thought of.

Senator **Hatch**. I would also presume—and correct me if I'm wrong—that you have taken no public position on the political or social merits of abortion?

Judge Bork. The only position I have taken was the opposition to the human life bill and the opposition to taking away the Supreme Court's jurisdiction.

Senator Hatch. I think it would be helpful to examine the character of the legal scholarship that has voiced apprehensions similar to yours on this case, since you have been criticized by some of my colleagues as being outside of the mainstream, because of your criticisms of the so-called *Roe* v. *Wade* case.

For example, Gerald Gunther of the Stanford Law School cites *Roe* as an instance of the "bad legacy of substantive due process and ends-oriented" judging.

Professor Archibald Cox of Harvard notes that the "court failed to establish the legitimacy of the decision by not articulating a precept of sufficient attractiveness to lift the ruling above the level of a political judgment."

By the way, let's pause here. What do you suppose Archibald Cox meant when he said that the decision was not legitimate?

Judge Bork. I suppose he means it comes out of no—so far as he can see—comes out of no legitimate constitutional materials, which are primarily text, history and constitutional structure.

Senator Hatch. Do you agree with that?

Judge Bork. Yes.

Senator Hatch. Let's continue. Dean John Ely of Stanford, who also favors abortion, says along with Archibald Cox "It is not a constitutional principle and the court has no business trying to impose it."

Professor Bickel, who I think is respected by almost everybody, who is studied in the law, also criticized the *Roe* decision for being legislation but not legal action. You're aware of that. In fact, this is the very point made by Justices White and Rehnquist. In fact, in later decisions, Justice O'Connor, the nation's first woman Justice, also criticized harshly the *Roe* opinion.

You could go on. Professor Forrester of Cornell calls the case "interventionist", and Professor Kirland of Chicago calls it "a blatant usurpation".

In your lengthy constitutional studies, is there any Supreme Court decision that has stirred more controversy or criticism amongst scholars and citizens than that particular case?

Judge Bork. I suppose the only candidate for that, Senator, would be *Brown* v. *Board of Education*. It is possible, you know, for the Supreme Court to be—

Senator Hatch. Or possibly the *Dred Scott* case.

Judge Bork. Yes, that's right.

Senator Hatch. Where there might be some parallels.

Judge Bork. But in my lifetime, those two. And it's possible for the Supreme Court to be entirely right and get an enormous amount of heat, and it's possible for it to be wrong and get an enormous amount of heat. So the controversy surrounding it isn't really the way I judge the correctness of the decision.

Senator Hatch. That's right, and I think that's starting to come across. I think that you're refuting your extraordinarily extreme critics, which I think are misrepresenting, in their full-page ads and a whole raft of other things what you stand for and what you do as a judge.

In any event, it is clear to me, and I think to others that listen, that your apprehensions about the reasoning of the *Roe* v. *Wade* case are shared by some of the legal minds of our age on both sides of the issue.

Let me ask one further question on this case, however. If you are confirmed, and the abortion decision comes to you, will you describe how you would approach the case? I'm interested to know whether or not you have already prejudged this issue or whether you will keep an open mind with regard to the case that comes before you.

Judge BORK. I think I have listened to arguments in every case, Senator, and sometimes I don't think somebody is going to be able to make it in an argument, and sometimes they do make it, despite my initial doubts.

But as I have mentioned to you, I would ask for a grounding of the privacy right and a definition of it in a traditional, constitutional reasoning way. As I say, if that can't be done, I will ask for a rooting of the right to an abortion, or some right to an abortion of some scope, in traditional, legal, constitutional materials. And if that can't be done, then I would like to hear argument on stare decisis and whether or not this is the kind of case that should or should not be overruled.

Senator HATCH. I acknowledge that you have encountered only one case similar to *Griswold* and *Roe*—in other words, the contraceptive case and the abortion case—on the D.C. Circuit, and that was the important *Dronenberg* v. *Zech* case.

Now, this is a case that is cited by your critics as evidence for your antipathy to the so-called right of privacy. Could you describe the facts of that case?

Judge BORK. That was a case in which the Navy discharged, honorably, I think it was a petty officer for engaging in homosexual conduct in the barracks with a junior, subordinate. The Navy has a regulation against homosexual conduct, not against the status of homosexuality, but against homosexual conduct in the service.

The discharged sailor sued, alleging, among other things, that he had a right of privacy to engage in homosexual conduct in the Navy, and that that flowed from *Griswold* and *Roe.*

Our panel of the court disagreed. We thought the right of privacy was relatively undefined, but we saw no principle in the Supreme Court's jurisprudence on the subject which would lead us to tell the Navy it could not ban that kind of conduct.

Later the Supreme Court, in *Bowers* v. *Hardwick,* upheld a much more severe regulation. After all, all we said was that the Navy was entitled to discharge this fellow honorably. In *Bowers* v. *Hardwick,* they allowed the criminalizing of civilian homosexual conduct, which is a much larger step than we took.

Senator HATCH. Your holding in that case was basically merely a finding that the doctrine of privacy could not be expanded to cover consensual sodomy; is that right?

Judge BORK. That's correct.

Senator HATCH. And as I understand it, there was unanimous consensus or agreement by the three-judge panel?

Judge BORK. That's correct.

Senator HATCH. Who were the other two judges besides yourself?

Judge BORK. Judge Scalia, and I think it was Judge Williams from the ninth circuit—is that correct?

Senator HATCH. And you say that the Supreme Court later, in a precisely similar case, upheld your particular point of view?

Judge BORK. Yes. Well, it wasn't precisely similar. I think that was a harder case for the court.

Senator HATCH. You're talking about the *Bowers* v. *Hardwick* case?

Judge BORK. Yes.

Senator HATCH. Okay. But it was consistent, though——

Judge BORK. Oh, certainly.

Senator HATCH [continuing]. With your particular decision, is that correct?

Judge BORK. That is correct.

Senator HATCH. By the way, your critics like to state that you wiped away selected Supreme Court decisions, by which they mean you failed to follow the privacy doctrine when you ruled on the *Dronenberg* case. But the Supreme Court didn't feel that way when it wiped it away, too, in its decision. That's a majority of the present Supreme Court, right?

Judge BORK. Well, that's the trouble. It wasn't clear what the privacy principle covered. So in deciding it did not cover homosexual conduct in the Navy, we didn't necessarily wipe away any cases. We just said that we didn't see that the principle covers this case.

It it impossible for a Court of Appeals judge, or any one judge, to wipe away Supreme Court cases.

Senator HATCH. You decided one other case of a related issue, and that was the *Franz* case. In that case, a woman was relocated under the Federal Witness Protection Program. She and her children were given new identities in order to protect their lives. Of course, the plaintiff in that case, Franz, was her ex-husband, and he wanted to find out where they were.

Now, that seems to me to be an extraordinary case. They were given witness protection and he wanted to find out where they were, and the competing interests are both very compelling in a case like that—the right of the husband to see his children, and the right of the wife to be protected from disclosure.

Could you give me your reasoning in that case?

Judge BORK. Senator, as I recall that case—and I haven't read it for a long time—I think that I was concerned that we were being asked to apply a constitutional principle, asked to create a constitutional principle, when I didn't think Congress had faced the issue. I wanted Congress to face the issue before we did, which seems to me to be always appropriate, because the legislature, when it becomes aware of the problem, may make all kinds of adjustments and so forth to the problem, so that it is not necessary for a judge to begin to apply the Constitution.

I was convinced that Congress had not faced that problem, so I proposed to say that Pennsylvania domestic relations law probably interfered with what was done, that that gave this fellow a right to see his children, and that Congress had not preempted Pennsylvania domestic relations law, had shown no desire to. I wanted in that way to send the case back so that the Congress would have to decide whether or not it wished to preempt domestic relations law and do what was, after all, a very drastic thing. That was my position in that case.

Then, if Congress wanted to do it, we would have to face the constitutional issue.

Senator HATCH. Your decision in that particular case has been attacked as denying a father the right to visit his child.

Judge BORK. I did not do that.

Senator HATCH. As a matter of fact, you remanded the case to enable the father to continue his legal battle to enforce his State-created visitation rights. You did not deny him access, but you kept that door open. But again, it shows how they are distorting your record with their inflammatory rhetoric and I think doing you a great injustice.

It is, I think, to show that these are the hardest cases. I am sure that there are valid and very strong interests on both sides of these types of cases, and it seems to me unfair, however, to attack you for ruling against one interest without mentioning that an even more compelling interest was on the other side of the case. That seems to me to be one of the hallmarks of this political campaign against you.

Judge BORK. Well, Senator, I don't know that I ruled against an interest. I do think judges have a role to play sometimes in bringing issues to the attention of the legislature that the legislature hasn't focused upon, and the preferred solution is a legislative solution. Then the court has to act if the solution isn't a good one.

Senator HATCH. Thank you.

Now, the Skinner case was brought up. In your 1971 Indiana Law Journal article you commented on the Supreme Court's decision in *Skinner* v. *Oklahoma* in 1942. In that decision, the Court struck down as unconstitutional, under the equal protection clause, a law that provided for sterilization of convicted robbers but not of embezzlers.

Now, some have taken your comments in 1971 out of context. As I understand it, your only point there in your article was that the case was defective as a matter of legal protection analysis.

Judge BORK. Senator, could you point me to the page where I said these things?

Senator HATCH. Well, I'm just kind of summarizing what I thought you stood for.

Judge BORK. Okay.

The CHAIRMAN. Don't worry. He'll take care of your interests, Judge.

Judge BORK. Pardon me?

The CHAIRMAN. I said don't worry, he'll take care of your interest.

Judge BORK. I know. But I——

Senator HATCH. Judge, I think you're doing a pretty good job of taking care of it yourself.

Judge BORK. I just thought I would enjoy it more if I had the page.

Senator HATCH. Judge, you don't need me to take care of your interests.

But the point is, you weren't suggesting, I take it, that there was no basis at all for that decision in the entire Constitution, such as the eighth amendment prohibiting cruel and unusual punishment; is that correct?

Judge BORK. That's correct.

Senator HATCH. You were just questioning the source of constitutional authority, the way it was used at that particular time?

Judge BORK. This entire article, Senator, is that kind of thing. At one point, on page 11, I stop, after criticizing a string of cases, and say that some of them maybe you could reach—I said some of them are in political agreement, and perhaps *Pierce* could be reached on acceptable grounds, but there is no justification for the Court's methods. That's what I have been talking about. In fact, more than *Pierce* could be reached on acceptable grounds; *Meyer* v. *Nebraska,* which invalidated a statute that prohibited the teaching of children in a foreign language, could also be reached on an acceptable ground.

But what I was focusing on here is the court's reasoning, because a judge has no mandate to govern from any source other than his logical demonstration that he got out of the legal materials. If a judge doesn't demonstrate that, then we're entitled to be unconvinced by the result.

Senator HATCH. That's coming across, I think, very well. I think for those who have studied your record and those who really do it fairly, they're going to conclude that you're testifying very truthfully here, and I think accurately and honestly and very intelligently.

Let me just end with this. I was interested in Senator Kennedy's comments about you and your writings and other lectures about the rights of women.

Before heightened scrutiny was employed in the equal protection analysis, the reasonable basis test that you advocated was used to strike down gender discrimination. In other words, the very test that Senator Kennedy was criticizing, saying it was used to uphold gender discrimination, was actually used to strike down gender discrimination.

For example, in the *Reed* v. *Reed* case, which struck down a law that preferred men over women in the appointment of administrators of the States, it's a perfect illustration where the reasonable basis test that you believe in was used to benefit women.

Moreover, in the *Claiborne* case, your reasonable basis test was employed to strike down discrimination against the retarded.

Judge BORK. Yes.

Senator HATCH. And you're aware of that.

In that case, Justice Stevens made the same point you have made today; that is, that the equal protection clause of the Constitution of the United States of America applies to everyone, not just selected people, not just one special class, or not just one person over another. And I think your views harmonize with Justice Stevens, and I think they surely indicate that you're in the mainstream.

In every one of these cases—and I think the importance of your testimony here today—it is not only that you're extremely intelligent, one of the great judicial minds of our country, but that you're in the mainstream. You have shown it through the opinions that you've written, I think by the articles that you have written, that have always had a strong and good legal underpinning to them. You have shown it through indicating to the people of America today who are watching this on television that these cases are complex, they're not simple, little bitty things, and there are usually good arguments on both sides of the case, and generally compelling arguments, and you have to, as a judge, honestly make the best decisions that you can with regard to each case.

In every case in your 5 years on the Circuit Court of Appeals for the District of Columbia, the most important appellate court in the country except for the Supreme Court—and some actually believe it may be more important because of the broad range of cases the Supreme Court never sees that you do—that you have been in the majority an awful lot and you haven't been reversed, and you have had the Supreme Court adopt your actual language time after time.

Now, I think that stands you in good stead. I think it is time for the American people to realize that what is involved here is really politics. Your opponents will try to show where you're an inadequate judge, or that you're unethical, or that you don't have ability, or your intellectual reasoning is not adequate or within the mainstream, they can't show it by your opinions or by your writings.

What they have done, the thing that I find really reprehensible, as I have looked at all these various groups out there who are criticizing you and have done it very selectively, they have been very selective in the use of their evidence, they have been selective in the use of their statistics, they have been improper in the use of their rhetoric, they have been inflammatory—If you look at these full-page ads, it makes you wonder how anybody could support some of these organizations in coming up with that, I should say, "clap trap" that really doesn't deserve to be injected into this type of an important nomination.

I just want to say to you, I have watched you for many, many years. You and I differ on the balanced budget amendment. We differ on the Constitutional Conventions Procedures bill, and on whether or not a convention can be limited to the single issue for which it's set up for. We differ on the innercircuit tribunal and we differ on diversity jurisdiction, and I am sure there are some other issues as well. But the point I'm saying is, it isn't important that we differ. What is important is the type of person you are, the reputation that you have, the intellect that is compelling, and the reasons why people like Chief Justice Burger have given you the accolades that they have, people who have sat there and people who know.

What really appalls me is how some of these law professors across this country have interjected some of these nuances into this that really don't deserve to see the light of day. I am very disappointed. And what really has me outraged is the same American Bar Association that found you unanimously exceptionally well qualified back in 1981, just a week ago had four of the 15 say that you're not qualified.

Judge BORK. I think it should be mentioned, Senator, that I think——

Senator HATCH. Wait. Let me just finish. I'm going to conclude. Now, ten of them have said you have the highest rating you could possibly have. That bothers me a lot. I'll tell you, I hope it bothers the American people.

I want to thank you, Judge. You have been very candid, I think you have been candid to all of us, and I appreciate the testimony. I, for one, admire your legal intellect.

Judge BORK. Thank you very much, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Judge, there is much I also admire about you, particularly your physical constitution, to sit there all these hours.

We are going to end the hearing now, but I would like you to think about tomorrow on how you would like to go about this, in terms of the length of time. You're the one sitting there. At some time tomorrow you and I can speak, or your representatives, but I want to make it clear that I am prepared to go as long and expedite this as rapidly as you would like. But I also understand there are limitations to anyone's ability to physically sit there that long. So I will need some guidance from you as we go.

I would like very much to move on. Possibly we could finish with you as a witness tomorrow. I don't know that. We have seven more of my colleagues, which will take us into mid-afternoon. Then there will be a second round. But I would like you to be thinking about a time frame in which you would like to proceed tomorrow.

Judge BORK. Thank you very much, Mr. Chairman. That's very kind of you. I seriously doubt, with seven more Senators to take the time, plus the second round, that we can conceivably finish tomorrow.

The CHAIRMAN. Well, let's you and I, after lunch, talk, because again, I mean this sincerely, I would like very much to accommodate what I know if I were in your spot would be a very difficult seat to be physically sitting in. I don't mean difficult in answering.

Judge BORK. What I meant by not finishing tomorrow was, if we can't finish tomorrow, by going to 8 or 9 o'clock, then I would prefer not to go to 8 or 9 o'clock and finish the following day.

The CHAIRMAN. Why don't we talk after lunch.

The hearing is adjourned until 10:00 o'clock tomorrow morning, when Senator Metzenbaum will begin the questioning.

[Whereupon, at 6:34 p.m., the committee was adjourned.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 16, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present. Senators Thurmond, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Hatch, Simpson, Grassley, Specter, Humphrey and Byrd.

The **CHAIRMAN**. The hearing will come to order, please.

Good morning, Judge **BORK**, and welcome back.

Judge **BORK**. Good morning, Mr. Chairman.

The **CHAIRMAN**. We left off the questioning yesterday; in the first round with Senator Metzenbaum to start today, I would like to briefly discuss today's schedule and then proceed with Senator Metzenbaum's questions.

Today is an important day on the Hill. The President is coming up to speak on the Capitol steps. I would suggest, unless any of my colleagues have a different view, that we recess at 12:30, or as close thereto, as we finish up whomever has that round, finish up between 12:30 and 1 and recess until 2:30. I understand the President may be here until 2 or thereabouts; I am not certain of that.

If that is agreeable with my colleagues and with you, Judge, somewhere after 12:30, before 1, we will stop, reconvene at 2:30, and make a judgment at that time how late we will go today and whether or not, Judge, it will be necessary for you to come back tomorrow. Quite frankly, I think it probably will be. I do not think we will finish today. You and I have discussed it; if we can finish today without it going very late, we will try. If not, we will come back tomorrow.

Does the ranking member have any comment he wishes to make?

Senator **THURMOND**. Thank you, Mr. Chairman. I do not have any comment. I think we can just move along as fast as we can.

The **CHAIRMAN**. I yield to the Senator from Ohio, Senator Metzenbaum.

Senator **METZENBAUM**. Thank you, Mr. Chairman.

Good morning, Judge Bork.

Judge **BORK**. Good morning, Senator.

Senator **Metzenbaum**. Judge Bork, I want to ask you some questions about your decision to fire Special Prosecutor Archibald Cox. President Nixon first asked Attorney General Richardson to fire Cox, but as we know, Richardson refused and resigned. Deputy Attorney General Ruckelshaus also resigned, but you agreed to stay on and fire Mr. Cox.

The regulation in effect when you fired Mr. Cox flatly prohibited firing him unless he engaged in extraordinary improprieties, which he clearly did not. That regulation had the force and effect of law. Under these circumstances, your firing of Mr. Cox was a violation of the law, was it not?

Judge **Bork**. No, I do not think it was, Senator.

Senator **Metzenbaum**. The court said it was. The court in *Nader* v. *Bork* stated, "The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was, therefore, illegal."

So when you say it was not, you are saying that the court's decision meant nothing.

Judge **Bork**. I did not say it meant nothing. I think it is wrong, Senator, and I will be glad to explain why I think so.

Senator **Metzenbaum**. You have argued that the regulation prohibiting the firing of Mr. Cox was a technicality, but the court which reviewed the matter found that you "abolished the Office of Watergate Prosecutor on October 23rd and reinstated it less than 3 weeks later under a virtually identical regulation. It is clear," said the court, "that this turn-about was simply a ruse to permit the discharge of Mr. Cox. Defendant's order revoking the original regulation was, therefore, arbitrary and unreasonable and must be held without force or effect."

The court further said, "The Attorney General chose to limit his own authority by promulgating the Watergate Special Prosecutor regulation. It is settled beyond dispute that under such circumstances, an agency regulation has the force and effect of law and is binding upon the body that issues it. The Supreme Court," said the court, "has twice held that an executive department may not discharge one of its own officers in a manner inconsistent with its own regulation concerning such discharge."

Now, you say that they were wrong?

Judge **Bork**. May I discuss that case, Senator?

Senator **Metzenbaum**. Please do.

Judge **Bork**. In the first place, it should be noted that the only reason the amendment to the regulation did not issue immediately was it was a Saturday night, Monday was a holiday, Columbus Day, and we could not get it published in the Federal Register.

But in the second place, it should be said—by the way, Mr. Cox did not join in that lawsuit and did not seek back pay or to be reinstated. The cases relied upon in Judge Gesell's opinion are all cases in which a department head issued a regulation and then himself did something in contradiction to it. I thought, and still think, that those cases do not apply to a case where a department head issues a regulation and the President orders him—the President gives an order to abolish that regulation, which is, in effect, what happened.

No case cited by the court in that decision involves anything like that.

I should also say that I appealed that case, and the moment I appealed it, the plaintiffs rushed in and said the case is moot; that is, there is no longer a live controversy. I replied that the case was moot, there was no live controversy when you filed it.

However, the Court of Appeals for the District of Columbia Circuit agreed that the case was no longer a live controversy and sent it back to the district court with instructions to vacate the opinion and decision. Of course, as we know, the instructions to vacate mean that the case no longer exists, in effect; the opinion no longer exists, in effect. Judge Gesell did vacate his decision and opinion.

Senator **Metzenbaum**. It was sent back to be vacated because there was a new counsel at that point; therefore, the office was no longer vacant. So the issue was moot. But the thing that concerns me, Judge Bork, and I think probably concerns millions of Americans, is that you are up for confirmation to be a member of the highest court of the land; a court determined that your action was illegal; you disagree with that position. But I wonder whether or not every American may not say, "Well, I can commit an illegal act also and it is not so bad because a member of the Supreme Court of the United States committed an illegal act and he disagreed with it, and I disagree with the act that convicted me," or whatever, in connection with some particular matter in which an individual is involved.

It is the message. Can an individual say, "I disagree with a court's decision," and that be the end of it? And I am aware of the fact that you——

Judge **Bork**. That is not the end of it, Senator. I tried to appeal it.

Senator **Metzenbaum**. I understand.

Judge **Bork**. And I did not get a chance to have that ruling tested on appeal because there was no longer a live controversy. So I never got to run through it, and I resisted dismissing that case in the court of appeals. I wanted to get to the issues.

I think that night all of us assumed that, as far as I know, Attorney General Richardson and Deputy Attorney General Ruckelshaus assumed that the regulation did not stand in the way of a presidential order. Furthermore, I should note that Mr. Cox himself referred to the delay in putting out a new regulation changing the charter, abolishing the charter, as a technical defect. At most, it was a technical defect. I do not even think it was that.

Senator **Metzenbaum**. You are telling us this morning that you could not change the regulation on Friday because you could not get it into the Federal Register.

Judge **Bork**. I could not publish it.

Senator **Metzenbaum**. But the facts are that whether you had done it on Friday or on Monday, the court still would have determined, apparently, that it was a ruse, and that it was just a way of getting around the regulation because you reinstated the same regulation, exactly the same regulation, 3 weeks later. So there is no reason to believe that the court would have come to any contrary conclusion.

Judge **Bork**. Oh, I think there is, Senator. I do not think there was any evidence before that court of a ruse. I did not discuss this with the President at all. We did not contemplate a new special prosecutor. We contemplated that the investigations would be run effectively by Messrs. Henry Ruth and Philip Lacovara in their old building with the same staff in the same way. There was no contemplation of a new special prosecutor until it became clear that the public wanted one.

Senator **Metzenbaum**. Was there ever any doubt in your mind that the people of this country expected the special prosecutor to go forward and obtain the facts with respect to the matter of Watergate? Was there ever any doubt in your mind that that——

Judge **Bork**. No, there was never any doubt in my mind that the people of the country wanted the investigations to go forward and prosecutions to result, if justified, and there was never any doubt in my mind that that is exactly what I wanted. In fact, I did my utmost to keep that Special Prosecution Force intact and going forward.

Senator, we can get into the details later, but I think it is important—and I think this is really what the matter is about. This is the final official report of the Watergate Special Prosecution Force, not written by me, written by the men and women in the Special Prosecution Force. They say on Page 11, "The Saturday Night Massacre did not halt the work of the Watergate Special Prosecution Force, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Peterson, head of the Criminal Division, in charge of the investigations WSPF had been conducting." And here is a crucial sentence. "Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House."

That is exactly what happened.

Senator **Metzenbaum**. You consistently took the position, did you, that the tapes should be made available, that the President should cooperate, and that the special prosecutor's responsibility should go on?

Judge **Bork**. I took the position that the special prosecutor's people, all of whom remained in place and in their own building, should go on. I never took the position that the President had to hand over evidence if he thought he had a legal right not to. I took the position that the Special Prosecution Force had a right to go to court to compel him to hand over evidence, and, indeed, they did.

Senator **Metzenbaum**. Let me ask you some questions about that. On October 24, 1973, 4 days after you fired Archibald Cox, you had a press conference on the Watergate matter. You said, "Until late last Saturday afternoon, I was not involved in these matters at all. I had upon two or three occasions, I suppose, discussed jurisdictional problems concerning the Special Prosecution Force with Elliot Richardson and upon occasion, perhaps two occasions, with Archibald Cox and some of his staff. But I did not know the details of what the jurisdictions were."

The White House has also stressed that you were not involved in the Watergate matter prior to your firing Mr. Cox. The White House submission on your nomination states, "Prior to Saturday evening, Bork had only been tangentially involved in giving advice to Elliot Richardson on the jurisdiction of the special prosecutor."

In fact, Judge Bork, a review of the record shows that you were involved in giving advice to the White House on the issue of executive privilege. I want to ask you about some documents, which at this point, Mr. Chairman, I ask be included in the record. Under your rules, we will make them available during the next break.

Judge BORK. Well, I wonder, if I am going to be questioned about documents, Senator, whether I may not see the documents now.

Senator METZENBAUM. Surely.

The CHAIRMAN. I think that is appropriate. We will get you that. Senator Thurmond whispered something in my ear. Would you repeat what you said, Senator?

Senator METZENBAUM. I said that under your rules, as I understand it, if special material is to be made available, you have asked us not to do it during the hearing, but to wait for the recess. I certainly intend to make them available to Judge BORK.

The CHAIRMAN. Correct, yes, just not to the press because I do not want to get into the business of passing out documents at this point. You can do that at the recess. But Judge Bork, as you have just given him, should have the documents in front of him from which he will be questioned.

Does he have the relevant documents now?

Senator METZENBAUM. He does, indeed.

[Material follows:]

August 2, 1973

MEMORANDUM FOR THE PRESIDENT

FROM: ALEXANDER M. HAIG, JR.

Attached is a copy of a letter from Charles L. Black, Jr., the Luce Professor of Jurisprudence at Yale University, outlining his views on the matter of executive privilege on tapes and documents. It is strongly supportive of your position and is especially significant in view of Black's normally liberal stance on most issues. It is also significant that Bob Bork has reversed his originally skeptical attitude on our position.

Office of the Solicitor General
Washington, D.C. 20530

July 31, 1973

Dear General Haig:

The enclosed letter to the New York Times makes so persuasive an argument for absolute presidential privilege that I thought you ought to see it. It has helped change my prediction on the probable outcome of litigation on the subject. The writer, Charles Black, is a good friend of mine and a very distinguished law professor at Yale. Interestingly enough, he is a man of very liberal persuasion.

Professor Black asks that this letter be held in confidence until it appears in the Times, probably this week as an article on the Op-Ed page.

Sincerely,

Robert H. Bork

July 25, 1973

The Editor
The New York Times
229 West 43rd Street
New York, New York 10036

Dear Sir:

I consider it my duty to put on the public record my decided conviction that Mr. Nixon is dead right in refusing compliance with subpoenas, whether issued by a committee of the Senate, by a grand jury, or by any other authority, commanding the production of written or taped records of consultations held by him as President. I think this refusal is not only his lawful privilege but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come.

Since there are no precedents, judicial or otherwise, covering this case, and since the Constitution does not expressly speak to the issue, we must have recourse to common sense, which ought to underly and inform consideration of every constitutional question. It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken. Does anybody really think that Franklin Roosevelt, or Lincoln, could have managed the Presidency on those terms? That the means by which Lyndon Johnson secured the cloture vote on the Civil Rights Act of 1964 would have been usable, under those conditions?

The Framers of our Constitution, as one of their first acts, unanimously resolved that all their proceedings should be inviolably secret, and that the Convention should in the end go before the public with a result, rather than with a record of the tortuous process by which that result was reached. The Supreme Court confers in the strictest secrecy, never violated, and is judged by its public decisions and its publicly uttered reasons. These facts should be pondered, just for a little moment, by those who would lave with the perfume of sanctity the public's so-called "right to know".

It is true that the Constitution does not expressly set up an "executive privilege". I doubt it ever occurred to the Framers that anyone would come to contend that the President had no right to take effectively private counsel, or to hold private conversations. In any case, his right to that privacy rests only on functional implication; he cannot efficaciously conduct his office without it. But it is equally true that the Constitution does not expressly confer any investigative power, or power of subpoena, on Congress or on its committees; this power, too, rests on implication, or at best on the judgment that investigation is "necessary and proper" to the exercise of the textually named congressional powers. But is there anyone so far gone in literalism as to hold that the President does not also possess those immunities "necessary and proper" to the effective exercise of the Presidency, even though those very words do not occur in the Constitution?

Two subsidiary but practically important points must be added. First, the decision that the President's records may be subpoenaed and forcibly publicized would certainly generate its own abuses, for the surest high road to wide publicity, for any Congressman or Senator controlling the subpoena power, would be to use it on the President. Secondly, all attempts to frustrate secrecy in serious decisional processes must fail, and will almost always do more harm than good, for the secrecy, being necessary, will surely continue sub rosa, without even the responsibility imposed by a permanent record and by relatively formalized procedures.

It is the ultimate constitutional foolishness to let the merits of a particular case rush the country into a disastrous precedent. We have to think not only of Mr. Nixon and Senator Ervin, but of President Eisenhower and Joe McCarthy, and of every possible future combination. Let us judge Mr. Nixon on his public record, and not convert our judgment of that record into a precedent that will embarass and degrade the Presidency for the whole future.

Sincerely yours,

Charles L. Black, Jr.
Luce Professor of Jurisprudence

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JL 3
FE 4-1
Black, Chas L., Jr.

THE WHITE HOUSE
WASHINGTON

August 3, 1973

Right

MEMORANDUM TO: AL HAIG

FROM: PAT BUCHANAN

Maybe this guy could help us out.

Pat

Solicitor General thinks highly of him & supports his analysis.

RN

NEW YORK TIMES - 8/3/73

Mr. Nixon, the Tapes, and Common Sense

By Charles L. Black Jr.

NEW HAVEN—Mr. Nixon is dead right in refusing compliance with subpoenas, whether issued by a committee of the Senate, by a grand jury, or by any other authority, commanding the production of written or taped records of consultations held by him as President. I think this refusal is not only his lawful privilege but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come.

Since there are no precedents, judicial or otherwise, covering this case, and since the Constitution does not expressly speak to the issue, we must have recourse to common sense, which ought to underly and inform consideration of every constitutional question. It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken. Does anybody really think that Franklin Roosevelt, or Lincoln, could have managed the Presidency on those terms? That the means by which Lyndon Johnson secured the cloture vote on the Civil Rights Act of 1964 would have been usable, under those conditions?

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Charles L. Black Jr. is Luce Professor of Jurisprudence at Yale.

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THE PRESIDENT HAS SEEN... JL 9
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FG 17-11
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MEMORANDUM

THE WHITE HOUSE
WASHINGTON

August 8, 1973

MEMORANDUM FOR: THE PRESIDENT

FROM: AL HAIG

SUBJECT: Another Letter from Professor Charles Black

Robert H.

(Bob) Bork has sent me a copy of another letter written by Professor Charles L. Black, Jr., which Congressman Bob Eckhardt has had inserted in the Congressional Record. I believe you will find it of interest.

Attachment

* * * * *

Obtaining The White House Tapes

HON. BOB ECKHARDT
of Texas
in the House of Representatives
Wednesday, August 1, 1973

MR. ECKHARDT. Mr. Speaker, in recent days there has been considerable debate over the constitutional problems and ramifications of the attempt by the Senate Select Committee on Presidential Campaign Activities to obtain tapes from Mr. Nixon. Following is a letter I received from Prof. Charles L. Black, Jr., a noted constitutional scholar on the Yale Law School faculty, commenting on the situation. I think my colleagues will find Professor Black's comments extremely interesting and useful.

Prof. Blacks comments follow:

YALE LAW SCHOOL
New Haven, Conn., July 30, 1973

HON. BOB ECKHARDT,
House of Representatives
Washington, D.C.

MY DEAR CONGRESSMAN ECKHARDT:

I want to communicate to you some of my thoughts on the deadlock now developing with respect to the President's amenability to the subpoena duces tecum served on him by Senator Ervin's Select Committee of the Senate.

I think I ought to say, first, what an enormous peril I see in what is going on without anyone's really wanting it to happen, we are in danger of degrading or even destroying the Presidency as we have known it. You know, from our many past conversations and from some public writings of mine, that I think the aggrandizement of the Presidency has in some respects gone too far, and that some of the mystique surrounding the office ought to be dissolved. But it would be extremely foolish for us to go too far in the other direction, for the Presidency is the one wholly national elective office we have, and the degradation of that office -- even of its symbolism, wherein lies a great deal of its demonstrated power for good -- would be a most unfortunate development, disturbing in the most dangerous way the balance of the best government yet devised on earth. We should be especially careful not to do this through dislike or disapproval of any incumbent. Presidents come and go; any incumbent's powers can be checked in the desired degree by Congress. The office must be valued and protected above all for what it can be in the hands of a Franklin Roosevelt laying the foundations of modern social justice, of a Harry Truman establishing civilian control of the military, of a Lyndon Johnson putting through the Civil Rights Act of 1964. It is against this background of fear for the indispensable dignity of this office that I make my technical points.

I think, first and most crucially, that the activation of this Select Committee of the Senate was wrong -- constitutionally wrong. I heard Senator Ervin say, on a broadcast on Sunday morning, July 29, 1973, that at least one of the principal aims of his Committee was the finding of facts regarding Presidential involvement in the Watergate affair and its cover-up. But even if he had not said that, or even if I perchance misheard him, it is perfectly plain that at least one of the missions of the Committee is the ascertainment of these facts.

Now this sounds innocuous enough, until one reads the Constitution. When one does that, one finds that the sole power of impeachment is in the House of Representatives, and, far more importantly, that if that House votes impeachment, the Senate including all the members of this Select Committee, will have to sit as a judicial body, presided over by the Chief Justice, with the responsibility of finding the President guilty or not guilty of the charges brought. How in the world can these Senators sit as judges, or jurors, or a little of both, in a case with which they have been so closely engaged? Any judge thus involved in the background of a criminal matter coming before him would unhesitatingly recuse himself. Any juror with the same background of involvement would automatically be excused for cause.

What this Committee has done and is doing (and I speak here with great respect, for I impute no improper motive or wrongful intent to these Senators) is so to act as to disqualify a part of the Senate from performing in the event of its Constitutional duty an impeachment's being voted by the House of Representatives. Indeed, it may be questioned whether the whole Senate is not to some extent disqualified, for this Committee is the agent of the Senate, empowered by that body and reporting to that body. With the deepest respect, I must say that what the whole Senate, each of its members, and all of its committees ought to have done was to abstain most scrupulously from any involvement in a matter which, as possible judges-to-be, they might later have to pronounce upon judicially. It cannot be constitutionally right for any Senators so to act as to disable themselves from the totally uncommitted performance of their judicial duty in case of impeachment.

Now I do not for a moment think that any court ought to try to stop this investigation. But when a court is appealed to for aid in the carrying on of the work of the Committee, whether by way of enforcement of its subpoenas, or of issuance of a declaratory judgment, that court is, I submit, duty bound to consider whether the Committee has constitutional warrant for its proceedings, or whether, on the other hand, its creation, empowerment and actions are profoundly unconstitutional, for the reasons I have given. If the latter judgment is correct, then of course no court ought to assist.

I must repeat that although I have spoken plainly, for the occasion is one for plain speaking, I utterly disclaim any imputation of wrongful intent on the part of any of the members of the Committee. I think only that they, and the Senate, have made a great mistake, and that no court ought to allow that mistake to spread to the judicial branch.

My next point would be that, although this subpoena situation has been treated as a "confrontation" between Congress and the President, it is by no means that. Directly and literally, it is a "confrontation" between the President and a Select Committee of the Senate. Congress has in no way -- whether informally by concurrent resolution or in the formal manner mandated by the Constitution -- committed itself to this "confrontation". The question, then, is not whether Congress might, by clear and specific indication of its will, have access to Presidential documents; I think, as I shall later make clear, that there ought to be wide limits even on that power, but that is not the present question. At the very most, this is a "confrontation" between the President and the Senate.

But I doubt that even that is an accurate characterization. The very Resolution (S. Res. 60, 93rd Congress, 1st Session) establishing this Select Committee does confer a general subpoena power, and the words used might literally, if fed into a computer, cover the President, though, as I will soon show, even that is doubtful. But I submit that a court ought to adopt it as a rule of construction -- aimed at the avoidance where possible of this highly undesirable confrontation, and at the protection of the judiciary from unnecessary involvement -- that, if this most crucial and sensitive crisis is to arise in court, the President must be named, so that the court may be sure that this undesirable situation is one to which the legislative authority has consciously committed itself. This rule of construction seems to me psychologically sound; who, in regarding general language about the subpoena power, and voting its adoption, thinks of the President, and of this ultimate confrontation?

I doubt, however, that the language of S. Res. 60 covers the President at all, even by generality. The subpoena duces tecum authorization reads as follows:

"(5) to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce for its consideration or for use as evidence in its investigation and study any books, checks, canceled checks, correspondence, communications, document, papers, physical evidence, records, recordings, tapes, or materials relating to any matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control."

Perhaps a lexicographically programmed computer might print out the judgment that the President is an "officer" or "employee" of the executive branch. But that is not the way we construe statutes. Is it not perfectly plain that such language is entirely inapt, as a matter of usage, to designate the President of the United States? If I am right here, then even the Senate is not in "confrontation" with the President, not having authorized his being subpoenaed.

S. Res. 60, moreover, contains the usual provision for report back to the Senate:

"(6) to make to the Senate any recommendations it deems appropriate in respect to the willful failure or refusal of any person to appear before it in obedience to a subpoena or order, or in respect to the willful questions or refusal of any person to answer questions or give testimony in his character as a witness during his appearance before it, or in respect to the willful failure or refusal of any officer or employee of the executive branch of the United States Government or any person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce before the committee any books, checks, canceled checks, correspondence, communications, document, financial records, papers, physical evidence, records, recordings, tapes, or materials in obedience to any subpoena or order;"

Does not this language (at the very least when applied to such an utterly unique and politically charged question as a "willful failure or refusal" of the President himself) designate the exclusive procedure to be followed by the Committee:? Is it not reasonable to infer from it a direction by the Senate that the matter of possible contempt be brought back to the whole Senate, for resolution upon action? Is the expressed power to "make recommendations" not an implied exclusion of independent action by the Committee?

Of course, even if authorized by the Senate, any court action would have to fall within the judicial jurisdiction. I understand from published reports (and it is implied in the Committee's own resolution" that reliance may be placed on the Declaratory Judgment Act, passed some forty years ago. The operative part of that Act now reads:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

I cannot think of a clearer instance than this of the mechanical application of general language to a unique and unforeseen situation quite obviously not within the contemplation of those who put the general language in place. Here again, it seems to me not only reasonable but wise for a court to require that, if Congress wishes to create the mechanism for inter-branch confrontation, it do so expressly and clearly.

Many more technical issues could be explored. These issues, though technical, are important, for correct procedure is requisite above all with respect to great constitution crises. But I will pass on to the main question on the merits, that of the "inherent" Presidential right of privacy.

"Inherent" is a frightening word. All it ought to suggest in this context is the question, "What does it take for the President to perform his sensitive duties with the highest effectiveness and in an air of dignity?" It seems to me quite clear that the Presidency could not be carried on, with dignity or with efficacy, if the President himself and every participant in consultations and discussions with him had to fear the forcible verbatim disclosure, under subpoena issued by any grand jury, or any court, of the tenor and content of such consultation. Call to mind some of our former Presidents. How would Lincoln have operated under this regime? Try to imagine what Franklin Roosevelt (or his cousin Theodore) would have thought of it. How would we have liked for Senator Joseph McCarthy to have the power to subpoena every record of every discussion held by President Eisenhower on the subject of subversion in government?

What is really happening is that an absolutely unworkable rule threatens to be put in place, simply because there is great dislike and suspicion of the present incumbent.

It is apparently the theory of the Committee that the President ought to be just as amenable to subpoenaing of his records as any mortal, so long as those records are relevant to some congressional, prosecutorial or judicial concern. I should think anyone could see, first, that such a rule would generate its own abuses, for any official controlling the subpoena power (and there are very many who do) would know that the surest way to conspicuousness would be to turn that power on the President. On what theory would we exclude state prosecutors, grand juries and legislative committees? I cannot think it would be possible for the President to take or receive frank counsel on these terms, and without utterly frank counsel any such great officer is lost.

In some recent comments by academic experts, it is tacitly conceded that executive privilege must exist in some large degree, but the present case is sought to be distinguished. Little mousetraps of "waiver" are sprung; concessions perhaps unwisely made under pressure of time and emotion, are seized upon as just exactly what it happens sprung; concessions, perhaps unwisely made under pressure of time and emotion, are seized upon as just exactly what it happens to take to make this case different. These comments have the flavor, to me, of highly special pleading. Their interest lies largely in their implied concession of the quite visible necessity of confidentialty in much of the President's consultation. Their attempts at distinction, to me, fail. It can hardly be that the solid grounds for presidential confidentiality are so easily, almost accidentally, to be undermined. [Presidential confidentiality, to be effective or even to exist, must be wide, and must be very largely at the discretion of the President, for to force him to submit to any other tribunal the issue of the propriety of protecting any particular communication is to destroy, by that requirement itself, the very confidentiality at issue. The remedy for abuse (like the remedy for abuse of the pardon power, the veto power, or any other presidential power) is to elect good Presidents.]

Indeed, I cannot see why we should be unwilling to cover the Presidency with the same confidentiality as that with which the Framers of the Constitution covered their deliberations. They saw clearly that nothing but ill could come of their consulting under constant threat of disclosure of every word tentatively uttered. They wanted to go to the country with a result and not with a record of the to-and-fro movement toward that result, of all the foolish things said and retracted. Similarly, the Supreme Court (like all our plural-member courts) consults in secrecy, and presents the public with a result and with finally agreed-upon reasons. There is absolutely nothing that jars with the spirit of our institutions in our judging the President on the record of things visibly done and of words spoken in public. That is enough for judgment, as it always has been, and to insist on more is to seek to strip the office of dignity and of the support of truly candid consultation. I have no doubt that that is what some now want, but if they get it I think we all shall at last be sorry.

For the foregoing reasons, I think President Nixon is right in resisting the Committee's subpoena, and I hope his position will be upheld by the courts.

Very sincerely,

Charles L. Black, Jr.
Luce Professor of Jurisprudence

# # # # # #

Office of the Solicitor General
Washington, D.C. 20530

August 3, 1973

General Alexander M. Haig, Jr.
The White House
Washington, D.C.

Dear General,

I enclose more of the thoughts of Charles Black because I think you will find these additional ideas quite interesting.

This letter, introduced in the Congressional Record by Congressman Eckhardt, covers additional points that did not appear in Professor Black's letter to the New York Times. I should note that Congressman Eckhardt introduced this letter as an accommodation to a friend and not as expressive of his own views.

I am sending copies of this to Leonard Garment, Fred Buzhardt, and Charles Wright as well.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

Nice reply & thanks memo from me to Pres attaching Black piece

I have no intention to deluge you with the collected writings of Charles Black. This will be the last. Bob workers were a standard, then getting off welfare completely would not really improve" life for the so-called welfare poor. Besides, a surprising number of them are working—94 per cent of the male welfare recipients studied had worked more than 50 per cent of the time covered by the study as against only 90 per cent of male nonrecipients. Among women, a majority of both recipients and nonrecipients had worked at least half the time. Moreover, the jobs held by low-wage workers were mostly full time—but so poorly paid and dead-end as to leave the workers still in poverty, often earning less than the "combined value of services and cash from welfare."

The Ferman-Miller study isolated a set of characteristics that tend to keep too many Americans in poverty, whether of the working or welfare variety—rural origins with poor educational opportunity; migration to the city or elsewhere; lack of skills and training. These problems are compounded for racial minorities and for women. For these people good jobs are usually not available, no matter how much they want to work; for them, too, welfare can be of substantial assistance, and many take advantage of it without losing their desire to work and rise.

The study notes a substantial difference in the problems of male and female welfare recipients. Contrary to stereotype, the women do not have large numbers of children, but they do tend to be the only workers in their families and they work for the lowest of wages. The men, on the other hand, usually make much better wages and sometimes are helped by a working wife or older child, but have such large families that they cannot adequately support them. In that situation, increased earnings for a female recipient is a possible solution; but it is not a likely solution for the male recipient, who probably needs—as Mr. Ferman and Mr. Miller argue—a family allowance plan.

They conclude that in any sensible approach to the poverty problem, "The emphasis should not be on welfare recipient versus nonrecipient meaningless categories—but rather on male workers versus female workers. Second, the emphasis should be shifted from the concept of a welfare problem to that of a labor market problem."

Obviously, if far more women than men are in the poverty class, whether welfare or working, any effective program will have to "result in well-paying, prestigious careers for women as well as men." Just as obviously, if there are no real differences between the working and the welfare poor, the problem is not to get some people off welfare but to get far more people out of an economic dead end. Mr. Ferman and Mr. Miller favor "restructuring the low-wage market," through unionization; surely their study also points straight to the need for an income assistance and maintenance plan.

PHASE IV MAY COST YOU YOUR JOB

HON. MICHAEL HARRINGTON

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, August 1, 1973

Mr. HARRINGTON. Mr. Speaker, the recently announced phase IV economic stabilization program has already run into widespread criticism and considerable popular doubts as to whether it will succeed or fail. In fact, some aspects of the policy may already be foundering, especially as the White House itself finds that it cannot purchase high quality steaks for the President.

More serious doubts, however, are beginning to arise. Bruce Davidson wrote an article for the July 30 Boston Globe, "Phase IV May Cut Jobs, Not Prices," which pointed out the distinct possibility that phase IV may not only fail to stem inflation, but may also mean a significant increase in unemployment, and a serious recession. That is a result we cannot, of course, tolerate just as we are recovering from the 1970–71 recession. I would like to insert that article in the RECORD at this time for the information of my colleagues:

PHASE IV MAY CUT JOBS, NOT PRICES

President Nixon's announcement of Phase 4 price and wage controls has already been met with fairly widespread hostility and expressions of doubt that it will succeed in fighting inflation. On the food front, which is most dramatic for the consumer, it has started with the assumption, conceded from the outset by the administration, that prices will indeed rise.

As troublesome as inflation has been and probably will be, it may not be the worst evil facing our economy. The greater danger, telegraphed by the Commerce Department of markedly slower growth during the second quarter of this year, is that we are possibly on the verge of a new bout with unemployment. Administration policy, abetted by a perplexed Congress, threatens to foster joblessness without succeeding in its other purpose of curbing price increases.

We may lose twice rather than just once—inflation and a stagnant economy—stagnation for short.

The Commerce Department figures show that the nation's total production of goods and service rose during the second quarter at an annual rate of 2.6 percent compared with 8.7 percent for the first quarter of the year.

There has been some propensity to cheer about the decline, which was partially expected by economists around the country. These cheers were based on the reasonable opinion that the very fast rate of growth in the first quarter was unsustainable without even worse inflation than we had been experiencing and that it would be far better to drop back toward the 4 percent rate widely seen as possible without unacceptable price rises. Furthermore, some work done by Carol Greenwald, an economist with the Federal Reserve Bank of Boston, suggests that our sense of the direction in which the economy is headed may be influenced by faulty signs.

She targets the Commerce Department's index of leading indicators, widely used by economists as a tool for evaluating the nation's near-term prospects, charging that over the past year the index has "overstated the economy's strength because much of the recent rise in that index reflects inflation."

She has constructed a new series like that used by the Commerce Department but accounting for price increases in such areas as industrial materials, corporate profits, manufacturers' new orders, plant and equipment contracts, changes in consumer installment credit, and changes in book value of inventories.

She presents figures showing that the index peaked in March—the undeflated index peaked in May—and argues that "The slowing rate of advance in the deflated index since the fourth quarter of 1972 presages a decline in the growth rate of real GNP."

But the Phase 4 message carries with it a call for balancing the Federal budget during the current fiscal year, which started July 1. The budget, which the Administration and Congress have agreed should not be larger than $268-billion, is the amount that would be financed by our existing tax structure with normal growth and an economy functioning at "full employment." Since the economy has been operating at less than full employment, the Administration had been prepared to accept a deficit which last January it estimated would be about $12 billion and more recently, because of the pickup in Federal revenues, something more like $3 billion.

Since the Administration has so far ruled out a tax increase, the decision to eliminate even the $3 billion deficit means cuts in Federal spending unless there are unexpected additional increases in revenue within the present tax structure. These cuts will presumably be made with or without the cooperation of Congress. And they will almost inevitably mean less employment somewhere in the economy.

The $3 billion may in itself seem small and is in relation to a total budget of $268 billion and a gross national product of nearly $1.3 billion. But the Administration has often stressed its belief that even small deficits were unacceptably inflationary. The corollary of that belief is the assumption that even small surpluses in the budget while the economy is working below capacity are unacceptably restrictive.

So this move toward spending restraint comes at just the moment when the economy looks as though it may already be cooling off by itself. It comes, too at a significant budgetary surplus—running at a rate of about $15 billion annually, an unprecedented figure.

This will not necessarily produce a no-growth situation much less a decline in overall output but the economy must expand rapidly enough to absorb new entrants to the job market. The addition of more than 2 million jobs in the past year has barely kept ahead of increases in the numbers of those working or seeking work.

The Administration has shown some capacity for flexibility in its various attempts to manage the economy but the current zig in attempting to impose the absolute restraint on spending looks to us like one that will see us all back in the tough job of maximizing employment. Treasury Secretary George Shultz has called the balanced budget "old-time religion," appealing to someone's sense of nostalgia. To us it sounds like old-time unemployment, and that we don't need.

OBTAINING THE WHITE HOUSE TAPES

HON. BOB ECKHARDT

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, August 1, 1973

Mr. ECKHARDT. Mr. Speaker, in recent days there has been considerable debate over the constitutional problems and ramifications of the attempt by the Senate Select Committee on Presidential Campaign Activities to obtain tapes from Mr. Nixon. Following is a letter I received from Prof. Charles L. Black, Jr., a noted constitutional scholar on the Yale Law School faculty, commenting on the situation. I think my colleagues will find Professor Black's comments extremely interesting and useful.

Prof. Blacks comments follow:

YALE LAW SCHOOL,
New Haven, Conn., July 30, 1973.

Hon. BOB ECKHARDT,
House of Representatives,
Washington, D.C.

MY DEAR CONGRESSMAN ECKHARDT: I want to communicate to you some of my thoughts on the deadlock now developing with respect to the President's amenability to the subpoena duces tecum served on him by Senator Ervin's Select Committee of the Senate.

I think I ought to say, first, what an enormous peril I see in what is going on the power to subpoena every record of every discussion held by President Eisenhower on the subject of subversion in government?

What is really happening is that an absolutely unworkable rule threatens to be put in place, simply because there is great dislike and suspicion of the present incumbent.

It is apparently the theory of the Committee that the President ought to be just as amenable to subpoenaing of his records as any mortal, so long as those records are relevant to some congressional, prosecutorial or judicial concern. I should think anyone could see, first, that such a rule would generate its own abuses, for any official controlling the subpoena power (and there are very many who do) would know that the surest way to conspicuousness would be to turn that power on the President. On what theory would we exclude state prosecutors, grand juries and legislative committees? I cannot think it would be possible for the President to take or receive frank counsel on these terms, and without utterly frank counsel any such great officer is lost.

In some recent comments by academic experts, it is tacitly conceded that executive privilege must exist in some large degree, but the present case is sought to be distinguished. Little mousetraps of "waiver" are sprung; concessions perhaps unwisely made under pressure of time and emotion, are seized upon as just exactly what it happens sprung; concessions, perhaps unwisely made under pressure of time and emotion, are seized upon as just exactly what it happens to take to make this case different. These comments have the flavor, to me, of highly special pleading. Their interest lies largely in their implied concession of the quite visible necessity of confidentiality in much of the President's consultation. Their attempts at distinction, to me, fail. It can hardly be that the solid grounds for presidential confidentiality are so easily, almost accidentally, to be undermined. Presidential confidentiality, to be effective or even to exist, must be wide, and must be very largely at the discretion of the President, for to force him to submit to any other tribunal the issue of the propriety of protecting any particular communication is to destroy, by that requirement itself, the very confidentiality at issue. The remedy for abuse (like the remedy for abuse of the pardon power, the veto power, or any other presidential power) is to elect good Presidents.

Indeed, I cannot see why we should be unwilling to cover the Presidency with the same confidentiality as that with which the Framers of the Constitution covered their deliberations. They saw clearly that nothing but ill could come of their consulting under constant threat of disclosure of every word tentatively uttered. They wanted to go to the country with a result and not with a record of the to-and-fro movement toward that result, of all the foolish things said and retracted. Similarly, the Supreme Court (like all our plural-member courts) consults in secrecy, and presents the public with a result and with finally agreed-upon reasons. There is absolutely nothing that jars with the spirit of our institutions in our judging the President on the record of things visibly done and of words spoken in public. That is enough for judgment, as it always has been, and to insist on more is to seek to strip the office of dignity and of the support of truly candid consultation. I have no doubt that that is what some now want, but if they get it I think we all shall at last be sorry.

For the foregoing reasons, I think President Nixon is right in resisting the Committee's subpoena, and I hope his position will be upheld by the courts.

Very sincerely,

CHARLES L. BLACK, Jr.
Luce Professor of Jurisprudence.

WHY TEXANS SAID NO TO THE TRINITY RIVER CANAL

HON. HENRY S. REUSS

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

Wednesday, August 1, 1973

Mr. REUSS. Mr. Speaker, the environment page of the July 25, 1973, Christian Science Monitor included an article entitled "Why Texans Said No To Trinity River Canal":

WHY TEXANS SAID NO TO TRINITY RIVER CANAL

(By Cale Berkman)

Even back in the 1930's, when legendary Mayor Bob Thornton Sr. goaded the growth of Dallas with his cry of "Keep the dirt flyin'," there was always talk around Dallas and Fort Worth that "someday" the muddy, meandering Trinity River would be cleaned up, and its intermittent and devastating floods contained.

Big dreamers even hoped that it would be "canalized" to bring cheap barge shipping to the landlocked area. In those days, this would have been a boon to farmers struggling to move their cotton and wheat over the old two-lane highways and dependent on the all-powerful railroads.

But since then the picture has changed dramatically. Today the dynamic cities of Dallas and Fort Worth cup between their 30 miles separation the Southwest Metroplex with its new giant airport. Barge transportation would not be much help to the average person.

And so last March the plan of canalizing the Trinity for the two-hundred mile stretch from Fort Worth to the Gulf of Mexico at Galveston became a hotly contested issue between many industrialists and most elected officials, who were "for" the Trinity River Authority (TRA), and the vehemently "agin" taxpayers and environmentalists.

What had brought the 17 Texas counties involved to a fued was the availability of $1.6 billion in federal funds for water projects. The kicker, however, was the requirement that local money be put up on a 10-to-1 ratio.

To raise the $150 million required the Trinity River Development Committee asked the voters to approve a bond issue authorizing a 15 cents per $100 tax assessment. In a $400,000 ad campaign they offered "consideration and conservation of wildlife, flood control, water supply, enhanced recreational facilities, pollution abatement, thousands of new jobs, and 'low-cost water transportation,'" i.e. barges on the canal.

But the opposing Citizens for a Sound Trinity Organization (COST), a coalition of businessmen, private citizens, the Sierra Club, and the Audubon Society, seized on the "low-cost water transportation." They branded it as unnecessary, a "colossal boondoggle," a scheme of Trinity land-owning "fat cats" to cash in at the people's expense. Working with a $15,000 ad budget, they sent out the message that one-third of the TRA directors own or control 31,000 acres along the river.

The bond issue was defeated in 9 of the 17 counties by a 54 percent margin.

One of the people who fought the hardest against the "fat cats" was COST chairman Dr. James White, a theologian from Southern Methodist University. He had become angry with the "pork barrel" aspects of the Trinity Canal while working on his last income tax.

Another anti-canal campaigner was a big businessman—COST vice-chairman Henry C. Fulcher Jr., whose Sitco Lumber Company ships 25,000 tons annually. "Slow barging savings on a Trinity canal is a myth," he said, stating it was cheaper to move lumber by rail from existing barge terminals than to have to truck it from a Trinity dock to warehouses, with all the transfers involved.

Dr. White and Mr. Fulcher, along with two other members of COST, accompanied freshman Rep. Alan Steelman (R) to Washington to speak before the appropriations subcommittee. Representative Steelman was the only elected official who was against the canal (while favoring water improvements).

Representing the other side at the May 23 meeting were two delegations of Texans consisting of 86 elected officials, businessmen, and TRA members, who had shown up to battle the still-viable issue.

The result of the meeting: Three weeks later the House Appropriations Committee approved $1.3 billion for flood control, bridge construction, water quality, and recreation on the river, while bypassing the canalization of the Trinity.

So each side gained some, lost some. Most of the advantages of the program were welcomed by everyone: cleaner, more plentiful water, flood protection, and beautification of the river area.

However, some COST supporters are angry with the allowance of $740,000 in federal funds for raising two bridges. According to Colonel Boone of the Dallas-based Corps of Engineers, the state had requested the widening of one bridge from two to six lanes, and replacement of another "old, dilapidated one." COST leaders Dr. White and Mr. Fulcher say the money for raising the bridges will be wasted, as there will be no barges to go under them and thus no need for greater height. But Colonel Boone says Congress has declared the Trinity to be navigable; hence the new high bridge construction.

The other side has some grievances, too.

During the Trinity bond issue contest, TRA's general manager David Brune was particularly chagrined at the injunction granted by U.S. District Judge Carl O. Bue to stop construction at the Wallisville dam at the mouth of the Trinity until an "adequate" environmental impact statement from the Corps of Engineers was submitted and approved.

"The City of Houston had already invested $125 million to take water from the Wallisville reservoir," he noted. "I think stopping that and enjoining the Trinity projects in the design phase that had no reference to navigation was the most ridiculous decision handed down by any court in interpreting the National Environment Act."

But manager Brune's assistant, George Jennings, sees healing of wounds between both sides now. "If we have to disassociate the canal from other water resource projects, we will work with the opposition to salvage the generally accepted benefits."

Perhaps for the future the answer lies in a report issued by the National Water Commission. That report amounted to a major overhaul of the nation's water policies and programs, some causing controversial reaction.

In essence, it would put the costs of flood protection and transportation facilities on the users: property owners, local and regional governments, and commercial recreation users of a channel and its locks.

KU ADAPTS FACILITIES TO HELP HANDICAPPED

HON. LARRY WINN, JR.

OF KANSAS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, August 1, 1973

Mr. WINN. Mr. Speaker, I would like to insert the following article from the

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Office of the Solicitor General
Washington, D.C. 20530

COPY FROM THE NATIONAL ARCHIVES--NIXON PROJECT

August 3, 1973

Hon. Leonard Garment
The White House
Washington, D.C.

Dear Len,

I enclose for your information a letter written by Charles Black of the Yale Law School faculty and placed into the Congressional Record by Congressman Eckhardt. I should note that Congressman Eckhardt introduced this letter as an accommodation to a friend and not as expressive of his own views. I think you will find it very interesting, particularly since Charles Black is a strong liberal and not a supporter of the President.

Sincerely,

Bob

Robert H. Bork
Solicitor General

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THE WHITE HOUSE
WASHINGTON

TELEPHONE MEMORANDUM

August 3, 1973

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OUT XXXX	AM 12:54 PM	1:03	General Alexander Haig White House Office White House Admin. X-684	Tlkd-ok 12:55 PM
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[illegible], CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
(PURSUANT TO SEC. [illegible], S. RES. [illegible], [illegible] CONGRESS)
WASHINGTON, D.C. 20510

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NOV 16 1973

November 16, 1973

Honorable Robert H. Bork
Acting Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Bork:

I am sorry that I was unable to hear your testimony before the Judiciary Committee on Wednesday, but I understand that you were most forthright and candid with the Committee. So that your further appearance before the Committee during this series of hearings can be obviated, and as indicated by Senator Hart during your testimony, I am submitting the following questions, the responses to which will be included in the hearing record.

1. In your testimony before this Committee, you stated that the President could limit the jurisdiction of the Special Prosecutor, Mr. Jaworski, with a "consensus" of the Congressional leadership. It appears that this aspect of the Special Prosecutor's new charter was understood by virtually no one--not the media,[1] not the Judge who decided the Cox dismissal case,[2] and not, apparently, even the Justice Department brief writers in that case, who limited the scope of the consensus provision to the question of dismissal.[3]

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[1] New York Times, November 2, 1972, at 22; Washington Post, November 2, 1973, at A3 ("Bork said that Jaworski will have the same charter Cox did with the additional commitment the President made regarding his power to dismiss him.").

[2] Nader v. Bork, Civ. No. 1954-73, at 9, n. 13. ("The two regulations are identical, except for a single addition to the new regulation which provides that the Special Prosecutor may not even be discharged for extraordinary improprieties unless the President determines that it is the 'consensus' of certain specified congressional leaders that discharge is appropriate.")

[3] Government's Brief in Opposition to Plaintiffs' Motion for

(con't)

(a) Do you consider the wording of the new language clearly to provide that the President may interfere with the Special Prosecutor's independence--that is, may limit his jurisdiction--with a "consensus" of the congressional leadership?

(b) Does this language also allow for such limitation without agreement by the Special Prosecutor?

(c) How do you account for the widely held public and congressional belief that the consensus provision applies only to dismissal of the Special Prosecutor, and not to limiting his independence or jurisdiction?

(d) Why was this added limitation included in the new charter?

(e) Under what circumstances do you foresee the President's moving to limit the jurisdiction or independence of the Special Prosecutor?

(f) Doesn't the existence of this new provision seriously undermine the independence of the Special Prosecutor and represent a major retreat from the jurisdictional freedom enjoyed by Mr. Cox until he was fired?

2. Mr. Richardson suggested during his appearance before the Judiciary Committee that the President should "sign on the dotted line" his assurance that he will not use executive privilege to refuse access to information by the Special Prosecutor.

(a) Aside from his unqualified statement of October 26 that "we will not provide presidential documents to a special prosecutor," has the President made any such definitive, public assurance?

(b) Do you agree as to the desirability that the President make such a definitive, unqualified, public statement?

3/ (con't) Preliminary Injunction, Nader v. Bork at 3. ("The Order... provides that the Special Prosecutor shall not be discharged 'except for extraordinary improprieties on his part and without the President's first consulting [several named Congressional leaders of both political parties] and ascertaining that their consensus is in accord with his proposed action.'")

Robert H. Bork
page 3

(c) Can you provide the exact language of any such assurance given by the President since his statement of October 26?

(d) Even if the President made such an assurance, would there be any legal obstacle to his changing his mind and reversing his position on the subject?

3. Doesn't the Court of Appeals decision in Nixon v. Sirica constitute controlling precedent in future cases where the federal grand jury requests further tapes and records from the White House under similar situations?

4. Should the White House tapes and records relevant to the duties of the Senate Watergate Committee be turned over to that Committee by the President? Please explain.

5. Should the White House tapes and records relevant to the duties of the House Judiciary Committee in its impeachment investigation be turned over to the Committee by the President? Please explain.

6. In your public statements, and in the Department's brief in Nader v. Bork, you have asserted that the discharge of Prosecutor Cox constituted an automatic abolition of the regulation under which he was appointed. Even accepting this position, which the District Court rejected, does this mean that the Attorney General (or any Executive branch official who promulgates regulations) can abrogate or abolish or amend regulations merely by acting inconsistently with their mandates?

7. Professor Wright said on October 22, 1973 (The Today Show) that the President violated his and the Attorney General's public pledges when he told Mr. Richardson to fire Mr. Cox. Do you agree? Please explain.

8. Prior to October 20, 1973, did you ever discuss with the President the subject of executive privilege, the tapes, or Mr. Cox's activities? Please provide details of any such conversations (date, subject, surrounding circumstances, who said what to whom).

9. Prior to October 20, 1973, did you ever receive any indication from members of the White House staff of dissatisfaction with Mr. Cox's activities or that he might be fired? When? Please explain fully.

10. Subsequent to Mr. Jaworski's appointment as Special Prosecutor, have you discussed matters of jurisdiction with him?

(a) Which areas of jurisdiction have you discussed?

(b) What was your position?

(d) Were any questions of jurisdiction raised during this period by the White House? Please provide details.

11. You have been most persistent in your argument that the constitutional doubts surrounding establishment of a court-appointed Special Prosecutor might hamper his functioning and jeopardize any indictments he secures. I might add that your doubts do not seem to be shared by most constitutional scholars or a majority of the members of the Senate.

Yet, Senator Byrd has made a lengthy presentation to the Senate outlining arguments that the appointment of Senator Saxbe to the position of Attorney General would violate the constitutional prohibition against senators' assuming offices whose emoluments have been increased during their terms. It seems to me that, if Senator Byrd is right, we would run considerably graver risks with an ineligible Attorney General than the risks you have pointed out in the case of a Special Prosecutor. For example, prosecutions might be invalidated, antitrust cases nullified and other official acts of the Attorney General thrown into litigation.

Why do you believe it so unwise to take a minimal constitutional risk with a court-appointed Special Prosecutor, yet perfectly acceptable to take, if Senator Byrd is correct, a more wide-ranging risk with the nomination of a potentially ineligible Attorney General?

Because the Judiciary Committee will be considering final action on the Special Prosecutor legislation next Wednesday, I would request that, if possible, you submit your responses to these questions by Monday, November 19.

Thank you for your cooperation.

Sincerely,

Edward M Kennedy

Edward M. Kennedy

CONG	11/16/73	

by mess - 11/16 ltr to the Acting AG fr Sen Edward Kennedy, Re: Was not present during Mr. Bork's testimony before the Judiciary Comte on Wed. So that his (Mr. Bork's) appearance before the Comte during this series of hearings can be obviated, submits several questions, the responses to which will be included in the hearing record. Requests responses by Nov. 19

11/16 - Mr. Bork - by hand
cc to Hugh Durham - by hand

Office of the Attorney General
Washington, D.C. 20530

Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

In response to your request of November 16, 1973, I am forwarding the responses to the questions which you posed in the order which they appear in your letter.

1.

Your first question and its subparts refer to the scope of the "consensus" provision in Mr. Jaworski's charter. Before responding to your specific inquiries, I believe it would be helpful to place the "consensus" provision in proper perspective.

The charter issued by Mr. Richardson for Mr. Cox is identical to the charter issued by me for Mr. Jaworski with the sole exception of the "consensus" provision. While Mr. Cox's charter did contain a provision relating to removal, it was silent as to any other limitations and I think it clear that there existed legal power to limit Mr. Cox's jurisdiction.

In establishing a charter for Mr. Jaworski, the "consensus" provision was inserted for the purpose of providing additional safeguards for the Special Prosecutor. Although public discussion has focused on removal, it was intended that the "consensus" provision apply to any attempt to limit the Special Prosecutor's independence, including his jurisdiction, and that was the way I stated the matter in the press conference at which I announced Mr. Jaworski's appointment. Due to a drafting error the "consensus" safeguard in the new charter appeared to apply only to removal. I have amended the charter to make clear that the "consensus" provision applies to both removal and any other limitations. (A copy of the amended charter is enclosed herewith).

(a) As noted above, under the charter as now written, the "consensus" provision applies both to removal and any other limitations.

(b) The "consensus" provision does not require the consent of the Special Prosecutor, however, in my view consensus on any action which the Special Prosecutor opposes is so exceedingly unlikely as not to be a practical possibility.

(c) Public discussion may well have focused on removal because of the discharge of Mr. Cox but as I have indicated the "consensus" provision is a safeguard against other limitations as well.

(d) The "consensus" provision is not an added limitation, rather it is clearly an added safeguard since any limitation now requires a consensus of Senators Mansfield, Scott, Eastland, and Hruska, and Representatives O'Neil, Ford (or his successor), Rodino, and Hutchinson.

(e) I cannot conceive of any likely circumstances under which the President would attempt unilaterally to limit or change the jurisdiction or independence of the Special Prosecutor.

(f) Mr. Jaworski has all of the jurisdictional freedom enjoyed by Mr. Cox and he has the additional commitment that he will not be discharged, his jurisdiction redefined, or his independence otherwise limited except with the consensus of the named Congressional leaders. The Special Prosecutor's independence has not been undermined but reinforced.

2.

As Acting Attorney General I feel that it would be improper for me officially to express views on what public statements the President should or should not make on this subject. Through General Haig, the President has promised cooperation with the Special Prosecutor and made it clear that the latter has the right to invoke judicial processes should disagreement occur.

3.

In my opinion the Court of Appeals' decision in Nixon v. Sirica is controlling precedent in this area. Like other precedent, it may be clarified or modified by future decisions, should any occur.

4. and 5.

As Acting Attorney General, it would be improper for me to comment on the subjects referred to in questions 4 and 5 of your letter.

6.

The district court opinion in Nader v. Bork is presently under review in the Civil Division of the Justice Department. Pending completion of that review and formulation of the Department's position as to appeal, it would be improper for me to discuss matters which were, and may be, the subject of the litigation. In any case, I doubt that your question is susceptible of a flat answer that would cover all circumstances.

7.

I did not hear Professor Wright's comment and, in any event, it would be improper for me as Acting Attorney General to comment on essentially political judgments.

8.

I have never discussed with the President the subjects of the tapes or Mr. Cox's activities either before or after October 20, 1973. The President discussed the subject of executive privilege with me on one occasion. Professor Charles Black of Yale Law School had written a letter to the New York Times upholding the President's right to confidentiality. The President telephoned me to ask that I tell Professor Black, whom he knew to be my colleague, that the President agreed with his argument and admired the professional skill with which he had made it. That was the only occasion upon which the President mentioned executive privilege to me.

9.

Prior to October 20, 1973, I discussed Mr. Cox's activities with members of the White House staff only at the specific request of Attorney General Elliot Richardson. Mr. Richardson asked me to assist him in thinking about problems of Mr. Cox's jurisdiction and specifically asked that I discuss the issue with members of the White House staff as well as with Mr. Cox and himself in an effort to discover areas of disagreement and to help frame possible solutions. To that end, I discussed jurisdictional issues on two or three occasions with Mr. Fred Buzhardt and he indicated generally that he thought Mr. Cox's staff might be going beyond any reasonable construction of the jurisdictional guidelines. Mr. Buzhardt, however, did not articulate any overall concept of Mr. Cox's jurisdiction. The task assigned me by Mr. Richardson was not the resolution of specific disputes but merely the attempt to give conceptual clarity to guidelines Mr. Richardson himself regarded as insufficiently precise. To that end, I gave Mr. Richardson a memorandum which he used as a discussion paper in a meeting with Mr. Cox and two members of his staff at which I was present. The discussion ended rather inconclusively, all persons agreeing to think the matter over in anticipation of further discussions. That ended my participation in the jurisdictional discussions. This subject was explored in my testimony before the Committee last Wednesday, particularly in questioning by Senator Hart.

The question of the possible discharge of Mr. Cox once arose in a telephone conversation with General Haig. He said that many members of the public were expressing the view that Mr. Cox should be discharged because of a press report, the contents of which I have now forgotten, and asked my opinion. I said that I thought Mr. Cox should definitely not be discharged over the episode and General Haig said he agreed with me. That telephone conversation was sometime last summer. I cannot fix a date to it but I believe Mr. Richardson had a similar telephone conversation at about the same time.

10. I have not discussed Mr. Jaworski's jurisdiction with either him or the White House except to say that I thought it should be the same as the jurisdiction given Mr. Cox.

11. I do not believe there is any constitutional risk in the nomination of Senator Saxbe as Attorney General once the statute lowering the compensation and emoluments of the office is enacted. On the other hand, I think there is grave constitutional doubt about a court-appointed Special Prosecutor, and the district judges of the District of Columbia appear to share my doubts, at least about the wisdom of the idea. Thus, I do not agree with the premise of your question that there is "minimal" constitutional risk in the court-appointed Special Prosecutor but a "wide-ranging" risk in Senator Saxbe's appointment.

I hope that I have satisfactorily answered your questions.

Sincerely,

Robert H. Bork
Acting Attorney General

Senator **Metzenbaum**. The first document is a memorandum from Alexander Haig to the President, dated August 2, 1973, with two attachments. Then there is a letter from Robert Bork to General Haig, dated July 31, 1973, and a letter from Charles L. Black, Jr., to the editor of the New York Times, dated July 25, 1973.

The second document or group of documents is a memorandum from Pat Buchanan to Al Haig, dated August 1973, with marginal notations and an attached newspaper column.

The third document is a memorandum from Al Haig to the President, dated August 8, 1973, with two attachments.

Judge **Bork**. I seem to have about five copies of each of these, Senator. If I can find the August 8th one—here we are.

Senator **Metzenbaum**. All right?

The **Chairman**. Take your time, Judge.

Judge **Bork**. That is fine.

Senator **Metzenbaum**. And a draft Congressional Record insert by Congressman Eckart of Texas, dated August 1, 1973, as well as a letter from Robert Bork to General Alexander M. Haig, Jr., dated August 3, 1973, with marginal notations and an attached Congressional Record insert.

The fourth is a letter from Robert Bork to Leonard Garment, August 3, 1973, with an attached Congressional Record excerpt.

The fifth is a log of the President of August 3, 1973.

First, Judge Bork, would you turn to Document A? Do you have that there?

Judge **Bork**. Yes.

Senator **Metzenbaum**. The second page of that document is a letter from you to General Haig. It states in part, "The enclosed letter to the New York Times makes so persuasive an argument for absolute presidential privilege that I thought you ought to see it. It has helped change my prediction on the probable outcome of litigation on the subject."

General Haig sent your letter to the President, as shown on the first page of the document. He included this statement of his. "It is also significant that Bob Bork has reversed his originally skeptical attitude on our position."

Now, Judge Bork, you were not simply passing on an interesting article. You were advising Mr. Haig and the President regarding your legal opinion of the President's right to turn over subpoenaed written or taped records of consultations held by him as President. Contrary to your statements that you were not involved, you were actively advising the White House; isn't that correct?

Judge **Bork**. Of course it is correct, Senator. The Department of Justice is asserting executive privilege or government confidentiality, whatever we are going to call it, all of the time. And, in fact, at one stage of this, Attorney General Elliot Richardson asked me to try to work out with Mr. Philip Lacovara a common position on executive privilege so that the Watergate Special Prosecution Force, which was trying to defeat executive privilege, and the Department of Justice, which in all kinds of cases—not in the Watergate cases, but in all kinds of cases—was asserting executive privilege. Mr. Lacovara and I tried to work out some means in which we would not wind up opposing each other, not directly, but wind up asserting opposing positions.

Executive privilege was a very touchy business, and I talked to people about it frequently. Now, in this letter, I think I had said to the White House—I do not know what I said. I guess I had said that the strong stand on executive privilege, which they asserted in all kinds of cases, was not going to work. My good friend, Charles Black, who was a colleague of mine at Yale, sent me this letter and said he was sending it to the New York Times. I think it appeared in the New York Times. And I passed it on.

Senator METZENBAUM. Judge Bork, apparently you had previous communications with the White House on this issue; is that right?

Judge BORK. Of course, because we had the executive privilege problem in all kinds of cases, and we were concerned about getting our positions worked out.

Senator METZENBAUM. That is the implication of General Haig's statement, that you had reversed your originally skeptical attitude on the White House position.

Judge BORK. I do not know if it was reversed. What I said was it helped change my prediction on the probable outcome of litigation. I do not even know what litigation that means.

Senator METZENBAUM. Let me ask you, Judge Bork, about Document B.

Judge BORK. Yes.

Senator METZENBAUM. That document is a memo sent from Pat Buchanan to Al Haig, dated August 3, 1973, attaching a column by Professor Charles Black. In that column, Professor Black argued that, "Mr. Nixon is dead right in refusing compliance with subpoenas, whether issued by a committee of the Senate, by a grand jury, or by any other authority, commanding the production of written or taped records of consultations held by him as President."

In other words, he argued that President Nixon could stonewall on the issue of turning over the tapes sought by the special prosecutor. Mr. Buchanan's comment in the column was, "Maybe this guy could help us out." General Haig's note back to him said, "Right. Solicitor General thinks highly of him and supports this analysis."

In other words, Mr. Haig was relying on your endorsement of Professor Black and your reversal of your position that the President had no obligation to turn over the tapes.

Judge BORK. Well, I did not say that, Senator. I said that it helped change my prediction of the outcome of litigation. I should say I have not read this letter by Professor Black in a long time, but Professor Black is a highly respected constitutional scholar and was not a supporter of Mr. Nixon's.

Senator METZENBAUM. I am not questioning that. I do not think that is the issue.

Judge BORK. But you did say that, in other words, he said the President could stonewall. Professor Black would not have said a thing like that.

Senator METZENBAUM. Let me ask you about Document C. That document includes a letter dated August 3, 1973, from you to General Haig, forwarding another analysis by Professor Charles Black, which was inserted in the Congressional Record by Congressman Eckart of Texas. You say in your letter, "I think you will find these additional ideas quite interesting."

As in the previous case, "these ideas" you were referring to had to do with Professor Black's position that the President did not have to respond to a subpoena by anyone; in effect, that he had unlimited executive privilege. General Haig then passed on your submission in a memo to the President dated August 8th. His memo said, "Bob Bork has sent me a copy of another letter written by Charles L. Black, Jr. I believe you will find it of interest."

As I see it, again, contrary to your statement that you were not involved, you were giving your advice to the White House. And as I understand the role of a Solicitor General, the Solicitor General is the attorney for the United States, not necessarily the private counsel to the President of the United States. Is that correct?

Judge **Bork**. No, he is attorney for the United States, and sometimes the United States is represented by the President.

Let me make one thing clear, Senator Metzenbaum. I never advised the White House how to meet, how to deal with the Watergate Special Prosecution Force. The most I did was send over Charles Black's letter to the New York Times, which was public, and there was no business about it. The only time I dealt with the White House on executive privilege was when Mr. Richardson put me in charge of trying to mediate a position between the White House and Department of Justice and the Special Prosecution Force. Since we represented the President in a lot of litigation having nothing to do with Watergate, it was essential that we work out, if we could, some particular position.

I used to confer with Fred Buzhardt, the President's counsel, and with Philip Lacovara. We never achieved an accommodation in principle.

Senator **Metzenbaum**. Let me proceed. In November 1973, you testified before the Senate Judiciary Committee regarding the functions of the new special prosecutor. After that hearing, Senator Kennedy wrote you a letter dated November 16, 1973. He asked you, "Prior to October 20, 1973, did you ever discuss with the President the subject of executive privilege, the tapes, or Mr. Cox's activities? Please provide details of any such conversations, date, subject, surrounding circumstances, who said what to whom."

You responded, "I have never discussed with the President the subjects of the tapes or Mr. Cox's activities either before or after October 20, 1973. The President discussed the subject of executive privilege with me on one occasion. Prof. Charles Black of Yale Law School had written a letter to the New York Times upholding the President's right to confidentiality. The President telephoned me to ask that I tell Professor Black, whom he knew to be a colleague, that the President agreed with his argument and admired the skill with which he made it." This is still you answering.

Judge **Bork**. Yes.

Senator **Metzenbaum**. "That was the only occasion upon which the President mentioned executive privilege to me."

Judge **Bork**. That is true.

Senator **Metzenbaum**. Now, Judge Bork, that answer may be technically true, but it leaves the impression that the President happened to see Professor Black's letter and decided to call you simply because you were an acquaintance of his. You completely failed to mention——

Judge BORK. May I see my response, please, Senator?

Senator METZENBAUM. You have it there.

Judge BORK. I do?

Senator METZENBAUM. Yes. While you are getting that, I will carry on because time is running out.

You completely failed to mention that you were the one forwarding Charles Black's analysis to the White House, and that you were endorsing it. Was not your answer to Senator Kennedy only half the story? Or to put it another way, did you not fail to answer the question completely?

Judge BORK. I do not think so, Senator. It occurred to me that it was important that I forward a copy of a New York Times letter to General Haig, and that General Haig gave it to President Nixon, but I did not discuss executive privilege with the President. He called me once to say he liked Professor Black's letter. I think, if I have my dates correct—since the President did not call me frequently—that I took that—I think. Now, I want to be careful because I am not sure of the dates.

I had been asked by General Haig right in that period of time to resign as Solicitor General and become President Nixon's chief defense counsel. After discussions, I convinced General Haig that I was not the man for the job. And I think I interpreted the call from the President more as a gesture to say he did not hold it against me, because there was nothing to the call and he would not ordinarily have called.

Senator METZENBAUM. Judge Bork, you have said that firing Mr. Cox could not hamper the investigations of the Office of the Special Prosecutor. At your 1982 confirmation hearings, you stated, "There was never any possibility that the discharge of the special prosecutor would in any way hamper the investigation or the prosecutions of the special prosecutor's office."

But you had no guarantee from President Nixon at the time he fired Mr. Cox that there would even be another special prosecutor. Is it not a fact that the decision to appoint a new special prosecutor was not made until several days later after the President had provoked a firestone of controversy around the country?

Judge BORK. That is right. Initially, we intended to leave the Special Prosecution Force intact but not to appoint a new special prosecutor, and they would go on under Mr. Ruth and Mr. Lacovara as before. But we did not initially contemplate a new special prosecutor until we saw that it was necessary because the American people would not be mollified without one.

Senator METZENBAUM. As a matter of fact, at your own press conference on the following Wednesday, October 24th, you were asked, "Would these mechanisms"—that is, to continue the investigation—"fall short of appointment of a special prosecutor as we know a special prosecutor?" You answered, "They may or may not. I have got a variety of alternatives in mind."

A report in the Washington Post of October——

Judge BORK. Senator, I think there is more in there on that subject, is there not? Somebody asked me if I had contemplated a new special prosecutor, and I said, "The thought has crossed my mind."

Senator **Metzenbaum**. That may very well be the case, and I will not challenge you if you say that you said it. I will not take issue with you.

The report in the Washington Post of October 24th stated, "Peterson"—who was then head of the Criminal Division at Justice—"and Bork met yesterday afternoon with senior staff members of Cox's prosecuting office to discuss how the investigation will proceed. 'The independence of the prosecution is still a problem,' one of the senior Cox staff members who attended the meeting said last night. Peterson said that no one has come to any firm conclusion about the hiring of another independent prosecutor. The last few days have brought that concept into question."

The White House submission on your behalf contains this statement: After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new special prosecutor's office, giving it authority to pursue the investigation without interference. And according to a published report, you told the American Bar Association in 1982, when you were being considered for an appointment to the Federal Court of Appeals, that after Cox was fired you "immediately began searching for another special prosecutor."

As a matter of fact, you actually ordered that the Justice Department itself take over the investigation, as I think you have just indicated, and the decision to appoint a new special prosecutor was made by the President several days later only after widespread public criticism. Is that not correct?

Judge **Bork**. Senator, it is entirely correct, but let me tell you how that happened.

On Wednesday afternoon, when I held the press conference and said, in response to a specific question about whether a special prosecutor was one of the mechanisms I had in mind to get evidence, I said, "It has, let us say, crossed my mind." That morning I was not telling the press everything that we discussed. I think you have documents in your possession that show that that morning before the press conference I met at the White House with Leonard Garment, Fred Buzhardt and Bryce Harlow. We recommended to the President a new special prosecutor. So that was on track. I had clearly been thinking about it before Wednesday morning, or I would not have gone over there and made the recommendation.

But there were two other aspects in which you used, Senator, the word "immediately." I did promptly act to safeguard the Special Prosecution Force. My great concern was that there might be a lot of resignations over there which would hinder the investigations and prosecutions.

I understood from the beginning that my moral and professional life were on the line if something happened to those investigations and prosecutions, and that is why I was adamant in asking them to stay—and Henry Peterson was, too.

Senator **Metzenbaum**. Judge Bork, you have said a number of times that you went ahead and conducted yourself as you did because you were worried that there might be a number of resignations. The American Government, the American people were totally distraught at this moment. You have sort of suggested that because some lawyers might quit—there are plenty of lawyers around. I am a lawyer, plenty of lawyers around—that because some lawyers might quit, even though they had had some experience in this area, that because of that you went forward and did this act which the court determined to be an illegal act. Is that not pretty hard for the American people to accept?

Judge BORK. If I thought it was just a question of replacing one lawyer with another, it would be pretty hard to accept. That is not what was taking place, however.

Senator, let me talk about that. I think maybe it is time now to tell the story. Do we have time to tell the story?

The CHAIRMAN. You can have all the time you want, Judge.

Judge BORK. As I said, my involvement with the Special Prosecution Force and Mr. Cox was limited to trying to draft, at the request of Mr. Richardson, a redefinition of the jurisdiction because the feeling was that the jurisdiction was stated so broadly that it covered things in no way related to Watergate. I did draft it; we discussed it with Mr. Cox. We never came to an agreement, and all this other stuff happened.

I also dealt with the Special Prosecution Force through Mr. Lacovara at Mr. Richardson's request on the question of accommodating our positions on executive privilege. I had no connection with the negotiations with Mr. Cox about the order not to go to court and so forth and so on. I wish I had because I could have said, if I had been involved, what are you going to do if Mr. Cox refuses the order—as, indeed, he should have. I had never disputed that.

If they had asked themselves that question, they might have asked: Who is going to discharge Mr. Cox? And if they had learned that Mr. Richardson and Mr. Ruckelshaus were not going to do it, they never would have gone forward with that order. They were very sick that night because they assumed that they would not have to get down to me.

Now, I was sitting in my office Saturday afternoon writing a letter, I think to a third grade class about the Bill of Rights, and I went down at the time scheduled for Mr. Cox's press conference into the office of Jack Hushin, who was our press officer then. We watched it on television. The minute it was over, Mr. Richardson's secretary came in the door and said, "The Attorney General wants to see you."

We went in then, into his office, and Mr. Ruckelshaus was there and a few of Mr. Richardson's aides, and we talked about this crisis that was developing. Finally, Mr. Richardson said something like, "I think they are going to order me to fire him," or "They have ordered me," or "I think they are going to order me." He said, "I cannot fire Cox. Can you, Bill?" And that was the first time it occurred to me that I was third in command at the Department of Justice. I suddenly saw it.

The CHAIRMAN. Excuse me. Would you repeat that? You said, "He said, 'I cannot fire him'"?

Judge BORK. "I cannot fire Cox," or words to that effect.

The CHAIRMAN. And "Can you, Bill?"

Judge BORK. To Ruckelshaus. Ruckelshaus said no.

The CHAIRMAN. If you do not mind, Senator. Did you or anyone else ask why he could not fire him?

Judge **Bork**. We knew. He said he promised the Senate.

The **Chairman**. But did he say it at the time?

Judge **Bork**. I think so. You know, you can ask him. That was my understanding. Mr. Richardson and I had discussed the tension growing between the Special Prosecution Force and the White House.

The **Chairman**. Was there any discussion at that time with the three of you in the room, or are there just two of you now?

Judge **Bork**. No, three of us plus an aide or two of Mr. Richardson's who were going in and out.

The **Chairman**. But there were three principals in the room.

Judge **Bork**. Yes.

The **Chairman**. You, the Attorney General and Ruckelshaus.

Judge **Bork**. Right.

The **Chairman**. And when it was at least implied or stated that he could not be fired——

Judge **Bork**. No, he did not say he could not be fired. Mr. Richardson always thought he could be fired. He said that he could not do it personally.

The **Chairman**. He could not do it personally, and the reason being?

Judge **Bork**. His assurances to the Senate when he was confirmed.

The **Chairman**. Did Ruckelshaus think those assurances applied to the department or to an individual?

Judge **Bork**. Well, the assurances to the Senate cannot very well apply to the department unless you think the assurance was something like a statute, which the Senate, of course, could not pass by itself.

Now, Richardson regarded them as personal assurances, and I will tell you why. I am skipping over now, but I would like to come back to this.

Later in the afternoon, Richardson went over to the White House. They attempted to persuade him to go ahead. He attempted to tell him he could not. While he was gone, Bill Ruckelshaus and I discussed what might happen in the outcome. And I realized, because of a conversation we just skipped, I realized I would probably be facing this thing. I never asked Ruckelshaus what I should do. I did say to him at one point, "Don't you think my moral position is different from yours?" He said yes. That is all I asked him.

But let me go back to the conversation that maybe——

The **Chairman**. Why was your moral position different?

Judge **Bork**. I had not made—as I understand, Mr. Ruckelshaus felt that there was something in his confirmation hearings that tended to bear on this; there was none in mine because I was confirmed long before. He also regarded himself as having come in as Elliot Richardson's deputy, so that he felt himself bound in a sense by Elliot Richardson's promises. I did not come in as Elliot Richardson's man, and I had made no assurances to the Senate.

But let me go on with this story. He said, "Can you do it, Bill?" And Bill said no. That is the first time I realized I was going to be asked the question. And he said, "Can you do it, Bob?" The thought had never occurred to me before, and it hit me like a ton of bricks. So I said, "Let me think." And they went on talking, and I got up and walked around Elliot's office several times. I finally said, "Yes, I can do it, but I will resign immediately afterwards." And they said, "Why would you resign?" And I replied, "Because I do not want to be regarded as an apparatchik," an organization man who does whatever the organization wants.

They said, "If you do do it," both of them said, "don't resign. The department needs the continuity and the stability." That is when the thought about the necessity of holding the department together first came into my mind, and Elliot and Bill were both quite strong on the point that, if you do do it, do not leave because the department needs this continuity. And I was the one person who was a department-wide officer who was left and who could make a good attempt at both preserving the Department of Justice and preserving the Watergate Special Prosecution Force, which was obviously the thing that had to be done in both cases.

The CHAIRMAN. But that was not part of your reasoning, based on what you have just said, when you said, "I can do it." You just said, "I can do it," and then only after that you were told by—and you said, "I would resign." And they said, "Well, do not resign." And the reason not to resign is to hold the department together, and you said, "That is when it struck me."

Judge BORK. My first thought to do it was the fact that we were in enormous governmental crisis. I do not know if everybody remembers——

The CHAIRMAN. I was here. I remember it.

Judge BORK [continuing]. The sense of panic and emotion and crisis that was in the air. It was clear then, I mean it was clear from my conversations with Mr. Richardson and Mr. Ruckelshaus that there was no doubt that Archibald Cox was going to be fired by the White House in one form or another. The only question was how much bloodshed there was in various institutions before that happened.

The CHAIRMAN. I am trying to figure out Bob Bork, the man, here. I am not talking about the legality of this.

Judge BORK. No. I understand.

The CHAIRMAN. Richardson says, "I cannot fire him. I made a promise." Ruckelshaus says, "In my confirmation hearing"—

Judge BORK. Well, he did not say "In my confirmation hearing." This was all in the air.

The CHAIRMAN. And they said, "Can you do it?" And you said, "I do not know," and you got up and walked around—which I think anyone would—and then came back and said, "Yes, I can do it."

Judge BORK. Yes.

The CHAIRMAN. And this is one of the most important moments in your life, a crisis in your life. It would be for anybody. Can you tell us what you were thinking when you got up and walked around? What went through your mind?

Judge BORK. Well, you know, it is a little hard to recall the blurred thoughts and the emotion of the moment, but one thought that went through my mind was that we were in a governmental crisis which would not be resolved until Mr. Cox left. At no time did I have any intention of anybody but Mr. Cox leaving, and I had nothing against Mr. Cox. Mr. Cox had behaved perfectly properly.

Had I been in his position, I would have refused that order not to go to court. He had to refuse it.

But that was the crux of a crisis which had to be resolved sooner or later. Now, the White House, when they got to me, began talking about the Six-Day War going on.

Senator **Kennedy**. Can I ask just one question?

Judge **Bork**. Yes.

Senator **Kennedy**. When you were walking around the room, did you ever think about the legally binding regulations that were in effect and that were not suspended for 3 days? I was here at the time that that charter was drafted, and I must say anyone that reviewed that history, any member, would understand that those regulations did not just apply to the individual who was Attorney General; it applied to the Office of the Attorney General.

Judge **Bork**. I understand that.

Senator **Kennedy**. If you understand that, I can see why you were walking around the room.

Judge **Bork**. No, we were not, Senator——

Senator **Kennedy**. Specifically, were you troubled at all that there were legally binding regulations that were in effect?

Judge **Bork**. I think we all assumed——

Senator **Thurmond**. Mr. Chairman, let me make a statement.

Senator **Kennedy**. Could he answer that question?

Senator **Thurmond**. Senator Kennedy has had his time. I suggest we go on around and let him go on a second go-round. He is not entitled to go now.

The **Chairman**. Quite frankly, Judge, the reason why I pursued this, I think maybe we could put an end to this. If you would rather us go, we will go on.

Judge **Bork**. No. Let me answer one question, and we can come back to it later.

The **Chairman**. Yes, all right.

Judge **Bork**. Senator Kennedy's last question.

The **Chairman**. We have interrupted you.

Judge **Bork**. I wanted to answer the last question from Senator Kennedy, if I may.

The fact is none of us thought that that regulation was a bar to a presidential order. I have seen Mr. Richardson quoted in the paper recently saying that he never thought the regulation was a bar to Mr. Cox's firing. None of us thought that. Nobody said, "But there is the regulation." We assumed the President could do this over an Attorney General's regulation. That is what we thought at the time. That issue has never been determined. Right or wrong, that is what we thought.

The **Chairman**. Thank you. I think we will go back.

Senator, you have two more minutes, and then we will go on.

Senator **Metzenbaum**. In your interview with the ABA in connection with your nomination in 1982, did you tell Mr. Coleman that you guaranteed Mr. Cox's deputies they would have access to the tapes?

Judge **Bork**. I do not know. All I told them, and I suppose what I told Mr. Coleman, is that I guaranteed they would have a chance to go for the tapes in court, or the evidence in court including the tapes.

Senator METZENBAUM. Judge Bork, there seems to be some question as to what you did tell Mr. Coleman at the ABA investigation in 1982. My staff has discussed with the ABA the question of obtaining information about your statements to the ABA regarding your role in the Watergate matter. The ABA has said it is willing to furnish that information if you will agree to waive any objection.

Would you be willing to waive any objection to the ABA providing that?

Judge BORK. You mean the notes from Mr. Coleman?

Senator METZENBAUM. The entire matter of your inquiry with the ABA at that point concerning this matter.

Judge BORK. Certainly. In fact, I thought I had. Somebody from the Department of Justice or the White House asked me if I would be willing to waive a week ago, and I said yes.

Senator METZENBAUM. If some written document is needed, we will just pass word to you to make it available.

Judge BORK. Let me say this: As to what I said to Mr. Coleman—I think those are his notes of the conversation—I do not know what words I used. I have never tried to convey the impression that I started searching for a special prosecutor instantaneously. Saturday night and Sunday I was not searching for a special prosecutor. By Tuesday, I was thinking about it; whether I thought about it Monday, I do not know.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Thank you very much, Judge, and I thank my colleague from Wyoming for his indulgence of the extra 10 minutes.

The Senator from Wyoming.

Senator SIMPSON. Mr. Chairman, you are very good, and I do have to get over to a clean water markup in the Environment and Public Works. I do appreciate your indulgence and your courtesy. Thank you.

Well, now, you have heard from our spirited and tenacious colleague from Ohio.

Judge BORK. We got halfway through the Saturday Night Massacre. We will have to get the other later, I suppose, Senator.

Senator SIMPSON. He will be back. He will be back.

Why not? We have only been talking about it for 14 years.

Judge BORK. That is true.

Senator SIMPSON. Fourteen years. This is a curious place. If you go out in the land and say, "What were you doing on the night of the Saturday Night Massacre," a guy will say, "What are you talking about?" But in this town when you say, "What were you doing on the night of the Saturday Night Massacre," they say, "I was just finishing shaving. I was going out to dinner. I will never forget it my whole life. I went limp. My wife and I talked and huddled together and had a drink and just shuddered in shock." [Laughter.]

That really is not the way it is out in the world about the Saturday Night Massacre.

Judge BORK. I sometimes refer to it, Senator, as the events of October 20th instead of the Saturday Night Massacre.

Senator SIMPSON. Whatever it was, out in the real world they do not refer to it as the events of anything, except that they know that there was a crisis; they know that the President was wrong;

they knew it was wrong to fire Arch Cox—who was my professor in labor law, so I got a little touch of that remarkable man. A great guy. They knew all that was wrong and that there was a crisis, but let me tell you, when it all came about and Jaworski tooled up, they knew that there had been no gap. You can dance on the head of the pin all day and all night and know that it got done.

Judge **Bork**. That is what the Watergate Special Prosecution Force says in their official report.

Senator **Simpson**. Well, of course.

Judge **Bork**. They did not miss a beat.

Senator **Simpson**. Of course. Fourteen years' worth, and you have talked about it now twice, I guess.

Judge **Bork**. Oh, I talked about it innumerable times, Senator.

Senator **Simpson**. I mean before this body.

Judge **Bork**. I talked about it with the Senate Judiciary Committee in 1973. I talked about it before the House Judiciary Committee in 1973. I talked about it before the Senate Judiciary Committee in 1982, and I am talking about it again today. And I have talked about it before in numerable other groups.

Senator **Simpson**. Well, in my mind, we are not going to find too much more about that. You have given access to every record and waived every possibility to withhold anything, and that is a very appropriate stand.

But I want to touch on one thing that the Senator from Ohio said yesterday and again today about the use of the word "illegal". It is very sinister as it is presented that the decision to file Archibald Cox was held to be illegal by a court, and should we then put a man on the Supreme Court of the United States who has done something illegal? And that is the sinister connotation of all of that stuff, along with the reference to the case of *Nader* v. *Bork*, and it was highly significant and it does not get said here—I want to say it one more time because there is no such thing in politics as repetition. You can tell somebody the same thing ten times and on the tenth time they say, "Oh, I did not know you believed that."

I have been all through that. This case of *Nader* v. *Bork* was vacated, period. You know, void, out the window, we all practiced law, some of us. We know what vacating a decision is. It means it is a zip, an absolute zip, in any kind of language you want to use, whether it is Black's Law Dictionary or the babblings of Al Simpson, it is a zip; it means nothing.

They vacated the decision upon the order of the court of appeals and the case has no legal consequence whatsoever, period. Would you agree with that?

Judge **Bork**. Certainly. That is entirely what "vacated" means.

Senator **Simpson**. With any other lawyer or with any other judge. So I think if we are going to hear this continual referral to Judge Gesell's opinion as authority for the proposition that the discharge was illegal, that that is just not so.

Judge **Bork**. Well, Senator, it should be said that, as Mr. Cox said, that it was at most a technical defect because one could rescind that charter at any time and then the discharge would follow. So, you know, it is a question of timing. But I think it was not even a technical defect. I think a Presidential order overrides an Attorney General's regulation.

Senator SIMPSON. I think it was highly unusual for them to do that under the circumstances, and that was done. But I just want to correct that distortion. There seems to be a continual distortion, and I do not think it is appropriate. And again it came up in its earliest form from some over-wrought executive director and in no way should it continue to prevail here, in my mind.

Now I wanted to ask a question—you are helping me, Orrin; you are furnishing me all sorts of good things. What have you got here? This is an impossible question.

I ask you this: We now have heard from the Senator of Ohio, and he is superb. He and I have been on the opposite side of more issues, but he is a remarkable spirited man, and he has been a great help to me in conference committees. If you want to go to a conference committee, take Metzenbaum with you. He is good stuff.

But he has asked you, and he has gone into the 1973 press conference, which I guess was the 23d or 24th——

Judge BORK. It was Wednesday, whatever that was.

Senator SIMPSON. Pardon?

Judge BORK. I think it was Wednesday, whatever that was.

Senator SIMPSON. OK. And I noted that the Washington Post went into that, but they both stopped at a certain point in the proceedings of the transcript of October 23d or October 24th. I have a copy of the transcript before me, 1973. It is odd that they would both stop. I mean if we are trying to develop a record, we ought to get it all in. And that is what you have done.

And meanwhile your opponents have spent—and not Senator Metzenbaum, but your corporate opponents, your non-profit corporate opponents are so busy in this nonunanimous decision bit that they have just nearly reached the point of exhaustion, and they are out working now. I do not know where they are, but they are.

But they seem to forget the text, the full text, and so you were asked these questions as Acting Attorney General, with the special prosecutor as one of the considerations in mind. It has, let us say, crossed my mind.

Judge BORK. I just had recommended it that morning to the President.

Senator SIMPSON. And then everything stops.

Let us go on with it. Let us take it all. Question: Will the Special Prosecution staff stay together as an entity? Will the head be under Mr. Peterson, and who will that head be? That is the question for Acting Attorney General Bork.

Answer: "Well, right now, and so far as I am concerned, that head is Mr. Ruth. They will stay together as an entity because I think their effectiveness demands upon that." That is what you said. There were other questions.

And then you said at the end, "I recognize, as does Mr. Peterson"—this is your quote—"that the American public must perceive that the integrity of the Department of Justice and of the criminal process is unimpaired, as well as our assuring you that that is true, and we have under consideration a variety of procedures or mechanisms by which that perception may be encouraged or may be made. The trust may be given to us."

The question then: "Mr. Bork, what are those?" Your response: "I am not going to discuss the variety of procedures we have under consideration." I would like to have, you know, like Paul Harvey says, the rest of the story in there. I think that would be honest and appropriate. And then, of course, the proof is in what happened, an operation that so irritated and overwhelmed the President that it must have been working pretty appropriately. I mean that is what happened.

Now enough of that. I just was thinking, what if the fondest dreams of your opponents come true and that you are not confirmed by the Senate, what then can they expect? Well, I think obviously we will have an appointment by this President. There is nobody that is going to question that, and then we will probably have a nominee who we will probably confirm almost routinely, such as a member of the Judiciary Committee, Orrin Hatch or Paul Laxalt.

Judge **Bork**. They both sound good to me.

Senator **Simpson**. Yes, not bad to any of us. I do not think any of us on the panel would spend too great a time putting them right there in the witness seat. But if that were not the case, that would splendid. It might be Jerome P. Sturdley, a person who has quite extensive experience on the bench and in the Bar, one that has said very little or has written very little, that it was either thoughtful, challenging or provocative or perhaps one whom the special interest would have a great deal of difficulty finding out one wit about for use in their opposition to the Presidential appointment, and that is, you know, the reason we are here.

But most likely he or she would obviously be one who would decline to do anything of what you are doing. They would not enter in any way into the exceptional discussion, the give and take, the review of judicial views and philosophy which we have seen these past 2 days. You are doing it and will do it, which is really unprecedented even for your immediate predecessors, Sandra Day O'Connor, Antonin Scalia and Bill Rehnquist. I think they ought to sober up and realize they could get another nominee who would say nothing and tell them nothing and share nothing.

And I think that is worth, you know, considering because I think the whole text of a new confirmation would be "Senator, I understand your position; I know what you would like me to say, but I honestly feel, sir, that I must adhere to my view. It would be improper for me as a sitting justice or a nominee or a person dealing with that issue in the future to advance an answer to that question. Next question please."

Now that is what you are going to get in the next load in this situation. I just think that after looking at some of the responses of Judges Scalia and Sandra Day O'Connor, and they were perfectly appropriate and no one challenged them a bit, nor could we in a new nominee. And you are good enough to lay yourself right out on the table.

But, you know, the questions are there. They said "I cannot respond to that." That was interesting. They were very adroit and very upfront and very acceptable, and we all accepted it, we on the committee. And that is what is a little bit of reality too.

Then I think also of our friends in the fourth estate, as it gets scratching down through the record of every person who has sat on the federal bench at least in the last 10 years, I know of no one, no one who has protected first amendment rights more than you. That is an extraordinary statement, but it is true.

To you *New York Times* v. *Sullivan* is milk soup. You are ready to go for the chunk. And *New York Times* v. *Sullivan* was an interesting case. It said that because we are politicians, people could say things about us that were, quote, "false". People could say things about us that were defamatory, those were the words, and that we could do nothing unless we proved actual malice.

Your language in the *Ollman* case was quite open, and I do not have it here before me at this moment, but, in other words, you say anybody—I guess it is kind of like anyone goofy to run for office is dumb enough to get elected or something like that. But it was said that we are indeed, and we should be, fair game. We better be able to tell our story, bring our own brains with us when we come. That is what the people expect of us.

But you would take that much further, would you not?

Judge BORK. You mean further than *New York Times* v. *Sullivan*?

Senator SIMPSON. Yes.

Judge BORK. I think some—and I have not got a firm position on how much further—but I think some doctrinal adjustment may be appropriate because the nature of the libel suit has changed so that it does now pose a greater threat to the press than it used to. But what the nature of that doctrinal adjustment might be, I have not worked it all out either.

Senator SIMPSON. But you are saying that indeed it is something that concerns the media that the libel suit itself, whether valid or not, has a chilling effect on the fourth estate.

Judge BORK. There are a number of publications that simply cannot take a major libel suit. They do not have the resources to defend it, never mind pay the judgment.

Senator SIMPSON. I think that it is worthwhile to recognize what an extraordinary ally and force you are. One of the quotes from that case was you said, as you were sticking with the decision, the fact that this was an expression of opinion. You said it is the kind of hyperbole that must be accepted in the rough and tumble of political argument. And I agree with that.

And that is one thing the Senator from Ohio and I have always agreed on. It is a rough and tumble but you can do it with civility and we try to do that.

Let us get back to privacy. That is a recurring theme here about privacy and judicial restraint and *Griswold* v. *Connecticut*, and we have now talked about contraception, homosexuality, sterility or else sexual preference, sexual gratification. There is no telling where we will get if we keep struggling along in this area. Those are important things. I do not even belittle that. But it has all been taken out of context, every bit of it.

I do not think you had an appropriate time to respond on the issue of privacy, and especially with regard to the *Griswold* case and the *Skinner* case. I guess I want to be sure because there was a line of questioning which I gathered—and I think it was our Chairman, and it was a good line of questioning—it was, well if you do not embrace these things through some method, how are we going to get to that point? How do you protect?

I want to ask you if it is fair to say that you believe that privacy is protected under the Constitution, but that you just do not believe that there is a general and unspecified right that protects everything including homosexual conduct, incest, whatever—and you mentioned that yesterday. Is that correct?

Judge BORK. That is correct, Senator. I think the fact that I did not get everything I wanted to say out was my fault because I was trying to discuss with Senator Biden and others the constitutional problem. But I think it requires a fuller answer than that and that is this: No civilized person wants to live in a society without a lot of privacy in it. And the framers, in fact, of the Constitution protected privacy in a variety of ways.

The first amendment protects free exercise of religion. The free speech provision of the first amendment has been held to protect the privacy of membership lists and a person's associations in order to make the free speech right effective. The fourth amendment protects the individual's home and office from unreasonable searches and seizures, and usually requires a warrant. The fifth amendment has a right against self-incrimination.

There is much more. There is a lot of privacy in the Constitution. *Griswold,* in which we were talking about a Connecticut statute which was unenforced against any individual except the birth control clinic, *Griswold* involved a Connecticut statute which banned the use of contraceptives. And Justice Douglas entered that opinion with a rather eloquent statement of how awful it would be to have the police pounding into the marital bedroom. And it would be awful, and it would never happen because there is the fourth amendment.

Nobody ever tried to enforce that statute, but the police simply could not get into the bedroom without a warrant, and what magistrate is going to give the police a warrant to go in to search for signs of the use of contraceptives? I mean it is a wholly bizarre and imaginary case.

Now let me say this——

The CHAIRMAN. Would the Senator yield at that point just for clarification?

Senator SIMPSON. Yes, certainly, Mr. Chairman.

The CHAIRMAN. If they had evidence that a crime was being committed——

Judge BORK. How are they going to get evidence that a couple is using contraceptives?

The CHAIRMAN. Wiretap.

Judge BORK. Wiretapping?

The CHAIRMAN. Wiretap.

Judge BORK. You mean to say that a magistrate is going to authorize a wiretap to find out if a couple is using contraceptives?

The CHAIRMAN. They could, could they not, under the law?

Judge BORK. Unbelievable, unbelievable.

The CHAIRMAN. I understand that, but under the law, Judge, could they not have—it was a crime, correct?

Judge BORK. It was a crime on the statute books which was never prosecuted, never.

The CHAIRMAN. Well, the fact that it was not prosecuted did not mean it was not a crime, does it?

Judge BORK. I have more to say about that, whether it was a crime or not.

The CHAIRMAN. Let us assume they were drug dealers. There was evidence that they were involved in some other legal activity, and there was a wiretap.

Judge BORK. And they hear a discussion of contraceptives?

The CHAIRMAN. Yes.

Judge BORK. Nobody is going to get a warrant for that and no prosecution is going to be upheld for that. And I would like to go on to that point because——

The CHAIRMAN. Thank you, Senator.

Senator SIMPSON. Judge, let me come back to another one here.

Judge BORK. Well, okay.

Senator SIMPSON. Go ahead. I want to hear that.

Judge BORK. I want to say that you really could not enforce that thing, and the privacy was not the issue in that case. It was the use of contraceptives, and it is a little hard to locate something about contraceptives in the Constitution.

But be that as it may, let me illustrate my objection to what is generalized right of privacy. Suppose a Senator introduced a bill which said every man and woman and child in this country has a right of privacy, period. I do not think that bill would go anywhere until he had to tell everybody exactly what the right of privacy protected. Did it protect incest? Did it protect beating your wife in private? Did it protect price-fixing in private?

No Congress would ever pass a bill like here, here is a generalized right of privacy; make of it what you will. No court would uphold such a statute because it would be void for vagueness.

Now the Supreme Court or Justice Douglas in effect did the same thing with the Constitution. Nobody knows what that thing means. But you have to define it; you have to define it. And the court has not given it definition. That is my only point.

Now the only reason that Connecticut statute stayed on the statute book—it was an old, old statute, dating back from the days when Connecticut was entirely a Yankee State—the only reason it stayed on the statute book was that it was not enforced. If anybody had tried to enforce that against a married couple, he would have been out of office instantly and the law would have been repealed.

Furthermore, if the prosecutor brought such a case, I do not think any court would uphold a conviction, assuming that you could get a conviction. That law had not been enforced for so long—it is an utterly antique statute; I do not think it was ever enforced—I think you would have a great argument of no fair warning, or sometimes that lawyers call—and I hate to use a word like this—desuetude, meaning it is just so out of date it has gone into limbo.

So no prosecutor is going to bring that prosecution. If he did, the law would disappear and furthermore no court would uphold the prosecution. That is the fact. That law never went anywhere. My objection—I think the law was an utterly silly law, but my objection is simply to the undefined nature of what the court did there. And I have tried to illustrate that for you by asking you whether you would vote for a statute that said nothing more than that everybody has a right of privacy, and the court shall enforce it. I do not think you would.

Senator SIMPSON. Judge Bork, one thing that kind of surprised me yesterday and yet it did not is that you really described that case as being some kind of a law school exercise, a professorial dream, a mess-around kind of a case. Is that right?

Judge BORK. Yes, it was. Some professers found that law in the books and tried to frame a case to challenge it on constitutional grounds. And, as I say, they had trouble getting anybody arrested, and the only person who could get arrested was a doctor who advertised that he was giving birth control information, contraceptive information, and I do not know if they prosecuted him or fined him under the aiding and abetting clause of the Code, and I think both sides regarded it as an interesting test case. The whole case was practically an academic exercise.

Senator SIMPSON. Judge Black and Judge Stewart both dissented.

Judge BORK. They did indeed, and Justice Harlan refused to go along with the right of privacy. He had reasons of his own. He used, I think, the concept of ordered liberty.

Senator SIMPSON. It has been obviously suggested—Mr. Chairman, I have what, about 8 or 9 minutes or something like that?

The CHAIRMAN. At least that much.

Senator SIMPSON. Obviously expressed again and again that you simply are a captive of the majority, that you do not listen to any cry of the minority, whether in race or position or ideas, that you have run roughshod over specific constitutional rights guaranteed by the minority. And yet you said yesterday you are a true believer in the Bill of Rights. I cannot believe the question was really asked, but it was. And you were asked about your position on the Bill of Rights. You said it guaranteed freedom of speech. I recall that.

Your decision in the *Lebron* case, which I read, the posters about the jellybean empire or whatever it was, and you said that was a perfectly appropriate expression. I think that gentleman is back hanging his posters today, and they are new and even richer today, and nothing wrong with that. I see they did give him until October 15 to display and then they are going to pull them down.

You protected him on that, did you not?

Judge BORK. I did indeed.

Senator SIMPSON. Why?

Judge BORK. Because the poster he was putting up was political commentary. Only political commentary, only misleading political commentary was banned. I mean there was no occasion to get in any category of speech other than political speech in this case.

It was political commentary, and on alternative grounds, one of them was, I did not think an agency of government should have a right to exercise a prior restraint on speech and I so held.

Senator SIMPSON. You were holding in under those same circumstances very likely.

Judge BORK. Of course.

Senator SIMPSON. We talked about religion and the Judge has left, but I thought Judge Heflin's remarks about religion were superb yesterday and what he said about your religious beliefs and it was crisply clear, like he is, about what that line of questioning and what that gains, which is nothing.

Judge BORK. I do not know. Is Judge Heflin, Senator Heflin going to question me about that?

Senator SIMPSON. I do not think so. He cautioned us all not to spend much time asking about that.

Judge BORK. Well, let me say one thing—I do not want to go into my religious beliefs—but the report in a national magazine that I was an agnostic arose from the following conversation, and the reporter agrees that it arose from the following conversation. He said "You are not terribly religious, are you?" And I said, "Not in the sense that you mean." That is it. He went, bang, he is an agnostic, and I later denied that I was an agnostic in the New York Times when I got a chance to.

I took him to be talking about great piety and regular church attendance, and that is what I meant in not in the sense that you mean. But agnostic does not come out of that conversation in any way, and I am not an agnostic. But that is as much as I think I should say about it. It is only the fact that it is on public record that leads me to deny it, I mean it is in a publication.

Senator SIMPSON. Well, that word was never used?

Judge BORK. No.

Senator SIMPSON. All of us here on that Panel know how that goes.

Let me ask you this: If the government were to prohibit me from exercising my right of privacy to educate my children in a religious tenet—and there are people in the United States who feel very strongly about that, every more strongly than I in fact—it is conceivable that a Judge could invalidate such a prohibition through an interpretation of the Constitution, is that not correct?

Judge BORK. That is correct. You mean if the government tried to say that you could not educate your children in your religion?

Senator SIMPSON. That is correct.

Judge BORK. There is not a ghost of a chance that it would stand up under the first amendment.

Senator SIMPSON. That is an important protection in your mind under the Constitution.

Judge BORK. It is a crucial protection.

Senator SIMPSON. And, as I say, there seems to be a bit of a gathering force out in the country or at least there was several years ago in various States. I remember a single case, I believe it was in the State of Nebraska.

So do I gather from what you have said in answers and responses yesterday that you believe that privacy is indeed protected by the Constitution in the fourth amendment, in the free exercise of religion clause and the like?

Judge BORK. Oh, yes. There are several crucial protections of privacy in the Bill of Rights. The framers were very concerned about privacy because they had been subjected to a very intrusive British Government, and they were very concerned that privacy be protected against the new national government, privacy in the aspects that they wrote into the Constitution.

Senator SIMPSON. And just finally on the issue of *Skinner* v. *Oklahoma*, which was a rather extraordinary case on the sterilization of criminals. The equal protection clause, does it not protect guarantees of protection from invidious discrimination?

Judge BORK. Senator, it does, but I think that the most that I said in criticism in this article about *Skinner* v. *Oklahoma* was that the classification distinction made by the court could not be squared with the other classification distinctions the court had made. If I can find the articles—I usually cannot when it is crucial. I really would not buy the way the Supreme Court there went about it, but I think it is clear—people who have looked at it more than I have say it is clear that that statute had racial animus in it, and it struck at, in effect, crimes that at that time were more likely to be committed by poor blacks than by middle-class white-collar whites. And on that ground the statute would be unconstitutional.

Senator SIMPSON. Without question.

Judge BORK. Without question. But I should say this, you know, the Supreme Court has never said that sterilization under some circumstances is unconstitutional. I am not saying that that is a good thing they have never said it. I just want to point out that they have never said that. In fact, they have upheld sterilization programs. Justice Holmes did in a famous opinion.

Senator SIMPSON. What was that opinion.

Judge BORK. That was *Buck* v. *Bell,* and I think it was a terrible opinion. That was a case in which they provided——

Senator SIMPSON. Who wrote the majority opinion?

Judge BORK. Holmes, Oliver Wendell Holmes. They provided for sterilization of folks who were mentally retarded, I think after one or two generations, and Holmes dismissed the equal protection argument as the usual last resort of the constitutional argument and wrote the infamous line—I like Holmes but this is not one of his better days—"three generations of imbeciles are enough."

Senator SIMPSON. Justice Holmes said that?

Judge BORK. Justice Holmes said that.

Senator SIMPSON. I think we ought to get him back here.

Judge BORK. Yes. [Laughter.]

I think considering the alternative, he might be glad to come back and do this.

Senator SIMPSON. Mr. Chairman, I thank you, and I do want to add, however, I would like entered in the record—and I will conclude my round, and you have been courteous—but it seems to me so far that the extremism so far in this case and the extremist views and the philosophy of Judge Bork, that the extremism is in the rhetoric of the opponents of Judge Bork. That is where it is to this point, and the stridency of that.

I am not talking about the panel. I am talking about newspaper ads and all this stuff, and television ads, and we have and will have an opportunity to pursue this to find that we have a, quote, "conservative judge" who exercises judicial restraint, who tries to leave social policy decisions to the people and their elected representatives where the Constitution does not clearly speak, you are that sort of judge.

And I want to enter into the record, Mr. Chairman, a thoughtful piece in this morning's Washington Post of Lloyd Cutler, counsel emeritus, as I call him, to Presidents, with a case-by-case illustration that Judge Bork's criticisms of the Supreme Court decisions which we have been discussing for the past two days were in the main shared by the, quote, "moderate members of our contemporary Supreme Court".

And I can tell you, do not think what Lloyd Cutler has done has not been provocative for him, because it is so good and so pungent and so authentic, what he has been saying, that they have now tried to drum him out of the corps. And that is why he has always been a superb man and will always be.

So I would like that statement, "Judge Bork is called Judge Bork, well within the mainstream", unquote, be part of the hearing record. And I thank you very much.

The CHAIRMAN. Without objection.

[Article follows:]

THE WASHINGTON POST
Sept. 16, 1987

Lloyd N. Cutler

Judge Bork: Well Within the Mainstream

The book against Robert Bork is that he is "outside the mainstream" of contemporary judicial philosophy. To locate the "mainstream" for us, the bookmakers cite such recent and current paragons as Justices Hugo Black, John Harlan, Potter Stewart, Byron White, Lewis Powell and John Paul Stevens. They are portrayed as conservative moderates, in contrast to Bork the ideologue of the extreme right.

But there is something wrong with this picture. It is at odds with the recorded views of these distinguished justices themselves.

Let's start with Justice Stevens. He stated publicly this summer what he had already expressed privately at the request of the American Bar Association's Judicial Selection Committee, namely, that he welcomes Judge Bork's nomination. Stevens went on to say, after quoting from one of Bork's opinions, that Bork's judicial philosophy "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This was hardly an off-the-cuff remark. During Stevens' years on the court he has reviewed many Bork opinions and heard him argue many government cases as solicitor general. It cannot be squared with the extravagant characterizations of Bork as a throwback to the era of Simon Legree and Dred Scott.

There is strong judicial evidence to support Stevens' view. Consider this list of the moderate justices, so rightly admired by Bork's present opponents, who dissented from the very Supreme Court opinions that Bork is now being attacked for having criticized in his days as a law professor. For the most part, Bork's criticisms support what these moderate justices said in their dissents.

> *"His views were and are widely shared by justices and academics who are in the moderate center."*

In *Harper v. Virginia*, the poll tax case, the dissenters included Black, Harlan and Stewart.

In *Griswold v. Connecticut*, the contraceptive right-of-privacy case, the dissenters included Black and Stewart.

In *Roe v. Wade*, which expended the *Griswold* precedent to cover some abortions, the dissenters included White. Stewart, who wrote a concurring opinion in *Roe*, said he joined the majority only because he bowed to the majority precedent set over his dissent in *Griswold* seven years earlier.

In *Katzenbach v. Morgan*, the Puerto Rico voting rights case, the dissenters included Harlan and Stewart. Powell, who was not appointed until several years later, criticized the *Morgan* majority's rationale in *City of Rome v. United States*.

BY [illegible] — THE WASHINGTON POST

In *Reynolds v. Sims*, the one-man, one-vote apportionment case, the dissenters included Black and Stewart.

In *Regents v. Bakke*, the university racial quota case, the four justices who read Title VI of the Civil Rights Act to exclude race as an admissions factor included Stevens and Stewart. Four years earlier, Justice William O. Douglas (who retired before *Bakke*) had expressed the identical view in *Defunis v. Odegaard*. Two years later, Stewart reiterated the same position in *Fullilove v. Klutznick*.

In *Reitman v. Mulkey*, the state action case invalidating a provision of the California Constitution guaranteeing the freedom to sell property, the dissenters included Black, Harlan and Stewart.

In *Allen v. Wright*, the Supreme Court, with Powell and White concurring, cited Judge Bork's currently criticized dissent on standing to sue in *Vander Jagt v. O'Neill*. As for Bork's criticisms of the rationale of the unanimous 1942 Supreme Court opinion in *Shelley v. Kraemer*, striking down state court enforcement of private racial covenants, his view is similar to that expressed by Prof. Archibald Cox, Prof. Laurence Tribe and many other scholars nowhere near the extreme right.

There are a few instances, of course, where Bork's academic critiques of Supreme Court opinions were not joined either by moderate dissenting justices or by his academic colleagues. But as to most of the holdings he has criticized, his views were and are widely shared by justices and academics who are in the moderate center of the judicial spectrum, not the extreme right.

Judge Bork's views about these cases cannot reasonably be classed as outside the mainstream by the same opponents who put these moderate justices inside the mainstream. While Judge Bork is by no means the mirror image of these distinguished justices (who are by no means the mirror image of one another), neither is he their exact opposite. Whether or not one agrees with his or their views on particular cases, they are all well within the mainstream.

The writer, a Washington attorney, was White House counsel under President Carter.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Judge Bork, just to go back not at great length on the privacy issue because I have a number of questions that I want to ask. But you raised something there on the enforceability or non-enforceability of the statute in Connecticut vis-a-vis the *Griswold* decision.

In the *Bowers* v. *Hardwick,* Georgia case, dealing with sodomy, that is an old statute that was on the books. I do not know. I believe that it was 60 years or more that it had ever been in force, but in fact somebody enforced that statute, did they not?

Judge BORK. I do not think so, Senator. The policeman was in the house because of a traffic violation, as I recall. Is that correct?

Senator DECONCINI. He was in the house. That is correct. He was in the house——

Judge BORK. He observed—pardon me.

Senator DECONCINI. He was in the house legally.

Judge BORK. Yes. He observed homosexual conduct and I guess made an arrest, but that ended it. There was no prosecution. The case arose because homosexuals sued to have the——

Senator DECONCINI. Yes. But is not making an arrest enforcing a statute?

Judge BORK. That is true. That is true. He made an arrest.

Senator DECONCINI. What bothered me is this generalization that, well, because it would never be enforced or had been is that it makes no sense. To me that is making a judgment for the legislative body to make. If they want to pass a bill and if the prosecutor or the justice does not want to enforce it, should a judge say—should they weigh that, the fact that it has never been enforced?

Judge BORK. I think they have to in terms of fair warning. There are all kinds of statutes. You know, I am told in some States until recently there are still statutes that you could not drive a car without somebody walking in front of you swinging a lantern. If somebody suddenly popped out onto the freeway and enforced that, nobody is going to uphold that law.

Senator DECONCINI. But we are talking here about a little bit different use or I believe a constitutional right of privacy. Let me just pursue with you.

You said yesterday, relating to a question that Senator Hatch asked you regarding *Roe* v. *Wade* and the ninth amendment, its application—and correct me please—you said something that nobody really knows what that amendment means. Is that correct?

Judge BORK. I do not know. I know of only one historical piece. There may be more. You know, this is not a subject I have researched at great length, but most people say they do not know what it means.

Senator DECONCINI. Do you know what it means?

Judge BORK. It could be—you know, I can speculate.

Senator DECONCINI. Do you have an opinion on the ninth amendment?

Judge BORK. The most sensible conclusion I heard was the one offered in the Virginia Law Review, which was that the enumeration, as the ninth amendment says——

Senator DECONCINI. Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Judge BORK. That is right, Senator. And I think the ninth amendment therefore may be a direct counterpart to the 10th amendment. The 10th amendment says, in effect, that if the powers are not delegated to the United States, it is reserved to the States or to the people.

And I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions. That is the best I can do with it.

Senator DECONCINI. Yes. You feel that it only applies to their State constitutional rights.

Judge BORK. Senator, if anybody shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.

Senator DECONCINI. I do not have any historical evidence. What I want to ask you is purely hypothetical, Judge. Do you think it is unconstitutional, in your judgment, for the Supreme Court to consider a right that is not enumerated in the Constitution——

Judge BORK. Well, no.

Senator DECONCINI.——to be found under article IX?

Judge BORK. There are two parts to that. First, there are some rights that are not enumerated but are found because of the structure of the Constitution and government. That is fine with me. I mean that is a legitimate mode of constitutional analysis.

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Senator DECONCINI. Let me ask you this question: If you had to speculate, what do you think Madison or some of the framers had in mind as to unenumerated rights?

Judge BORK. They might have had in mind—this is pure speculation, which I do not think is——

Senator DECONCINI. I understand. I said this is all hypothetical.

Judge BORK. All right. They might have had in mind what I just said about the enumeration of these does not entitle judges to override the state constitutional rights. They also might have had in mind perhaps a fixed category of what they regarded as natural rights, although if they did have in mind a category of natural rights, I am a little surprised they did not spell it out and put it into the Constitution, because they specified all the other rights.

There is no evidence that I know of that this was to be a dynamic category of rights, that is that under the ninth amendment the court was free to make up more Bill of Rights. There is no evidence of that at all that I know of. And I think that had that been their objective, they could have spelled it out a lot better, and a lot of the constitutional debates we had right after the Constitution was formed, and John Marshall began applying the Constitution and so forth, would have been irrelevant debates because the court is just entitled to make up constitutional rights.

Senator DECONCINI. Would you say that in your judgment it would be unconstitutional for the Supreme Court to find a right—we will not say what it is, but Right A——

Judge BORK. If a Supreme Court makes——

Senator DECONCINI [continuing]. Because it is not enumerated here.

Judge BORK. If the Supreme Court makes up a new right for which there is not historical evidence, then I think it has exceeded its powers under the Constitution.

Senator DECONCINI. That is vis-a-vis your criticism of the *Griswold* case.

Judge BORK. Yes, insofar as they did not explain adequately where it came from and what it was.

Senator DECONCINI. And if we follow that line of thinking, how would you address the *Griswold* case or the statute? You indicated that you thought that it was a bad statute and the results of that case you agreed with, I think you said yesterday, but not——

Judge BORK. I agreed with it politically.

Senator DECONCINI [continuing]. The structure of the decision. How would you as a Supreme Court judge address a similar case dealing with an area that you now feel is not enumerated or a constitutionally right set out? Where would you find that right if you decided that you felt you wanted to come to that same conclusion as you indicated on the *Griswold* decision? You wanted that conclusion——

Judge BORK. No. I wanted that conclusion as a political matter. You know, I make a sharp distinction between a judicial function and a legislative function. If I were a legislator, I would vote against that statute instantly.

Senator DECONCINI. Right.

Judge BORK. As a judge, I would have to be persuaded that there was something in the Constitution.

Senator DECONCINI. Do you see anything else in the Constitution?

Judge BORK. I have not gone through this exercise, Senator, so I am just speculating. I suppose the most likely form of attack might be the equal protection attack. I do not know.

The CHAIRMAN. Equal protection you say, Judge?

Senator DECONCINI. The equal protection clause.

Senator LEAHY. I just did not hear the answer.

Senator DECONCINI. Judge, going to the equal protection clause, last week President Reagan said that your critics had been engaging in highly charged rhetoric that is "irrational and totally unjustified" were his words, end of quote. Many of your other supporters have said that they cannot understand what your critics could possibly be concerned about. And to your credit—and I compliment you for this—I have not read of you saying that you do not understand why people are concerned about you. You do understand apparently.

Judge BORK. I have not commented upon parties to this dispute at all. Okay?

Senator DeConcini. Well, at least I did not read anything. So I am correct.

Judge Bork. Yes.

Senator DeConcini. Now let me pose this hypothetical to you. If you were a black man, do you not believe that you would be gravely concerned to read comments that you, Judge Bork, have made about public accommodation laws, which you said, quote, "unsurpassed ugliness", that laws to ban literacy tests——

Judge Bork. Do you have, Senator, the page that is on and that article?

Senator DeConcini. That is in the New Republic, 1963. I do not have the page. I am sorry. I will have to ask someone to look it up for you. That laws to ban literacy tests which were used in the South to deny blacks their voting rights were, quote, "very bad".

Judge Bork. Where is this, Senator?

Senator DeConcini. That is in hearings on the Human Life Bill, the Judiciary Committee, 99th Congress in 1982.

Judge Bork. Can we take these up——

Senator DeConcini. Let me just finish these and then you can address them one by one, if I may.

The laws to ban literacy tests which were used in the South to deny blacks their voting rights were, quote, "very bad, indeed pernicious constitutional laws", end of quote; that decisions to outlaw poll taxes were, quote, "wrongly decided", unquote; that you disagreed with the decision revoking restrictive covenants, and that you criticized the Supreme Court decision invalidating a California referendum overturning open housing laws.

Now you may well have legitimate reasons, and I am going to give you ample time because I know the Chairman will insist on for you to answer this. You might be able to persuade many people that you were right when you made them, but do you not think you have to agree that those kind of statements are ample in nature to raise a great deal of concern about, quote, "where you are coming from on these kinds of issues"?

Judge Bork. If those statements were all that people had before them, they should certainly raise a great deal of concern. I would like to deal with each of them.

Senator DeConcini. Please do.

Judge Bork. But before that, I should say, that if I were a black man who heard those statements but knew my record as Solicitor General and as a judge, I do not think I would be concerned because it is a good civil rights' record.

Now let us go back. What is the first—you mean the New Republic article, Senator.

Senator DeConcini. Yes, sir, regarding the public accommodation.

Judge Bork. What I said was I was discussing the principle. It starts off by saying "of the ugliness of racial discrimination there need be no argument". Then I went on to talk about this bill which forced association which worried me at the time, it does not worry me now, not at all; it was a good idea. I said the principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the State coerce you into more righteous paths. That is what I said was the principle of unsurpassed ugliness. It was the principle I thought was underlying this thing, which was a principle that can apply much more broadly.

Senator DECONCINI. That is still your view?

Judge BORK. No, it is not my view. This was based upon, as I said, a time when I was libertarian and I thought the presumption was always against State regulation of individual conduct.

Senator DECONCINI. That is no longer your view?

Judge BORK. No, no. And I was insisting upon a principle of coercion that could be stated and would not have this broad sweep.

I no longer think that legislation can be rested always upon a principle. It is more of a judgment of the individual situation that you cure.

Senator DECONCINI. Judge Bork, when did you cease being a libertarian?

Judge BORK. About 1970. I was—you will see traces of it in an article I wrote. At the time, I was trying to get my libertarian principles into the Constitution, much in the way that people get privacy into the Constitution. And I wrote an article that appears in Fortune Magazine for December of 1968, I believe, called the "Supreme Court Needs a New Philosophy". You may think that is a theme I harp upon, but——

Senator DECONCINI. Did that come upon you over a period of time?

Judge BORK. No, no. I am just telling you this was the last time I expressed this libertarian standpoint.

Senator DECONCINI. And after that you changed.

Judge BORK. Yes. Let me tell you about that, Senator, if I may. I was in London that year and Fortune called me—I had written for them before—and asked me to write something about the Supreme Court. And I wrote about two models of how the Supreme Court might go about its work. And one model was to take the lead of *Griswold*, only instead of calling it privacy, call it freedom, which it is, and construct the philosophy that lines up a more general principle of freedom that the individual amendments are simply illustrations of.

That sounded like a great idea to me then, and when I came back from London after a sabbatical year, that is when I talked, of course, with Alex Bickel and found the course going flat, and I said, "What is wrong with this course? Why are not the students excited?" And he said, "You are not saying those crazy things anymore", by which he meant those crazy libertarian things I used to say. And that is when I first realized I was moving away.

And by 1971 I had abandoned this attempt and said you have got to go to the intents of the people who made the Constitution.

Senator DECONCINI. What about the reference here to the Voting Rights Act as very bad?

Judge BORK. Where is this?

Senator DECONCINI. That is out of the hearings on——

Judge BORK. I have not got that before me. Was I discussing *Katzenbach* v. *Morgan*?

Senator DECONCINI. Excuse me. The ban of literacy test, excuse me, and it is the Katzenbach——

Judge **Bork**. Senator, I have always said, and it is quite obvious, that a literacy test used to deny any racial group or ethnic group or any other group access to the polls is bad under the Constitution, under the 14th amendment. I was not saying that the banning of literacy tests was bad by the courts.

Senator **DeConcini**. That is how I read it.

Judge **Bork**. Well, Senator——

Senator **DeConcini**. And that is fair enough. I think it is very important that you clarify it.

Judge **Bork**. Let me say this: I said here in this testimony that I agree entirely with the dissent of Justice Harlan joined by Justice Stewart in *Katzenbach* v. *Morgan*. And the reason I agreed with the dissent was that the majority said that Congress by statute could change a rule the Supreme Court had laid down. The Supreme Court had held that non-discriminatory literacy tests were constitutional. Congress passed a statute which in certain circumstances says they are outlawed. And the Court said the Congress can define the equal protection clause in some ways.

I thought that was bad constitutional law. I do not think Congress can change the Constitution, which is precisely why I testified against the Human Rights Bill, which would have changed *Roe* v. *Wade* by statute. And I certainly have never endorsed——

Senator **DeConcini**. Is that the same reasoning, Judge Bork, that you opposed the Civil Rights Act?

Judge **Bork**. No, no.

Senator **DeConcini**. What was the reasoning for that?

Judge **Bork**. The 1963 article in the New Republic is not a constitutional article. That was simply political philosophy, and it was very bad political philosophy and, you know, it is 25 years ago. And I trust——

Senator **DeConcini**. And I appreciate that. I do not want to be held for everything that I did 25 years ago either, and I appreciate that.

Judge **Bork**. All right. But my views on *Katzenbach* v. *Morgan* have not changed. I do not think that the Congress of the United States can change the Constitution by statute.

Senator **DeConcini**. I have a little problem with that, Judge Bork.

Let us go on to something else regarding the 14th amendment. Your view of the 14th amendment, can you give that to me so I will not paraphrase it incorrectly regarding where you feel it applies as to racial discrimination or anything else? Just tell me, if you will——

Judge **Bork**. The equal protection clause applies to all racial discrimination, and I think about the only instance in which I have seen a court uphold a difference between races was when there was a race riot in a prison, and the warden separated the races, and somebody filed a lawsuit to challenge that. And the court said that is reasonable. If there is a race riot, you can separate the races. That is the only instance I can recall. Otherwise, it is just about absolutely unconstitutional to make a racial distinction.

Senator **DeConcini**. To make a racial distinction.

Now your position also is that Congress nor the States can pass laws defining that. Is that right?

Judge **Bork**. Well, you mean, defining what the substance of protections of the Constitution means?

Senator **DeConcini**. Yes.

Judge **Bork**. I do not think so, Senator. If they can do that, *Marbury* v. *Madison* and the power of judicial review is dead.

Senator **DeConcini**. I cannot understand then why the precise words used in the 14th amendment, which are "deny to any person within its jurisdiction the equal protection of the laws" creates the confusion that it does with you. It does not with me.

What words of those words I just read are not precise? If the plain language of the amendment requires States to equally protect all within its jurisdiction, why would there ever need to be any analysis of the legislative history or intent of the Congress when those words are as precise as this person can read them?

And I am not a student of the Constitution or pretend to be a law professional of constitutional law. The amendment does not say that the State cannot enact laws that discriminate. It says it must equally protect any person. Does this not mean that a State must enact laws to protect equally all persons? Is that not the rest of that amendment?

Judge **Bork**. I think what it means, Senator, is the State either by statute or by executive action, any way the State can act, may not deprive people of equal protection of the law. It does not mean that the State must go out affirmatively and legislate——

Senator **DeConcini**. But does it not mean it can go out affirmatively?

Judge **Bork**. Sure. A State can affirmatively protect racial groups and other groups. There is no problem with that.

Senator **DeConcini**. But your position is then that to deny any person within its jurisdiction equal protection of the law does not apply to other minorities.

Judge **Bork**. No, no. I did not say that. We went around this somewhat yesterday, Senator, and I prefer the position that Justice Stevens enunciated.

Senator **DeConcini**. I do not want Justice Stevens' position. I want your position.

Judge **Bork**. Well, that is my position.

Senator **DeConcini**. Okay.

Judge **Bork**. I was just telling you it is in the *Cleburne* case. The historical meaning, the core idea, the trouble that caused the 14th amendment to be adopted was the fear of and the reality of racial discrimination against former slaves in this country, so that every time a court reasons about the 14th amendment, it usually starts with the paradigm case of racial discrimination.

I objected to when the Supreme Court was using a method of saying this group, illegitimate children, aliens is in; this group, somebody else, is out. That seemed to me to be a very funny way to proceed. It is much better to proceed—because we have no evidence that any of those groups were meant to be in or out. It is much better to proceed under the reasonableness test, which the thing after all says, "nor shall any State deny to any person the equal protection of the laws". Any person is covered. That means everybody is covered, men, women, everybody.

And the question, when a statute makes a distinction is whether the State has an adequate interest in it and the distinction is reasonable. Now in a racial case it will almost never be reasonable.

Senator **DeConcini**. In a racial case. What about the sex discrimination cases?

Judge **Bork**. Well, sometimes it will be reasonable and sometimes it will not because I do not——

Senator **DeConcini**. Where do you find in this amendment that the reasonable standard is there, that it requires one standard here for racial and then another standard as you apply it other than racial?

Judge **Bork**. Reasonable standard came in, I think, in the last century under the Supreme Court, and I think, if I may say so, that is a reasonable way to read this clause because it applies to all persons.

We know that it is irrational to make a distinction between persons on racial grounds, utterly irrational. We also know that for some purposes it is rational, reasonable to make a distinction between the genders, between the sexes.

Senator **DeConcini**. Let me tell you——

Judge **Bork**. But not always.

Senator **DeConcini**. I will tell you why I am so confused on it. In a recent interview you were quoted saying that "The role that men and women should play in society is a highly complex business, and it changes as our culture changes. What I am saying (10 years ago) was that it was shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues", end of quote. That was June 1, 1966, the Judicial Notice.

Now what troubles me, Judge, is why are the questions concerning sex discrimination any more difficult or any more complex and undeserving of constitutional, judicial resolution than other questions routinely subject to the court constitutional analysis, questions such as the discrimination on the basis of race that we have discussed here? It leaves me with a big void here that—and I know that you have tried to explain it and I have paid attention yesterday, but I did not get it.

Judge **Bork**. You are comparing, I take it, Senator DeConcini, my——

Senator **DeConcini**. Yes, that is 1986. I am sorry.

Judge **Bork** [continuing]. My remarks about the Equal Rights Amendment with my views of the equal protection clause. Is that what you are saying?

Senator **DeConcini**. Yes. It is in that interview, yes, sir.

Judge **Bork**. Yes. All right. My objection to the Equal Rights Amendment was that legislatures would have nothing to say about these complex cultural matters, and had no chance to express a judgment. People would go straight to court and challenge any distinction, and the court would have to write the complete body of what is allowable, discrimination or whatever it is.

A reasonable basis test allows a little more play in the joints, I think, for the court to listen to the legislatures and look at the society and bring evidence in and so forth. If you want to say that the Equal Rights Amendment really would enact the same thing as the reasonable basis test, then my objection to the Equal Rights Amendment drops out.

Senator DECONCINI. What troubles me is that——

Judge BORK. But nobody said that, Senator.

Senator DECONCINI [continuing]. You are saying to me, as I understand, what you are saying to me is that this reasonable test is something that the court has made up, that you are willing to use, and I do not see any distinction in that amendment. It seems to me far greater to say, "Yes, it applies to women, just as it applies to the races."

Judge BORK. I said that, but it cannot apply just as it does to the races. It is possible to say——

Senator DECONCINI. You say it can apply just as it does to the races.

Judge BORK. It cannot apply——

Senator DECONCINI. It cannot.

Judge BORK [continuing]. To gender just as it does to race. It is possible to say, for example, that there shall be no segregated toilet facilities anywhere as to race. I do not think anybody wants to say that as to gender. Differences have to be accommodated. That is why the difference.

Senator DECONCINI. But is not that a bogus argument? We are not talking about unisex toilets here. We are talking about——

Judge BORK. No.

Senator DECONCINI [continuing]. Fundamental rights that women for too, too long have not been provided.

Judge BORK. That is right.

Senator DECONCINI. And we are talking about your interpretation of whether or not on the Supreme Court you are going to look towards that equality for women, whether we have the Equal Rights Amendment or not. And if you have a reasonable standard that comes into play for women, because I am referring just to women or for sex—let us just say the women—but you do not apply that reasonable standard to racial matters——

Judge BORK. I do. Senator, I do. It is exactly the same standard.

Senator DECONCINI. You do have the standard?

Judge BORK. Yes, exactly the same standards, a reasonable basis test, and there is no reasonable basis to segregate the races by toilet facilities. There is a reasonable basis to segregate the genders by those facilities. And when I said to you that you cannot treat gender exactly the same as you do race, all I meant was some distinctions are reasonable as to gender, such as the one we mentioned, some are not reasonable, the same one would not be reasonable as to race.

Senator DECONCINI. But is it not fair that, you know, as you said in the *Griswold* case, nobody is going to enforce that statute? Who is going to come around that they have to use the same——

Judge BORK. I did not say anybody was going to do that, Senator. I was just explaining to you that——

Senator DECONCINI. But is not that carrying it to an extreme, Judge Bork?

Judge BORK. No, Senator. All I am saying to you is that the various things we would prohibit in the law as to race, not all of those would be prohibited as to gender. Now, for example, you could not have a national law that said only blacks or only whites will go into combat. It may be—and I do not want to arouse a philosophical argument here, but it certainly seems likely to me that you could have a national law—in fact, the Supreme Court has said as much—saying that only males will go into combat, and, you know, there was a case about whether you could have an all-male draft, and the Supreme Court said you could.

So that is an illustration of the fact that gender in some cases is treated differently from race.

Senator DECONCINI. Let us turn to sex discrimination cases. You know, where is the reasonableness in that area? Is that for the court to decide whether or not eight men and one woman decide that this is a reasonable front? How do you set that standard?

Judge BORK. I think that is exactly what happens. I mean if you put that in court, it is either going to be a bench trial or a jury trial—I suppose a bench trial—and a series of judges will have to decide it on the facts whether that is—if we are talking about a title VII case—whether it is a hostile environment case or discrimination and conditions of employment case.

Senator DECONCINI. And you use a reasonable standard there as far as the Supreme Court is concerned of whether or not to uphold the lower court?

Judge BORK. No, no. That is a statute. And if there is a disparity in treatment, you have got a violation of the statute.

Senator DECONCINI. But under the 14th amendment you do not find any reasonableness for sex discrimination case if it were brought on that basis?

Judge BORK. The statute applies to private employers, and the 14th amendment applies to government action. And I am not quite sure I understand the questions.

Senator DECONCINI. Well, if you have sex discrimination, an action brought on sex discrimination charging the 14th amendment, government action towards the person bringing the action, the reasonable standard applies here?

Judge BORK. Have you got a good reason for the distinction? Is there some good reason for the distinction being made? Now there are a million kinds of judgments to be made about that in many different contexts.

Senator DECONCINI. You leave this Senator unsatisfied as to how this Senator can conclude that you are going to protect the citizens of this country in interpreting the Constitution on the court as it relates to sex. And maybe we can go over this some more, Judge BORK. I am not trying to make a federal case or looking for some excuse here. I am trying to satisfy myself that you are not excluding large segments of our population as you clearly do not exclude large segments of our population on the racial issue. But it seems to me that there is a question as to how you treat the sexual segregation. And that is a trouble to me, but my time is up.

Judge BORK. Well, let me answer the question nonetheless, Senator, because I would not like to have that implication left in the room.

The fact is—and I was looking for the materials and I cannot find them, but I will get them—the fact is that as Solicitor General

I argued positions for the protection of women broader than those that the Supreme Court would accept.

The other fact is that in the gender cases that I have decided as a Court of Appeals judge, I have decided more of them in favor of a female claim than I have the other way, I think substantially more. There is no reason whatsoever in my record to think that I have any problem protecting women or any other group.

Senator DECONCINI. Well, as Solicitor General, of course, you know, your client is the government.

Judge BORK. Well, sometimes we filed amicus briefs in cases we did not have to file them.

Senator DECONCINI. Well, how many, what percentage is that?

Judge BORK. I do not know if I have the figures.

Senator DECONCINI. That is not primarily what the Solicitor General does, is it?

Judge BORK. Well, we file a lot of amicus briefs.

Senator DECONCINI. Well, is not the main purpose of Solicitor General to represent the Government? Is not that the primary purpose of that?

Judge BORK. He represents the Government and he also represents governmental policies if he thinks they are intellectually sound and respectable.

Senator DECONCINI. I see a difference as to your position as Solicitor General enforcing some laws and what your interpretation is going to be as a judge.

Judge BORK. Well, let me say this, Senator, there is some bearing because when the Government is sued—and the Government is my client, you are right—if there is any way to defend the Government, I will try to defend them.

Senator DECONCINI. Sure.

Judge BORK. But when I file an amicus brief where no client of mine is involved, I have not the same obligation to find any way to do it. But beyond that, on my court of appeals record—and these are not cases whose results are compelled by Supreme Court precedent—I have voted more often than not for the female party in the case.

There is no, if I may say so—with all respect, there is no ground in my record anywhere to suspect that I would not protect women as fully as men.

Senator DECONCINI. Well, I am going to have to pursue that a little bit later, Judge. Thank you.

The CHAIRMAN. Judge, before we move on, I want to make sure I understood two things. In response to one of the questions, you said the 14th amendment applies to government action not to private action?

Judge BORK. Right.

The CHAIRMAN. And the amicus briefs or the cases where you asked the court to go beyond where it had gone before a Solicitor General, would you supply those at some point?

Judge BORK. I will. The difficulty is I do not have any books here, and every time the crucial moment comes I lose the place.

The CHAIRMAN. Look, Judge, I am having trouble finding my questions. So do you not worry about that?

Judge BORK. No, I am not.

The CHAIRMAN. We will have a couple of hours' break and maybe you could do that.

And, lastly, you said you heard of no arguments about the ninth amendment that would lead you to believe it has some applicability along the lines being discussed, and you cite the Virginia article. Have you read Patterson's "Forgotten Ninth Amendment"?

Judge BORK. No. The ninth amendment has never been a center of my concerns.

The CHAIRMAN. I am not suggesting you should have. I just want to know if you had, because I will not question you on it if you have not read it.

Judge BORK. And the Supreme Court has never relied upon the ninth amendment.

The CHAIRMAN. Well, we can talk about that when my time comes.

Senator Grassley, it is now 12 o'clock. And we will go with Senator Grassley. I thought you might want a 5-minute break, but would you rather continue to go, Judge, or would you like a 5-minute break?

Judge BORK. I would just as soon go and then we can have——

The CHAIRMAN. Okay. We will go now——

Senator LEAHY. Mr. Chairman, is that going to be the last round before we break?

The CHAIRMAN. Yes, that will be the last round before we break rather than start another round because the President is coming up. So we will break from 12:30 when Senator Grassley finishes, unless any of my colleagues would rather do it another way, and then we will come back at 2:30, and we will start with the Senator from Vermont at that time and then hopefully continue today and we will see where we go from there.

If there is no objection, that is how I would like to proceed. Is that agreeable with you, Judge?

Judge BORK. Certainly, Senator.

The CHAIRMAN. Senator Grassley from Iowa.

Senator GRASSLEY. First of all, I do not know whether it makes much difference if you read the "Forgotten Ninth Amendment" or not because it was written in 1954 and a lot has developed since.

The CHAIRMAN. I was just curious, Senator. It was not an accusation. Calm down; it was just a question.

Senator GRASSLEY. Judge Bork, first of all, I want to congratulate you on your openness to answering questions. It is a breath of fresh air to have somebody like you before us who is willing to answer these questions. You are the fourth Supreme Court nominee that I have had the opportunity to evaluate. I want to express my appreciation for the depth to which you are willing to go in responding to our questions.

This gets me to my initial questions regarding your views. These may not seem appropriate, compared to the questions you have been asked. But you know that there has been a debate raging over the past 2 months over the Senate's advise and consent role. All the committee members have weighed in with their views on what our proper role is. This may be an uncomfortable question, but, given your preeminence as an interpreter of the Constitution and, because as a judge, you must decide between two views all the time, I am wondering if I can hear your view on what article II, section 3 of the Constitution means.

Judge **Bork**. I think to begin with the obvious meaning is that you can judge a candidate's intelligence, temperament, integrity, and so forth, and relevant background. I think it is also clear that you can judge a candidate's judicial philosophy. But I think it would be quite wrong to say, "Well, I agree with him but there is one crucial case that he might decide the wrong way and therefore I will not confirm him."

I think given the nature of the structure of the nominating process and the confirmation process and the structure of the bodies involved, the Senate should assure itself that the candidate's judicial philosophy is a respectable one and one that is allowable on the bench in the United States.

Senator **Grassley**. Is it significant that the power of judicial appointment is in Article II, the Executive function, rather than in Article I, the Legislative function?

Judge **Bork**. I think it is, Senator. I think it means that the framers were quite worried about the idea that a large legislative body might engage in nepotism and so forth. Whether they were right or not, I do not know, but they were worried about it.

And I think it means that the Senate's function is not to pick candidates with rifle-shot accuracy, that is to say, no, we do not like those seven people but if you will nominate him or her, we will confirm." I think the Senate's function is to decide whether somebody is in a certain range.

Senator **Grassley**. Is it significant that the framers inserted a two-thirds approval requirement for advise and consent on treaties proposed by the President, but made no such vote requirement for Executive appointments?

Judge **Bork**. I suppose it is, but I am not sure—I have not looked into that, but I suppose it means that they were more concerned about foreign entanglements and the kinds of troubles the President might get us into.

Senator **Grassley**. How deferential do you believe the framers intended the Senate to be toward executive appointments?

Judge **Bork**. I wish I could say that I thought it was extremely deferential, but I have no idea how deferential they meant it to be.

Senator **Grassley**. Judge Bork, when you were a law professor, you criticized the Supreme Court's reverse discrimination holding in the *Bakke* case. Critics charge that this is evidence of your insensitivity to racial minorities. Justice Powell wrote the opinion. Did any other member of the court join Powell's opinion?

Judge **Bork**. No. All eight members of the court went off on different grounds. Nobody agreed with Justice Powell in that case. And I must say he put the case on first amendment grounds, and I think nobody was satisfied with that.

Senator **Grassley**. Well, then there was no majority opinion?

Judge **Bork**. No, there was no majority opinion.

Senator **Grassley**. Judge Bork, 4 years before *Bakke,* in the *DeFunis* case, the Supreme Court was faced with another preferential admissions program in higher education. Although the court held the *DeFunis* case moot, Justice Douglas reached the merits of the case. He wrote views opposing reliance on racial criteria even for benign purposes, and he insisted that the 14th amendment required, and I quote, "the consideration of each application in a racially neutral way".

Is my recap of the *DeFunis* case accurate?

Judge **Bork**. As I recall it, Senator, yes.

Senator **Grassley**. Judge Bork, have your writings as a law professor about this case generally followed this view articulated by perhaps the most liberal Justice of the 20th century?

Judge **Bork**. Yes, I think generally I have certainly objected to race. Now, when you get into use of race as a criterion for remedial purposes, that is a different kind of animal. I do not think I took a constitutional position, but I was quite worried about the use of race for a long time as—that is, I used to think if there was a transition period as we brought a certain racial group into the mainstream of American life, using race as a criterion might be all right. But what I was afraid of as a policy matter was that the preferences would never go away and it would become a permanent feature of American life, causing a lot of resentments and causing other groups to demand the same preferences.

But I have never really written about the subject at length.

Senator **Grassley**. Let me ask you a follow-up question on the self-contradiction of racial quotas. I would like to quote from Professor Bickel's. "Morality of Consent" at Page 133, and I quote:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation. Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." Now, this is to be unlearned, and we are told that this is not a matter of fundamental principle but only a matter of whose ox is being gored.

Continuing to quote, "Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."

Do you share these views?

Judge **Bork**. Well, of course, they are more strongly expressed than I usually write, Senator, as we have learned. But as a policy matter, any long-run institution of quotas worries me very much. As a constitutional matter or a statutory matter, I do not think I should express an opinion because I assume that kind of thing may be litigated in any court I happen to be on in the future.

And I think I have made it plain enough—well, I wrote what I thought about the policy in "Regulation" magazine, so there is no point in me saying I do not have a policy view. But I think I have made it plain that my policy views do not determine my statutory or constitutional views.

Senator **Grassley**. Now, I would like to turn to the principle of judicial restraint, and I want to ask you a question that was put to Justice Fortas during his confirmation hearings to be Chief Justice in 1968; and I quote:

"To what extent and under what circumstances do you believe the Supreme Court should attempt to bring about social, economic, or political change?"

Judge **Bork**. Is that the question, Senator, to which Mr. Justice Fortas said, "Zero, absolutely zero"? I seem to remember it.

Senator **Grassley**. Basically, yes. He said none.

Judge **Bork**. That requires some qualification. If the social change is mandated by a principle in the Constitution or in a statute, then the Court should go ahead and bring about social change. *Brown* v. *Board of Education* brought about enormous social change, and quite properly.

If the social change is the judge's idea of what would be a nice social change, then Justice Fortas' answer is correct: Zero.

Senator **Grassley**. OK. Well, now, Justice Fortas said that. Obviously, he was very much a judicial activist. What can you do to convince me, then, that if you take that same point of view, you really mean it and are going to follow it?

Judge **Bork**. I do not know how I could. You could look at my record so far. That is about all I can advise. Otherwise, I really cannot afford to give you a bond or anything like that so that I could forfeit it if I become an activist.

Senator **Grassley**. I think you can sense some of the problems we deal with as we try to categorize people too much. But each of us, you know, has some views of the kind of people we like on the Supreme Court, and obviously I have expressed some satisfaction with some of your points of view already.

Judge **Bork**. Well, I guess I can say this, Senator: For 16 years, I have been saying one thing about the Court's function; that it has to be guided by the intention of the lawmaker with appropriate respect for precedent. I have been saying that for 16 years in articles, in speeches, and in my opinions, and I am saying it here. If I got on the Supreme Court and began to do anything else, I would be a laughingstock. I would make a fool of myself in history for having done that. I suppose that is the best guarantee I can give you.

Senator **Grassley**. Again, on the issue of judicial activism, there was a recent nominee to the federal court, and he happened to be, I am sorry to say, put forward by this administration. And this nominee once wrote in a "Law Day" article about things that "we ought to be thankful for in our legal system." Among them, he said, was "lawmaking by the courts," and those are his words. Here is what he wrote about that, and I quote again.

"There is nothing new about this and nothing truly conservative about people who decry it. The centuries old tradition of the common law is that law is changed and new law is made by judges. They should continue to do so."

Can you give me your thoughts on such a statement? And I trust that you would disagree with such a demonstration of judicial imperialism.

Judge **Bork**. Which branch of law was he addressing himself to? Constitutional law as a form of common law or what?

Senator **Grassley**. Basically, yes.

Judge **Bork**. Well, I am not quite sure what the gentleman means, whoever he is. But if he means that the courts are free to evolve constitutional law and establish principles that are not in the Constitution, then quite clearly I disagree with him. If he means that starting from something like the free speech clause of the first amendment that the courts will, in fact, and must evolve the meaning of that clause in something like a common law development, then I agree. But the whole question is whether there is a basic premise in the Constitution which the judge is working out or whether there is not. It sounds like he means there is not but they should go ahead anyway, with which I disagree.

Senator **Grassley**. I would like to follow up on what is wrong with judges making law, because I think you just expressed your view. But there are other points of view on the same issue. There seems to be at least two; although there are probably many more arguments advanced why judges ought to be able to make law. One is that judges are an "elite" of our society, better educated than the masses, best able to protect society from itself. A second argument often used is that judges have a duty to protect all those who are under-represented in the political process.

May I have your analysis of these arguments about judicial imperialism?

Judge **Bork**. Well, the first argument is one that is very commonly made by those who do not believe in original intent but believe in a judge creating constitutional values by the method of moral philosophy, say. There are a lot of academics who believe that. The usual ground for that is that judges are better at matters of principle than legislators are; that legislators are better at matters of expediency than judges are.

Senator **Grassley**. Let me be more definite in what I am trying to get at here.

Judge **Bork**. OK.

Senator **Grassley**. Are any of these arguments persuasive enough in your mind to allow a judge to make law?

Judge **Bork**. Absolutely not. That is a much shorter answer than the one I started to give.

Senator **Grassley**. Let me ask you this: Do not legislatures do dumb things sometimes, and are not the courts sometimes the only institutions in a position to protect society from such laws?

Judge **Bork**. I am bound to say, Senator, yes, they do dumb things sometimes. And often those dumb things are unconstitutional.

Senator **Grassley**. That is not a reason for making-up a new Constitution, is it?

Judge **Bork**. That is not a reason for making up a new Constitution, no. There is no clause in the Constitution that says the legislatures shall make no dumb law.

Senator **Grassley**, I want to now ask you about another issue that has been brought before us. Do you change your mind too much, or do you have the ability to change your mind at all? Of course, judges are not robots. They have the ability to rethink their views over time and change their minds. From that standpoint, obviously, they are similar to Senators because we change our minds all the time.

So I want to focus on your ability to change your mind on important issues. One example I am aware of is your position on the public accommodations provisions of the 1964 Civil Rights Act. I think Senator Simpson yesterday reminded us that there are three members of the Senate who voted against that Act and now have changed their minds about it as well.

What other legal issues can you identify for me where you have rethought your views and have publicly come to different conclusions?

Judge BORK. Well, in 1968, as I mentioned, I endorsed a version of lawmaking under the Constitution by the Supreme Court. In 1971, I had become convinced that I was quite wrong, and I published the Indiana article, the main thrust of which was that I take back what I said in "Fortune"; that is wrong, and I will tell you why it is wrong. And I did.

In the second half of the Indiana article, I said, admittedly as a speculative, tentative view—and I explained why I took that position—that maybe the Constitution protected only explicitly political speech. I have explained why I have decided that was wrong. Indeed, more than wrong; it was an example of a professor doing what legislatures sometimes do—being dumb. It was a dumb idea. I published it. I have dropped that.

The CHAIRMAN. When did you drop that idea?

Judge BORK. Oh, in class right away. I think maybe in my 1982 confirmation hearings I indicated that I had dropped it, and then somebody wrote an article in the ABA Journal characterizing my views. It was not an article. It was that browser's page or something. And I wrote a rather stiff letter about that.

That was a pure professor's exercise. As soon as I was faced with the counterarguments and the reality, it collapsed. That part of it collapsed. I still think, I must say, that much of that article is quite good. I like it.

The CHAIRMAN. Thank you very much.

Senator GRASSLEY. Would you ever see yourself like Justice Stewart, who dissented in the *Griswold* case regarding the right to privacy issue, and then 7 or 8 years later, he joined in the majority in *Roe* v. *Wade?* Do you see yourself able to make those sorts of changes?

Judge BORK. Well, I suppose I could if I became convinced, sure, that I was wrong the first time. I have changed my mind on cases——

Senator GRASSLEY. But he necessarily says he was wrong the first time. It was a case of the passage of time, and maybe the privacy argument was carrying greater weight?

Judge BORK. I do not know why he did it exactly. But I have changed my mind in the same case over there. I have written opinions for a panel, got a petition for rehearing, reheard it, and realized I was wrong and come out the other way. I have done that two, three, four times.

Senator GRASSLEY. Yesterday, on another issue, Senator Thurmond questioned you about the importance of precedent. I would like to follow up on that, and I want to refer to a statement made by Justice Rehnquist when he appeared before this committee. I quote, "A precedent might not be that authoritative if it has stood for a shorter period of time or if it were the decision of a sharply divided court."

I want to know if you might agree with that view?

Judge BORK. Well, I think in some part I do—yes, in major part I do. I suppose the passage of time by itself is not important. The only reason it is important is that if expectations and institutions and laws and so forth have grown up around the decision in that passage of time. That certainly weighs in favor of not overruling the decision. In a very short period of time, obviously, things are unlikely to have occurred.

On the other hand, the Court, I think, tends to lose confidence if it starts overruling cases that it decided 6 months or 1 year ago just because the personnel is changed. It is a complex question of when to overrule, and I do not know that I have a philosophy. I know that I do not. I know the factors I would consider, some of them. I have never read a theory of when to overrule and when not to overrule a precedent that had any firmness to it. People just discuss various factors.

Senator **GRASSLEY**. I think you commented well on how long a precedent has stood. What about on the issue of how sharply divided the Court might be?

Judge **BORK**. You mean the first time?

Senator **GRASSLEY**. Yes, and commenting on what Justice Rehnquist said.

Judge **BORK**. Well, I suppose that would have some weight. On the first point, *Plessy* v. *Ferguson,* which allowed segregation, was 58 years old when it was overruled, and a lot of customs and institutions had grown up around segregation. So that is not a dispositive point. I guess *Plessy* was a sharply divided Court. I cannot recall right now.

But I would think that a sharp division in the Court would lessen the weight of the precedent somewhat, but not dispositively.

Senator **GRASSLEY**. I think you have commented on that. I want to go on to another point. You are probably tired of having us ask questions about the *Griswold* case, but probably much needs to be said. In *Griswold,* Justice Black, in dissent, wrote that the ninth amendment was passed to assure the people that the Constitution was intended to limit the federal government to the powers expressly granted to it, or by implication necessary for it to operate. Yesterday, Senator Thurmond asked you about the purpose of the ninth amendment.

Let me ask you this: In more than 150 years between enactment of the ninth amendment and the *Griswold* case, had the Supreme Court ever used the ninth amendment as a weapon of federal power to prevent State legislatures from passing laws they considered necessary?

Judge **BORK**. I believe the Court had never, and I believe the Court to this day has never done so. I think only a concurrence by Justice Goldberg really relied upon the ninth amendment in the *Griswold* case. It has just never been an amendment that the Court has ever found to have much force, just as they have not found the 10th amendment to have much force.

Senator **GRASSLEY**. So then the *Griswold* case was a rather radical decision in terms of the history of Supreme Court jurisprudence?

Judge **BORK**. Oh, the *Griswold* case was an enormous innovation, yes. It was a radical departure from what they had been doing.

Senator **GRASSLEY**. I have a question I want to ask about the 10th amendment. The 10th amendment states, as we all know, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively and to the people."

Now, everybody is going to agree that that is a worthy amendment. However, what was intended to act as an obstacle to expanded federal authority has become, in the words of the Supreme Court, only a "truism".

What does the 10th amendment mean to you today?

Judge BORK. Well, I think, Senator, that is unfortunately part of what I was discussing when I was discussing the fact that the commerce clause is expanded in ways that it is simply too late for a judge to go back and tear up. I think the framers and the ratifiers had a rather clear idea that these powers were limited and had kind of clear contours to them. Indeed, the Government operated that way for a while, for a long while.

But the fact is, beginning with the Civil War up through the New Deal, the idea that those powers were limited and not really national in scope got lost. Now, we are operating in a fashion in which the 10th amendment, I am sorry to say, has almost no practical significance, and I do not really see how it can much, given what has happened to the way the Nation has grown.

Senator GRASSLEY. Well, let me ask you this: Would you disagree with the Supreme Court's 1985 decision in *Garcia* v. *San Antonio*?

Judge BORK. Well, I should not speak to that, for two reasons. One is I do not know, and two is I should not speak to it even if I did know. The third one is I argued and lost the case that *Garcia* overruled as Solicitor General. I tried to uphold a federal regulation of state wages and hours. It was a congressional statute, and I went in to defend it. I was the first Solicitor General in 40 years to lose a commerce clause case. Then after I lost it, they went and overrule it.

I cannot really, I think, speak, Senator Grassley, to what I would do in a similar case.

Senator GRASSLEY. The question has been raised about you taking the place of Justice Powell, and his kind of being a swing vote on the Court and what that might do to the Court. I would like to ask you—and maybe you cannot comment about this either—about Justice Powell's dissent in *Garcia*. How do you relate yourself and your philosophy to Justice Powell's dissent?

Judge BORK. The most that I can say, I think, properly, Senator, is that I have sometimes thought—and I suggested to the Supreme Court in the *National League of Cities* case which *Garcia* overruled—that there were ways in which the Court could defend federalism as a constitutional value, but those ways are quite limited now. And exactly what a Court can do, I do not know, and I really should not express an opinion on *Garcia* and *National League of Cities* out of propriety, and also because I really have not got an opinion.

Senator GRASSLEY. At least the *Garcia* case overruled a precedent.

Judge BORK. Oh, yes.

Senator GRASSLEY. I have only 1 or 2 minutes left.

Judge BORK. *Garcia* overruled a precedent, Senator, and the case it overruled had just overruled another precedent. So it was going back and forth pretty fast there.

Senator **Grassley**. I want to ask you a question about the death penalty, and this will have to be my last question. I do not think there is any doubt about it. My own personal political philosophy is that I would agree with you that since the Constitution specifically refers to the death penalty, it is obviously an available sanction for heinous crimes. I also note the argument of some that since the standard of what constitutes cruel and unusual punishment is an evolving one, there is no place for the death penalty in today's society. That is the other argument.

I want to know whether or not you buy the argument that the eighth amendment standard is an evolving one?

Judge **Bork**. Well, if it is, Senator, I take it if that statement has any meaning, it means that society itself, not the judges but the American people itself have evolved their moral views so that this thing becomes wrong. If that is true, statutes will reflect that fact, and the death penalty will be repealed.

If it is not true, then judges ought not to apply their own evolving morality.

Senator **Metzenbaum**. Senator Grassley, I think we are all due on the floor. It is 12:30. If you have additional questions, I do not know if you have additional time. I am not the timekeeper. But under the circumstances, Judge Bork, I think the Chair has previously announced we will reconvene at 2:30. We will look forward to seeing you at that time.

The **Chairman**. I agree with the new Chairman. Thank you very much.

Judge **Bork**. Thank you.

[Whereupon, at 12:29 p.m., the committee recessed, to reconvene at 2:30 p.m., the same day.]

AFTERNOON SESSION

Senator **Kennedy**. We will come to order.

Senator Biden has been necessarily detained for a few moments. To move the hearing along, we will recognize the Senator from Vermont, Senator Leahy.

Senator **Leahy**. Thank you very much, Mr. Chairman. Judge Bork, welcome back. I do not know if you were attending the celebration of the Constitution. If you were not, I hope you had a cooler place to spend the noon hour than those who were out there.

Judge Bork, I am interested not so much in one specific case, but just how your own thinking has evolved over the years and what we might anticipate, knowing that there are no ironclad guarantees when any judge goes on the bench, nor should there be. But Senator Simpson had said earlier this morning that you are in a different position than if a totally unknown person were to come here who had never written on anything or anything else. And that is true. You are one of the most prolific writers I have ever seen. And having spent a good part of the month of August in Vermont reading your writings, there were days that I wished you had perhaps not been so prolific, and perhaps days that you wish the same.

Judge **Bork**. I share that sentiment, Senator.

Senator **Leahy**. I am sure you do.

But I would hope that no President would send up somebody who is a total tabula rasa. I would not want any President to show what would be almost disdain for the Supreme Court to nominate any man or woman, no matter how brilliant, who had no views ever expressed in the law. So I think it is good for us and for the country that if the President is going to send a name up, he sends somebody with a large body of writings behind him in the field that he will be deciding.

Let me first go over a few things. You said yesterday, in effect, that you believe that there is not a constitutional underpinning to the Supreme Court's opinion striking down a ban on contraception. You said yesterday that there is no constitutional underpinning to the Supreme Court's opinion striking down racially restrictive covenants, and that there is no constitutional underpinning to the Supreme Court's opinion upholding the principle of one person, one vote. In fact, you set forth all those views in your Indiana Law Journal article.

So I would like to ask you, now that we have talked about your views on those three areas, your views on the Supreme Court's decisions in another area—in fact, the main focus of your article, the area of freedom of speech. I would like to take as my starting point—and I would like to see the evolution, if there is one, of your views in this area—the starting point the 1971 Indiana Law Review which you entitled "Neutral Principles and Some First Amendment Problems."

I am using that for a number of reasons. First, the article is well written; its arguments are clearly stated. Whether one agrees or not with the arguments, we know specifically what they are. I think this is probably cited more often in Law Reviews and by courts than any of the rest of your articles. In fact, I think it is sort of in the top 10 or 12 of the articles most cited by any author of Law Review articles.

I understand it represents the most comprehensive statement of your philosophy of the Constitution. Am I correct on those points so far?

Judge Bork. Yes. I wrote primarily in antitrust, and this constitutional law was something I wrote in from time to time.

Senator Leahy. It is also an area that naturally focuses the attention not only of the Senate, but certainly the country, and your feelings there, if you were to go on the Supreme Court.

Let us start with the first amendment and the right of free speech mentioned in the Indiana article. On Page 20 you say, "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary, or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the Government or the violation of the law." That is basically an accurate statement of what you have in there.

Judge Bork. Yes. That was my theoretical position at that time.

Senator Leahy. Then in 1986, March 7, 1986, you spoke at a forum on the political process and the first amendment before the

Federalist Society at Stanford, and you provided the committee with a transcript. Your Law Review article was mentioned by the moderator, and you responded as follows: "Dean Ely has been kind enough to mention my past writing, such as the article in the Indiana Law Review, which—I have been confirmed twice now, and I have had to eat that article page by page both times." Is that correct?

Judge **Bork**. That is correct.

Senator **Leahy**. Now, I recognize a tad of levity in your saying that, but you said about the same thing in an interview on USIA Worldnet a few months ago this year.

Judge **Bork**. Well, I do not recall what I said in that interview. I was talking to a group of German professors whom I could not see. I forget what I said in that interview.

Senator **Leahy**. Well, then, let me not then hold you to that interview. Let me just go back. What did you mean when you said earlier with Dean Ely, "I have been confirmed twice, and I have had to eat that article page by page both times"?

Judge **Bork**. Well, I am sorry, Senator, that was a bit of hyperbole. But I have eaten selected paragraphs of that article. This is one right here that you point to that I guess I am going to eat again.

Senator **Leahy**. Well, no, I am not——

Judge **Bork**. Well, no, I mean that. I am not just being funny. I mean it.

Senator **Leahy**. Well, we discussed this just a slight bit in my office, but let me go back just to do sort of the chronology. I do this, Judge, and if at any point I am taking a part that you feel is at all out of context, you just say so and I will go back to that.

I would like to follow a chronology, if I might, on how you have done it. Let us go back to some of the confirmation hearings where I think you have shown some differing with that article, or at least where the article has been brought up.

In January 1973, you appeared before this committee as the nominee for Solicitor General, and Senator Tunney, then of California, read to you an extract from that article in which you said, "Explicitly political speech does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affects politics, but it would not for that reason receive judicial protection."

And Senator Tunney had asked you how you relate that to how you feel about recent Supreme Court articles, and you said, "The article you have there is explicitly a tentative and rather theoretical attempt to deal with the problem. At the end of the article, I point out that I think these are the conclusions that are required by the idea of neutral principles, but that I am not sure about the whole subject."

Was that a retraction of the Indiana article?

Judge **Bork**. That part of it. That part of it, Senator, yes.

Senator **Leahy**. How far would you say you have moved from the Indiana article in that 1973 period?

Judge **Bork**. About to where the Supreme Court currently is. Let me say this: The Indiana article was not my starting point on free speech. I started off on free speech in a very liberal way, protecting almost everything. This was an attempt to ask in what sense is speech different from other human activities which can be regulated. I took Justice Brandeis' opinion from *Whitney* v. *California*, I believe, in which he said, in effect, there are four functions of speech: the development of the faculties of the individual, the happiness to be derived from engaging in the activity, and the provision of a safety valve for society.

And I suggested that those functions—the development of the faculties and the happiness—were not different from other human activities that develop your faculties and make you happy. And the provision of a safety valve was really a legislative matter, and I said the discovery and spread of political truth is the only unique function of speech that it does not share with other human activities. So I tried to find a bright line.

The bright line, I have become convinced, particularly since sitting on first amendment free speech cases on the court, the bright line is impossible. To say that somebody has to speak explicitly politically, you know, it is like saying somebody who wants to discuss a major issue in moral terms is protected only if he says, "And, therefore, let us pass a law." Now, that is just silly, and the more I thought about it, the sillier it became.

I do not think a bright line test is available in this area. It is a spectrum. Furthermore, as another professor pointed out to me, the realm of politics extends much more through life than it used to, particularly in part because of the spread of government throughout life. So that the area of what is political or what affects politics has expanded enormously, and fiction affects it and so forth and so on.

Now, I have expanded to where I am about where the current Supreme Court is, but let me say this: In this same article, I committed what I think is a logical fallacy. I said that political speech would have to be protected even if there were no first amendment, because the framers constructed a republican form of government, great care about elections, terms of office and so forth and so on. To have a government like that, without free political speech, would be an anomaly. It would be nonsense.

But I did not draw the correct conclusion from that. If political speech would have to be protected anyway, then why did they put the first amendment in? And why did they speak of freedom of the press which is not restricted to political speech? I am afraid I have to conclude that the category has to be much broader than I made it then. And my decision shows it.

Senator LEAHY. Yet you say in it that while there is no bright line still, which is a moving away from your basic premise back in 1971, you still say that it has got to be political speech.

Judge BORK. I do not think so, Senator. I say that I think it is generally true. Harry Kalven, one of the great scholars of the first amendment at the University of Chicago, and Alexander Meiklejohn, another one of the great scholars of the first amendment, all start with political speech as the core of the amendment: the idea that there may be no such thing as seditious libel against the Government, that that is inconsistent with our form of government and the first amendment. But they move out from there.

Senator LEAHY. Are you saying, then, that there are first amendment rights outside the core of political speech?

Judge **Bork**. Oh, sure. Certainly.

Senator **Leahy**. Well, then that differs markedly, does it not, from your 1971 article?

Judge **Bork**. Yes.

Senator **Leahy**. Well, let us go back, then, to when that came about. You did not differ markedly in 1973 when you spoke to Senator Tunney.

Judge **Bork**. I think there is a difference there. I think I was saying it spreads out, did I not? I have not got it before me, but I think you have read it and suggested it was something of a change.

Senator **Leahy**. I think it is. You said in your article, let us take it step by step. In 1971, you say these remarked are intended to be tentative and exploratory, but then you go on to say, "Yet at this moment I do not see how I can avoid the conclusions stated."

You then go on, when you are talking with Senator Tunney, you told him, "It seems to me as you move out from there"—speaking of political speech—"that first amendment claims may still exist, but certainly by the time they reach the area of pornography and so forth, the claim of first amendment protection become somewhat tenuous."

Now, that seems to me to say only that there may exist something beyond the area of political speech. Now, is there not a huge realm of material that is neither political nor pornographic?

Judge **Bork**. I hope so, because I do not spend my time reading either of those two.

Senator **Leahy**. Let me go to—I am sorry. You were going to say you do not spend your time reading either one?

Judge **Bork**. All my reading material is not one or the other, so I hope there is a category in there.

Senator **Leahy**. Well, what about most of the books on the bestseller list? Are they protected?

Judge **Bork**. I do not read those, Senator, but I assume they are protected.

Senator **Leahy**. All of them?

Judge **Bork**. I do not know what is on the bestseller list, and I certainly have not read them.

Senator **Leahy**. Well, what kind of a book might not be?

Judge **Bork**. Pornography.

Senator **Leahy**. What about something that advocated the violation of laws?

Judge **Bork**. Well, you know, the Supreme Court has come to the *Brandenburg* position—which is okay; it is a good position—which is that you cannot be prosecuted for advocating violation of the law unless lawless action is imminent, or imminent lawless action may be caused. That is a good test, and it is very unlikely that the publication of a book advocating violation of the law would produce imminent lawless action. It would have to be a very powerful book to have people——

Senator **Leahy**. Well, what about speech of a person? What about Martin Luther King suggesting civil disobedience?

Judge **Bork**. Well, there are two aspects to that, Senator. One is that Martin Luther King, as I understand it, was usually advocating civil disobedience in order to test a law, like the segregation law, and he did it under a claim of constitutional right.

Now, in our system it is often true that the only way one can get a constitutional ruling on a law is to violate the law, and I think that was a lot of what Martin Luther King was doing. And if you do, obviously, test the law and the law is held unconstitutional, I do not see how the person who advocated breaking it could be held liable.

Senator **Leahy**. Could you have a law that would say that it would be illegal in the first instance to advocate the violation of that law?

Judge **Bork**. I do not think so. It seems to me that if the attempt is by a person or a group to challenge the constitutionality of a law, then I do not see how it can be made illegal to advocate that attempt.

Senator **Leahy**. What if they advocated the violation of a law to test its constitutionality and the constitutionality was upheld?

Judge **Bork**. I really do not know how that would come out. I really do not know how that would come out.

Senator **Leahy**. Let us go back and take a variant of that. You have a law on the books, let us say, that says that you cannot advocate disobedience of a law, for whatever reason.

Judge **Bork**. I think the law is unconstitutional because——

Senator **Leahy**. Even if the law that they then advocate disobeying turns out to be constitutional?

Judge **Bork**. Well, I do not know. Now, we are into an area I have never worked in or thought about. But let me say this: If you are advocating a constitutional test—and you are right—I think that case is clear. If you are not advocating a constitutional test, then I think the Supreme Court's *Brandenburg* decision applies. That says if you are advocating lawless action and it is imminent that it will occur, the speech is not protected.

Senator **Leahy**. Well, I still am having some difficulty knowing just how your thinking has changed, indeed whether it has, on this area of free speech. When you were here for the court of appeals confirmation hearing in January of 1982, Senator Thurmond asked you about what you said about free speech in the 1971 article. You answered that you were engaged in an academic exercise, a theoretical argument.

Judge **Bork**. That is exactly what it was.

Senator **Leahy**. And that is your feeling today?

Judge **Bork**. Pardon me?

Senator **Leahy**. That is your feeling today?

Judge **Bork**. Oh, yes.

Senator **Leahy**. Does that mean it did not state your views?

Judge **Bork**. Pardon me?

Senator **Leahy**. Does that mean the article did not state your views?

Judge **Bork**. No, no. That was a theory I worked out, and it seemed good to me then. But I recognized that it was pretty far off current doctrine, and I was not entirely comfortable with it. But it seemed to me that if you followed this idea of neutral principles, then you can apply the principle of protection, I thought, only to that aspect of speech which is different from other human activity. That is just wrong. But that is what I was doing at the time.

Senator LEAHY. Well, that is where I have the problem, Judge, because you also told Senator Thurmond that "It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I reached," referring back to the 1971 article. Now, if you say the 1971 article is wrong, and yet you are in favor of applying the concept of neutral principles, you say it reaches the result that you reached.

Does that not reaffirm what you just discarded?

Judge BORK. I do not think so. Oh, oh, you have to apply a principle that is awfully large to get to that result in 1971. And that principle would be that all forms of human action which seem in some sense similar to the judge must be treated similarly. I do not think that is true. I think, in fact, legislatures and judges have much narrower principles that they deal with, and they can still be neutral. What I was dealing with here was rather cosmic, I think.

In any event, Senator, I would suggest that my decisions on the court of appeals in the first amendment area do not suggest at all a restricted view of the first amendment.

Senator LEAHY. But your decisions in first amendment areas have been in areas of political speech, have they not?

Judge BORK. Well, you can call them—one of them is a newspaper column and I said it was a political subject. It was not a political speech. Nobody was advocating doing anything. It was just sort of a matter of public, political interest. And I also applied the commercial speech doctrine in a case.

Senator LEAHY. You applied it—I did not hear what you said—you applied it——

Judge BORK. I applied the doctrine that protects commercial speech in a case.

Senator LEAHY. And tell us about that case.

Judge BORK. Well, I think it was a tobacco advertising case. That is all I can recall about it, *Brown and Williamson*. That is all I can recall about it, off-hand, but I can find out about it and let you know more about it. The fact is, Senator, I simply do not have a narrow view of the first amendment's protection of speech.

Senator LEAHY. Do you agree then, with the *Brandenburg* case?

Judge BORK. Yes, I do. I will tell you—the other thing I should say that moved me somewhat in 1971 about incendiary speech was that I had just been through, in fact, was still going through the student revolution at Yale, in which speech advocating law violation and violence was rampant and we had three episodes of arson in the law school, one in which they burned books in the library. I suppose that experience made me perhaps a little less happy than I would have been otherwise, but I realize that we have to put up with that and it is constitutionally protected.

Senator LEAHY. I can remember my days as a prosecutor during some of those same demonstrations at the University of Vermont. Let's go back to *Brandenburg*. When you say that you agree with that decision, that has not always been your position, has it?

Judge BORK. No, it has not.

Senator LEAHY. Didn't you and Mr. Bickel write a law review article saying that the *Brandenburg* case was a fundamentally wrong interpretation of the first amendment?

Judge BORK. The same article here?

Senator LEAHY. I am speaking of the article, "The Individual, the State and the First Amendment," written by you and Alexander Bickel, in which you say on page 21, *"Hess* and *Brandenburg* are fundamentally wrong interpretations of the First Amendment."

Judge BORK. Yes.

Senator LEAHY. So, at that point you thought it was wrong but today you feel it is right?

Judge BORK. Well, there is obviously a question of how much chance you are willing to take. Now, if you have speech advocating violence or forcible overthrow of the Government, it is possible to say we will take a chance and, unless the imminent danger of violence or something of that sort is here, we will protect the speech that is also possible to say, and at the time I was thinking about and had discussed with Bickel, the fact—relied upon by Holmes in his *Gitlow* opinion—the fact that we tend to think that some of these folks are insignificant and I suppose in America they are.

But I was thinking about the fact that I knew of another nation where funny little men in raincoats, wearing mustaches, were standing on the corner advocating forcible overthrow and nobody took them seriously and we got a Nazi regime. I do not think that is a real problem in America, so I think we can afford to have a wide first amendment protection of the sort that *Brandenburg* supplies.

Senator LEAHY. Without going into the specific case—I know in some of this I may have to go back on my next round so I can follow just where you are going without going into a back pattern now, at one point you felt the *Brandenburg* case was a fundamentally wrong interpretation of the first amendment. Today you feel it is right.

Judge BORK. It is right.

Senator LEAHY. In 1982, at your confirmation hearing, you testified that you still agreed with the conclusions you reached in the 1971 article. Is that correct?

Judge BORK. I think—I do not have that here, Senator, but I think you said that if one follows that application of neutral principles, which I was then discussing, one comes to that. I think that is true, if you take neutral principles in the largest, most philosophic sense. But I do not think we should anymore.

Senator LEAHY. Let's go on to that. Let's move up a year later. In 1983, Jamie Kalven wrote an article which you are obviously well-familiar with, criticizing your free speech views from 1971, 12 years before. There has been a lot of discussion about it in the Nation magazine. After a summary of the article appeared in the ABA Journal, you wrote a letter to the editor in which you stated—I will summarize, but I think it's an accurate summary—"Jamie Kalven's summary of my views is both out of date and seriously mistaken. I do not think, for example, that first amendment protections should apply only to speech that is explicitly political. As a result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to a democratic government and deserve protection. I have repeatedly stated this position in my classes." Is that a pretty accurate summary of the way you reacted to the Jamie Kalven article?

Judge **Bork**. Yes, Senator, but I should say one thing. I never read the Jamie Kalven article. I only read the summary of it that was given in the ABA Journal.

Senator **Leahy**. Well, maybe I should say, is that a pretty accurate statement of your views, the way I read it?

Judge **Bork**. Well, it is. It does not take in all the forms of speech that would be protected, but it clearly states that it is not just political speech and I think I go on to say that I do not think this rationale requires protection of pornography.

The **Chairman**. Senator, your time is up, but in order to let the Judge continue, we will finish this line, but do not go to a new question, okay. Continue so we do not cut off what the Judge means.

Senator **Leahy**. I am sorry. I thought I started at——

The **Chairman**. Maybe I am wrong.

Senator **Leahy**. No, they have got the timer. Judge, maybe just in your——

The **Chairman**. I beg your pardon. You have five more minutes. I am sorry. I was mistaken. Five more minutes.

Senator **Leahy**. Were you starting to say something? Did we cut you off?

Judge **Bork**. I do not recall now. I think we will have to reconstruct it.

Senator **Leahy**. Well, let me go back to another question and obviously, we are going to have another time around and you are going to have a chance to see the notes and transcripts of this and if you thought you did not get a chance to answer something fully, naturally we will go back to it. But, have you ever before made a statement that you felt *Hess* and *Brandenburg* was right?

Judge **Bork**. Not in public. *Hess?* Which case is *Hess?*

Senator **Leahy**. Well, let's just stick to *Brandenburg*. *Hess* v. *Indiana* was a case where there had been an antiwar demonstrator——

Judge **Bork**. Well, this is a case of obscenity.

Senator **Leahy**. Who blocked a public street. He had told either the sheriff or the policeman something, what he thought about them, and went back to an updated version of Chaucerian language, I believe it was.

Judge **Bork**. I do not know——

Senator **Leahy**. Fortunately, a well-read sheriff who recognized exactly what he meant.

Judge **Bork**. That Chaucerian English is—I do not know what I think about that case. I am less willing to say that obscenity in public is as protected as advocacy of something in private.

Senator **Leahy**. I do not mean to mix things up with *Hess*. I would rather stick with *Brandenburg* because I had understood your view of *Brandenburg* differently than the way you had expressed it today.

Judge **Bork**. Well, I have had a different view of it from time to time, but I had a view as broad as *Brandenburg* before I wrote this article, when I was still teaching that course in constitutional theory with Bickel, I had an enormously broad view of the amendment.

Senator **Leahy**. So is it safe to say then that there has been a metamorphosis of your views from 1971?

Judge **Bork**. Oh, yes. My views have evolved and changed. A gentleman named Scott called me this morning from a suburb of Chicago and wanted to give me this and I think since I have been trying to say this and I cannot say it as well as this quotation, I would like to read it to you. It is what Benjamin Franklin said when he voted in the convention for the Constitution, 200 years ago tomorrow.

He said,

> Mr. President, I confess there are several parts of this Constitution which I do not, at present, approve, but I am not sure that I shall never approve them for having lived long, I have experienced many instances of being obliged by better information or fuller consideration to change opinions, even on important subjects which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment and to pay more respect to the judgment of others.

I have been trying to say that for 2 days now, Senator, but this gentleman from Chicago called me and gave me that quotation. I think that says it.

Senator **Leahy**. Then, in 1979, when you gave a speech at the University of Michigan on "The Individual, the State and the first amendment," you said again that political speech is at the core of first amendment protection. You said that any version of the first amendment not built on the political speech core and confined by, if not to it, will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins and the law.

Judge **Bork**. Senator, may I have a page citation of that?

Senator **Leahy**. Page 9 of the—the quote came from page 9 of the University of Michigan speech.

Judge **Bork**. Well, I think that is right and I think that is a fairly conventional view. I said the political core will, in some sense, confine the first amendment's protections, but it will not be confined to politics. That is right. I think that is the way Alexander Meiklejohn looked at it. I think it is the way that Harry Kalven looked at it. I think it is the way that Alexander Bickel looked at it. Political speech is the paradigm case. Other kinds of speech inform our society and make it freer and make it better able to be efficient and govern itself, and they are all protected.

But, when you get to something, for example, to take the outer case, when you get to pornography, it is a little hard to see what that has to do with any connection with the way this society lives and governs itself.

Senator **Leahy**. I am not talking about pornography. There are an awful lot of cases that do not fall, as we both agree, do not fall in either the political area or the pornographic area. My last question, if I am correct, you said that back in 1979, you felt *Brandenburg* was fundamentally wrong but today you feel it is right?

Judge **Bork**. Yes. I think that what I thought was wrong with *Brandenburg* then was that it did not take sufficient account of the dangers of not one speaker, but many speakers passing the same message of violent overthrow or violence, no one speech of which would produce violence or violent overthrow, but taken together, might produce a very dangerous situation. I now think that this society is not susceptible to that, even in its worst days, and I also think that the first amendment says we will take that chance.

Senator **Leahy**. Thank you, Mr. Chairman. Judge, just so you know when we go on the second go-around, I will want to re-visit this area. I have a number of questions in the area of the first amendment. Thank you, Mr. Chairman.

The **Chairman**. Thank you very much. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman. Judge Bork, I had intended to move right into the issue of liberties and freedoms, due process and equal protection, but I am a little surprised by some of your responses to Senator Leahy so I will pick up there. When he asked you about the 1971 Indiana Law Review article, which has been a pillar of the law attributable to you, you said, as I wrote it down that you have moved to where the Supreme Court currently is. If that is so, I think these confirmation hearings may be very brief indeed. Is it really so that you have moved to "where the Supreme Court currently is"?

Judge **Bork**. On first amendment law. The important part of that article, from my point of view, is the first half, which argues that judges must stick to intention, what the framers intended. The second half is an attempt to apply the idea of neutral principles in a rather cosmic and artificial fashion to some first amendment problems. On the first amendment, I am now—you may give me a case, Senator, that I do not agree with. I have not been following it that closely.

But as I understand the Supreme Court's current position on things like advocacy of civil disobedience and so forth and so on, yes. Now, on the question of things like obscenity, the Supreme Court seems to have two positions. One is the one expressed in *Cohen* v. *California* in which an obscenity was on the back of a jacket a young man wore into the courthouse and the other one is in the—and the Supreme Court said that that was protected by the first amendment.

The other was in the *Pacifica* case, where a comedian was saying the ten forbidden words, as he called them, over the air, on a radio station and the Supreme Court allowed the Federal Communications Commission to take away the license or somehow punish the station. So, in the obscenity area, they seem to have two positions. I am not sure which is the one. But on the subject of speaking, advocating political disobedience or civil disobedience or advocating overthrow, I am about where the Supreme Court is.

Senator **Specter**. Judge Bork, let's come back to the 1971 article which most of us have assumed that was where you were. You were quoted in an interview in 1985, October, in "Conservative Digest" saying that "I finally worked out a philosophy which is expressed in the 1971 Indiana Law Review."

Judge **Bork**. Do you have an extra copy of that, Senator?

Senator **Specter**. I have my copy. The specific quotation is, "I finally worked out a philosophy which is expressed pretty much in the 1971 Indiana Law Journal piece, neutral principles and some First Amendment problems."

Judge **Bork**. Yes, I think that is right. The explicitly political speech business is a small part of that article and I think—was this 1985?

Senator SPECTER. In 1985, October of 1985.

Judge BORK. Well, as Senator Leahy just pointed out, by 1982, I had written to the ABA Journal disavowing that position, so as far as speech is concerned, I was not sticking to that position.

Senator SPECTER. Well, that is not quite the way I read it, Judge Bork. In the 1982 article, you take exception to limited questions of moral and scientific debate as being central to democratic government.

Judge BORK. Senator, where is this?

Senator SPECTER. Now, I am referring to the article——

Judge BORK. What page is this?

Senator SPECTER. There is only one page. It is the one you referred to this morning. It is in the American Bar Association Journal.

Judge BORK. Oh, I am sorry. I have the wrong one. I have the "Conservative Digest" here.

Senator SPECTER. Let's go back to the "Conservative Digest" if you found that. The "Conservative Digest" says in October 1985, "I finally worked out a philosophy which is expressed pretty much in the 1971 Indiana Law Journal piece." That is less than two years ago and the essential question is, is it right or wrong.

Judge BORK. Well, Senator, may I ask? I do not have the page number. This is several pages long.

Senator SPECTER. Page 101. Left-hand column. While you are taking a look at that, Judge Bork, could somebody pick up for you "The District Lawyer" from May/June of 1985, where you say pretty much the same thing?

Judge BORK. Well, this, Senator, I think clearly was said with respect to my philosophy about judging in matters of the intention of the lawmakers. I was not endorsing everything I had said in that Indiana article, obviously, because in 1982, 3 years before that, I had taken back the part about explicit political speech. This is my basic philosophy of judging—the original intention philosophy that I was saying, I have worked it out and pretty much expressed it there. And that is true.

Senator SPECTER. Judge Bork, in 1982, you made a comment that was limited to moral and scientific debate, but let's go on to some of the other points. Your views, as you expressed them, about the Holmes doctrine on clear and present danger were not very equivocal.

Judge BORK. Where is this, Senator.

Senator SPECTER. This is in the University of Michigan speech, which Senator Leahy had asked you about. And you talk about the Holmes-Brandeis position and then you say this statement defies explanation. There is a terrifying frivolity in the whole statement.

Judge BORK. May I have the page please? I have it, Senator. I found it. It is page 20.

Senator SPECTER. Page 20.

Judge BORK. Well, I think the statement I just quoted does defy explanation and I think there is about it a terrifying frivolity, a point that I must say that Alex Bickel made as well about this thing. Holmes said, about a case where a man was advocating the violent overthrow of the Government, he gave as a reason for protecting that advocacy—now I have just said that *Brandenburg* would protect it and I do not mind that rationale, but what Holmes said was that if in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

In the first place, Senator, one wonders. One reason I think it defies explanation is that the dominant forces of the community have just passed the law he would hold unconstitutional. How can he say that we must allow a proletarian dictatorship to have its way but a law passed by a democratic majority cannot have its way. It seems to me to defy explanation.

Senator Specter. Well, Judge Bork, you can have it, it seems to me, one way or the other. It can either be frivolous and defy explanation, but it cannot be right.

Judge Bork. Cannot be what?

Senator Specter. Cannot be both right and defy explanation and be frivolous.

Judge Bork. Right, did you say?

Senator Specter. Well, you have said that you accept the *Brandenburg* v. *Ohio* and *Hess* v. *Indiana* decisions, which essentially state the Holmes' clear and present danger doctrine.

Judge Bork. I do not think I necessarily accepted *Hess,* but what I was criticizing here is a statement by Holmes—his reasons, his reasoning in the case. I found his dissent in that case not to be a very coherent statement of a rationale.

One could arrive, I think, at the *Brandenburg* decision, along the lines I was discussing: we recognize the dangers of this kind of speech but we will put up with a good deal of it rather than—we will err on the side of putting up with it rather than err on the side of suppressing it. But that does not mean that this statement makes any sense.

Senator Specter. Judge Bork, I do not quite understand how the Holmes rationale can make no sense, and you can accept the rationale, but let me move on for just a moment.

Judge Bork. Senator, may I please try once more to explain that. I do not accept the rationale. The rationale makes no sense. There is a different rationale for *Brandenburg* than this. That is all I meant.

Senator Specter. As to *Brandenburg,* you said *Hess* and *Brandenburg* are fundamentally wrong interpretations of the first amendment. I do not want to belabor it any longer, Judge Bork, but it just seems surprising to me, that in the context where you characterize that doctrine as "fundamentally wrong" and attack the rationale as "frivolous," that you can, at the same time, say that you now accept the current Supreme Court interpretation.

Judge Bork. Senator, I do not attack the rationale of *Brandenburg* as frivolous. I attack the rationale that Holmes gave in *Gitlow* as frivolous, and I do not know that I would agree with *Hess.* I would have to go back and look at that. I just think *Brandenburg* is where the law has settled, it seems to be an acceptable place for the law to settle, and I am not—I was engaged in a debate here with the ACLU. I am not engaged in a debate any more. The law has settled on *Brandenburg.* I think *Brandenburg* is fine. I am not concerned about it.

Senator SPECTER. Judge Bork, I would like to come back to the subject because I think the interpretation will be that if you take Gitlow to Abrams, to DeJong, to the Smith Act prosecutions, and Dennis, to Brandenburg and to Hess, that it is one doctrine, and we can come back to it at a later time.

But the doctrine that Holmes expresses I think is a very well established one, the essential part of which is that time has upset many fighting faiths, and that these ideas ought to have full expression, until there reaches a time when there is an imminence of violence.

Your very extensive writings, on a number of occasions, have taken fundamental issue with that. So I will want to retrace through the philosophy, to see how you can come to that conclusion, because I think it is an important issue.

Before moving on to equal protection and the liberties argument, I just want to understand what your position is at the present time.

In this 1984 ABA Journal article, you say that you continue to think that obscenity and pornography do not fit the rationale for protection, referring to the first amendment rationale. Have you changed your view on that?

Judge BORK. No. I have not, Senator.

Senator SPECTER. Well, would you disagree with Justice Rehnquist's opinion, who was Justice then, not Chief Justice, in *Jenkins* v. *Georgia,* where he said that the first amendment prohibited Georgia from convicting someone for showing the movie, "Carnal Knowledge"?

Judge BORK. Well, I do not know the movie, "Carnal Knowledge," and for all I know it may not be pornography. You know, I think unfortunately for the Court—because some of them get quite upset about it—when a community bans a particular item, movie, book or magazine as being obscene or pornographic, the Court is almost necessarily faced with a task of examining it to see whether it falls within the allowable definition of those words.

And for all I know, the court examined "Carnal Knowledge" and decided it was not pornographic.

Senator SPECTER. The question, Judge Bork, is, you have a Georgia statute on obscenity, you have a jury verdict, you have a conviction, you have it upheld by the State Supreme Court, and then you have the U.S. Supreme Court, Justice Rehnquist saying first amendment protection stops that prosecution.

All of your writings say—and you affirm it here this afternoon—that the first amendment does not reach pornography or obscenity to stop majority rule in a State court determination. And I am saying to you that that pretty clearly places you at variance, at least on that issue, with Justice Rehnquist, or, I am asking you if it does.

Judge BORK. With respect, Senator, I think it does not at all, because merely because a particular State defines something as pornographic does not mean that the Supreme Court has to accept that definition.

In order to protect the first amendment, the Supreme Court has to apply a definition of pornography of its own. Otherwise, the States could define literary works, or even political speech as pornographic.

Senator **Specter**. Well, but you are then saying that it is appropriate for the Supreme Court to strike down a conviction on first amendment grounds where it is pornographic.

Judge **Bork**. No, no, Senator. I am not making myself clear. I will try to be clearer in what I say. The determination of what is pornographic for first amendment purposes has to be made by the Supreme Court, or by the lower federal courts.

Otherwise, if you let a State's definition of what is pornographic govern, things that are not pornographic, in a constitutional sense, might be banned. So it is that the Supreme Court, when it looks at "Carnal Knowledge," must be saying that this thing is not pornographic; it does not have those characteristics that would entitle a State to ban it.

I have not read the case. I am almost certain that must be what they must be doing.

Senator **Specter**. Of course it would have to say that because when it is obscenity, it is not within the first amendment, but if the Supreme Court picks up a case where a State has entered a conviction on pornographic grounds, and strikes it down as violative of the first amendment, as incorporated by the 14th amendment due process clause, then they are reaching that form of speech on first amendment grounds.

And you are saying that the first amendment does not reach that kind of speech.

Judge **Bork**. The first amendment does not reach pornography, as pornography is defined by the Supreme Court. If a State says something is pornographic and the Supreme Court disagrees, it must strike down the conviction because it is not pornographic in a constitutional sense, and I think that is entirely what is taking place there.

For example, if a State passed a statute saying that there was imminent lawless action from a certain type of speech and convicted somebody of that, the Supreme Court would have to take a look and determine whether or not that was a reasonable judgment about imminent lawless action, because if it were not, the Supreme Court would reverse.

In all of these cases, I think the Supreme Court must make the ultimate judgment about whether the State's categorization of the speech as pornographic, or as dangerous, in the *Brandenburg* sense, was a correct determination.

Senator **Specter**. Judge Bork, if you are saying that, then you are saying that the majority, Madisonian majoritarianism which you write about so extensively, does not apply in that situation. That we are not allowing the legislature to make a definition, a definition which a conviction is entered on, but that the Supreme Court has the authority, legitimacy—your term—to come in and upset that conviction.

Judge **Bork**. Senator, with respect, that is entirely consistent with my position on what I have called the Madisonian dilemma, and that is that the Supreme Court must, by applying the Constitution, define what things the majority may rule, and what things the majority may not rule, where the individual, or the minority, must be left freedom.

Now free speech is perhaps the most central freedom in the Constitution. That means that the Supreme Court, ultimately the Supreme Court, the Federal Judiciary, when it says pornography is not protected, it must make sure that what the State calls pornography is pornography, and that is why they are entitled to examine a State determination that "Carnal Knowledge" is pornography and to reverse it.

Senator SPECTER. That is done by applying the first amendment.

Judge BORK. Yes, Senator. I agree, entirely.

Senator SPECTER. But your writings are exactly to the contrary, as recently as 1985.

Judge BORK. Senator, I do not understand. I am missing some aspect of this, because in 1985, I said the first amendment protection did not extend to pornography. All I am saying now is, that the Supreme Court must decide what is pornography, and what is not, in order to apply the first amendment protection.

Senator SPECTER. And you are saying that they do apply the first amendment protection.

Judge BORK. Not to pornography. They have to define what——

Senator SPECTER. But they make a definition of whether the speech is, or is not, pornography.

Judge BORK. Right.

Senator SPECTER. And they interfere with the determination made by the State of Georgia.

Judge BORK. They must do that.

Senator SPECTER. But you have written that the Court does not have legitimacy in using the first amendment to interfere with what a State has done.

Judge BORK. Senator, I never said that the first amendment—the Court did not have a legitimate role, under the first amendment, to interfere with what the State has done. Now, the State may say we are regulating pornography, but it may be regulating things that the Supreme Court does not think are pornography. Therefore, the Supreme Court must make sure that it is pornography, before it allows the State to ban it.

Senator SPECTER. Judge Bork, with all due respect, I think you are putting the rabbit in the hat. The Supreme Court has to take the issue to decide what is involved. Now you have written, going back to the Indiana Law Review article, "There is no basis for judicial intervention to protect that variety of expression we call obscene or pornographic."

Now you cannot have a determination as to whether it is obscenity or pornographic until the Court takes it up, but you say, flatly here, that there is no basis for judicial intervention.

Judge Bork, I think this is important because you have this strain running through the equal protection clause, the due process clause, through all of your writings.

What you are essentially challenging is any basis for judicial intervention, and of course the Court has to make a determination as to what the facts are, if they are to reach a conclusion. But the issue which you have framed is whether the Court reaches that question.

Judge BORK. May I have a page number there.

Senator SPECTER. Page 20.

Judge **Bork**. All right. The Court must protect speech that the first amendment covers. It must not protect speech that the first amendment does not cover and which a community wishes to outlaw. A community's definition, or characterization of a particular magazine, or book, or movie as "pornographic" cannot be taken as final.

The Supreme Court must have its own definition of what is pornographic, and, indeed, it does, and then look at the book, or the speech, to see whether it is pornographic, and hence, subject to State regulation.

Senator **Specter**. But isn't it exactly the same, that the Supreme Court must make a determination as to what is equal protection of the law, and the Supreme Court must make a determination as to what is due process of law?

Judge **Bork**. That is right.

Senator **Specter**. And the thrust of your writings have been that the Court may not make those interpretations, absent some specific constitutional right. That it is really the same area of judicial action, and Supreme Court determination, Supreme Court legitimacy.

Judge **Bork**. Senator, in the pornography case we are talking about, there is absolutely no problem, because the Supreme Court has the first amendment and its guarantee of free speech and free press to apply, and it must apply it.

So that there is no question of judicial legitimacy in the first amendment area. There is a constitutional provision which must be applied.

Senator **Specter**. But it all depends on whether the Court, legitimately, may apply the first amendment to pornography cases, and you have said that they should not.

Judge **Bork**. Well, and so has the Supreme Court said that, I believe. But the whole thing I think we are discussing, Senator Specter, is who determines whether or not this thing is pornography, and all I am saying is, that in order to serve the first amendment, the Supreme Court must determine that and not the local community.

Senator **Specter**. Well, I would say that the Supreme Court has to make that same determination in the due process area, or the equal protection area——

Judge **Bork**. Yes.

Senator **Specter** [continuing]. Which, as I understand it, you say they do not have legitimacy in certain circumstances.

But let me move on to the point that I had intended to start with.

You said yesterday, Judge Bork, that the professorial writings did not really involve damage, that nobody is hurt in a classroom, but people are hurt in a courtroom, and that is the point of departure.

I would raise a question about the power of ideas, and the work of a thinker, and point to your own comments in the antitrust field where, as you point out, there was a new idea at the University of Chicago in the antitrust field. It was an idea of your mentor, heir and director, whom you have written about so extensively, and it became the law, as you have articulated it.

And I think that the ideas are very, very important. When you talk about equal protection—and your writings have focused on equal protection applicable only in a racial situation, and you have expanded that to ethnic groups—and you have expanded that even further in some of your testimony today—at least as I interpret it—to a reasonable standard test, and these are subjects which I want to explore with you at some length, and I only have a few minutes left, about 5 or 6 minutes left here today.

It seems to me, in reading the history of *Plessy* and *Ferguson*, and the adoption of the equal protection clause of the 14th amendment, and reading Raoul Berger, that there was no question that at the time the equal protection clause of the 14th amendment was adopted, that the framers, or ratifiers, did not intend, in the remotest way, to cover desegregation. That they expected to have segregated schools.

There were many States which had segregation. Five border States, eight Northern States. The District of Columbia schools were segregated. The Senate gallery was segregated.

So that the interpretation which you have advanced, that "separate but equal," in the absence of equality through separation must lead to integration, seems to me to be at very sharp variance with what the framers had intended.

So that if you take a consistent interpretation, you cannot come to the result that the Supreme Court did in *Brown* v. *Board of Education.*

But even on more fundamental grounds, you could not come to the conclusion that the schools had to be integrated on due process grounds, and you have been very critical of the due process clause, saying that if there is not a specifically articulated right in the Constitution, you cannot derive it from due process.

But yet, the D.C. schools were desegregated. Where can you find in the Constitution, in the due process clause, authority for desegregation?

Judge BORK. I will answer that first, Senator, but I would like to go back to *Brown* and the equal protection clause, if you will, because that seems to me to be important, too.

Senator SPECTER. Sure.

Judge BORK. *Bolling* v. *Sharpe*, I guess, was the companion case to *Brown* v. *Board of Education*, and the Supreme Court there faced a problem because the equal protection clause through which *Brown* moved to accomplish desegregation applies only to States and not to the federal government.

And you had, then, the problem of the District of Columbia, and the only available constitutional clause, they thought, was the due process clause, which does apply to the federal government.

I am told that was the first time, I think, in *Bolling* v. *Sharpe*, that anybody said that the due process clause contains an equal protection component like the equal protection clause.

Senator SPECTER. No. They did not say that, Judge Bork.

Judge BORK. Didn't they?

Senator SPECTER. No. In *Bolling* v. *Sharpe*, the decision was made on the ground that it was fundamentally unfair, an arbitrary deprivation of liberty in violation of the due process clause, not reverse incorporation.

Judge BORK. I know. They said the fifth amendment does not contain an equal protection clause, but the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. And as a matter of fact, since then—I guess the reason—since then, they are not mutually exclusive, and the equal-protection concept got into the due process clause. And since then it is commonplace for the courts, or for advocates, to refer to the equal-protection component of the due process clause, which is what this is taken to have accomplished.

Senator SPECTER. Well, I think the Court is perfectly clear here, that they do not find an equal-protection obligation for the federal government, and they put it on due process grounds and on fairness grounds.

But the underlying question, Judge Bork, that seems to me to be applicable here, is why does the Court come to that position? It seems to me that it goes back to a statement you made yesterday in response, I believe, to a question from Senator Thurmond, where you said, referring to the commerce clause, that the appointment power meant that sooner or later, the commerce clause would be interpreted in accordance with the needs of the nation, which is a very broad articulation of what the Supreme Court does, meeting the needs of the nation.

That certainly is not concrete and that certainly is not specified in the Constitution——

Judge BORK. That is true.

Senator SPECTER [continuing]. At variance with what the Commerce clause says. And if you read the history of the equal protection clause and the due process clause, and the status of segregation, you find that it is very much opposed to integration.

And yesterday when you were asked about which was the most controversial case besides *Griswold*—I think Senator Hatch asked you that—you picked *Brown* v. *Board of Education*. And that was because——

Judge BORK. It was controversial.

Senator SPECTER [continuing]. It was a controversial case. You said that even though cases are good, they are controversial. You did say that?

Judge BORK. Even though I think legally they are clear, I meant politically controversial.

Senator SPECTER. Well, that was the question. You said it was controversial.

Judge BORK. Yes.

Senator SPECTER. And I think it was that controversial because there was no legal underpinning for it.

Judge BORK. Senator, I think there was, and let me say two things about it. One is that I have recently been told—I have never read the briefs in the Supreme Court but I know some folks who have in *Brown*—and it begins to look as if there is historical argument that the framers of the 14th amendment did not like segregation and may have intended to do away with it, but that—and the black codes and the segregation did not begin to come into the South until the troops left the South, the Northern troops left the South. And later the Supreme Court changed. *Plessy* v. *Ferguson*, after all, is a 1896 case, which is fairly long after the 14th amendment, *Plessy* v. *Ferguson* being the case that said separate but equal is all right.

But passing that, passing that historical evidence, which I think casts some doubt on the flat assumption that the 14th amendment really meant separate but equal, let me say this. They wrote a clause that does not say anything about separation. They wrote a clause that says "equal protection of the laws".

I think it may well be true, as you suggest, Senator, that they had an assumption which they did not enact, but they had an assumption that equality could be achieved with separation. Over the years it became clear that that assumption would not be borne out in reality ever. Separation would never produce equality.

I think when the background assumption proved false, it was entirely proper for the court to say "we will carry out the rule they wrote" and if they would have been a little surprised that it worked out this way, that is too bad. That is the rule they wrote and they assumed something that is not true.

And in that way I do not think any damage is done—you can [illegible] look at it more severely. You could say suppose they had written a clause that said "we want equality and that can be achieved by separation and we want that too."

By [illegible] was perfectly apparent that you could not have both equality and separation. Now the court has to violate one aspect or the other of the clause, as I have framed it hypothetically. It seems to me that [illegible] the actual amendment was written, it was natural to choose the equality segment, and the court did so. I think it was proper constitutional law, and I think we are all better off for it.

Senator SPECTER. Judge Bork, I think [illegible] better off for it, but I do not think that that is a logical conclusion [illegible] looking at the framers' intent. But if you turn to due process and take your application of due process of law and what you have said about *Griswold* and *Roe* v. *Wade*, how can you justify *Bolling* v. *Sharpe* applying the due process clause to stopping segregation?

Judge BORK. I do not know that anybody ever has. I think that has been a case that has left people puzzled, and I have been told that some Justices on the Supreme Court felt very queasy afterwards about *Bolling* v. *Sharpe.*

Senator SPECTER. If you take Raoul Berger's analysis they felt very queasy about *Brown* v. *Board of Education* and *Bolling* v. *Sharpe* because they came to a decision, essentially as you said it yesterday, in accordance with the needs of the Nation.

My time is up, but what I want to come back to is how that applies in other contexts, how that applies in privacy, how that applies in equal protection. And if you are willing, as a Supreme Court nominee, to say that you sanction *Brown* v. *Board of Education,* and you sanctioned *Bolling* v. *Sharpe* on due process grounds, then it seems to me you are a significant distance from original intent.

Judge BORK. I do not think I am on *Brown* v. *Board of Education.*

Senator SPECTER. How about *Bolling* v. *Sharpe*?

Judge **Bork**. I think there may be a significant difference there, and I did not say I sanctioned it. I think that constitutionally that is a troublesome case.

Now it has been suggested that if the Supreme Court had struck down segregation in all of the States under the equal protection clause, Congress most certainly would have stopped segregation in the District of Columbia. And it would have been a national scandal if they had not.

Bolling v. *Sharpe* seems to have been propelled by a feeling that if we are going to do this to all of the States, we cannot let the federal government do it. I understand that feeling.

Senator **Specter**. But as a matter of principle and as a matter of exponent as you are of neutral principles, if you can apply the due process clause as they did in *Bolling* v. *Sharpe*, why not in *Griswold* v. *Connecticut*?

Judge **Bork**. Well, if they apply the due process clause that way, Senator, I quite agree with you. Why not in *Griswold* v. *Connecticut*, and why not in all kinds of cases? You are off and running with substantive due process which I have long thought is a pernicious constitutional idea.

Senator **Specter**. I think it is as you articulate it, but if you start to deal with the needs of the nation and you accept in *Bolling* v. *Sharpe* to strike down segregation in the District of Columbia, and you accept it in the commerce clause, what happens to your principle?

Judge **Bork**. Senator, I did not accept it in *Bolling* v. *Sharpe*. And when I say I accepted it in the commerce clause, I accept it because what has happened is irreversible. There is simply no point in a judge running around trying to tear down the federal government in the code book and all the institutions build up, and you do it by a principle of stare decisis. That is all you can do, a principle of following precedent so that we do not try to tear up the Nation in a vain attempt to take the commerce clause back to where it was in 1790.

Senator **Specter**. Final question: Do you accept *Bolling* v. *Sharpe* or not?

Judge **Bork**. I have not thought of a rationale for it because I think you are quite right, Senator.

Senator **Leahy**. You say you have or have not?

Judge **Bork**. Have not. I think you are quite right, Senator, because if you say it is due process and we will do whatever is fair or good under due process, the court's powers are unlimited. That is the problem I have with that substantive due process.

Senator **Specter**. Well, I know that you will not reverse *Bolling* v. *Sharpe* in any event, but it is a very uneasy conclusion, Judge Bork, when you talk about the needs of the Nation. And when my next round is up, you get into the concepts of rooted in the conscience of the people and you get into Holmes, who was very much against substantive due process but talked about striking laws on which reasonable men could not differ, and you see the application of Alexander Bickel to these doctrines and his articulation of insulation and leisure, and where the courts have been and what the tradition of this country is, and I think that what so many of us are looking for here is some reassurance that you would follow in that tradition. That is what I am looking for.

Judge BORK. All right. I think——

Senator SPECTER. I am concerned about where you are going to be. If you are going to accept the Supreme Court where it is today, whether I like it all or not, fine. But if you are going to make sharp variations from it, then we have got to pursue quite a number of questions because I think your answers to Senator Leahy raise a number of issues, at least, that I want to pursue.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Before we go to the next questioner, I had indicated earlier that about every hour-and-a-half we would give an opportunity to break for 5 minutes. Although we have only gotten through two questioners, I suggest we take a 5-minute recess, and then we will begin with Senator Heflin.

Judge BORK. Mr. Chairman, I wonder if I might have 20 seconds to supplement my discussion with Senator Specter?

The CHAIRMAN. Take as much time as you like, Judge.

Judge BORK. Thank you very much, Mr. Chairman.

The CHAIRMAN. Is Senator Specter here though? Maybe if you are going to supplement Senator Specter, we should have him in the room.

Judge BORK. Well, why don't I wait until he comes back.

The CHAIRMAN. I think he is just outside the room.

Judge BORK. All right. Thank you.

[Brief recess.]

Judge BORK. The Senator is here now.

The CHAIRMAN. Yes. Please proceed, Judge.

Judge BORK. Senator Specter, I just asked for a moment to supplement——

The CHAIRMAN. We will have order in the hearing room please.

Judge BORK [continuing]. Supplement one answer to you and that is this: I want to make it clear, absolutely clear if I can, that my doubts about the substantive due process approach to *Bolling*—and I really think that *Bolling* said that the equal protection component exists in the—we can go back to that. My doubts about the substantive due process of *Bolling* v. *Sharpe* does not mean that I would ever dream of overruling *Bolling* v. *Sharpe,* as you suggested.

And furthermore I should make it clear, as I have said repeatedly, segregation is not only unlawful but immoral. And I do not want my doubts about a constitutional mode of reasoning to be turned into anything other than that, not by you, Senator. I mean just by people who are listening to us.

Senator SPECTER. Judge Bork, I appreciate your comment and we can pick it up later as to issues which are awful and immoral, but perhaps the court ought to reach again.

Judge BORK. I suspect we will pick that up again, Senator.

Senator SPECTER. Thank you very much for the addition.

The CHAIRMAN. Is there anything else you would like to say?

Judge BORK. No, thank you, Mr. Chairman.

Senator Heflin from Alabama.

Senator HEFLIN. Judge Bork, I have given considerable thought to why the furor and we have a furor. I suppose that probably this is—your confirmation is one of the hottest issues that has been around in a long time. I suppose like a gas burner, there are a lot of flames, but the most intense flame, it seems to me, is *Roe* v. *Wade*.

Now you have been asked some questions about it. I do not think there is any question that the pro-life people who fervently and vehemently support you think that you will reverse it or at least some part of the court will reverse it.

The pro-choice people just as vehemently and fervently believe that you will also. There are those that probably would say if the President did not think that you would reverse that case or join the majority to reverse that case, that he would not have appointed you. You can go on down with various speculations. I do not think there is much question that this is a major issue.

There are those that contend that the pro-choice people have basically generated a heat among the civil rights coalition and that the civil rights coalition are mistakenly equating abortion rights with civil rights. Whether that would be true, I do not know. I do not know but it remains to be seen.

There is no question that the spotlight is on this issue and it is an issue that I think deserves clarification and directness on your part.

You answered the question about *Roe* v. *Wade* and what you would do. I believe that Senator Hatch, and maybe someone else, asked you questions about it. But, as I recall and looking at the record, you had basically three questions that you said you would ask a lawyer. I do not know whether you said asking a lawyer is an invasion on your part or not. If not, then we can clarify that.

Basically, you had indicated that you would ask the lawyer first to see if he could find a right of privacy ought to be found in any one of the specific amendments, but in some principal fashion from the Constitution.

So I want to know not only where you got it but what it covers. So I suppose that that question would be: Where do you find in the Constitution a general right of privacy?

And second, you said that if you would tell that lawyer that if you cannot find a general right of privacy, can you derive a right to an abortion or at least to a limitation upon anti-abortion from the Constitution.

You said that you would—if after listening to the arguments and to those two questions that you would raise, then if did not sound like it was going to be a viable theory, which would be directed to those two, then you would say you would like for him to argue whether it is a kind of case which should not be overruled, which is basically stare decisis.

Now on the general right of privacy—well, first, let me quote what you have been quoted and this comes from magazines and some of your writings—if it is incorrect, then correct me—*Roe* v. *Wade* is in itself an unconstitutional decision, a serious and wholly-unjustifiable usurpation of eight legislative authorities. Is that a correct recital of a statement you have made?

Judge **Bork**. I made that statement, yes.

Senator **Heflin**. All right, sir.

Now we go back to the general right of privacy, upon which *Roe* v. *Wade* is based coming out of *Griswold,* and you had two, one Justice Goldberg out of the ninth amendment and the other one from Justice Douglas which is called the penumbra, which is sort of a vague term, but I understand that is something to do with astronomy and various shadows and unclear things, but it comes from the specific mentioning of rights of privacy, as you have enumerated to me in various other amendments.

Now you in your studying it and making a statement like that, do you really believe that you can find anywhere a general right of privacy that you would accept from the Constitution?

Judge BORK. I do not know, Senator. I certainly would not accept emanations and penumbras analysis, which is I think less an analysis than a metaphor. And the ninth amendment part gives me difficulty because it is a little hard to know what category of rights, if any, were supposed to be preserved by the ninth amendment unless it is the State constitutional rights.

But there may be some way to do it. I have heard fairly strong moral arguments for abortion, just as I have hard fairly strong moral arguments against it. Whether those moral arguments could be rooted to the constitutional material, I really do not know.

What I do unfortunately, I suppose, is take Supreme Court opinions that seem to me unsatisfactory as matters of constitutional reasoning and criticize them. And I have not gone back into the history and other things in an attempt to construct a new——

Senator THURMOND. Judge, keep your voice up so we can hear you.

Judge BORK. All right, Senator—a new right of privacy that has some other meaning. Maybe, as I say, one of the moral arguments would apply perhaps only to abortion because *Griswold* and *Roe* are quite different cases in quite different situations, and I do not know if you want me to rehearse some of the moral argumentation I have heard or not, but I do not know—I have not heard anybody yet root it in the Constitution.

Senator HEFLIN. But I am correct in assuming that as of now at this hearing that you know of no theory which could be derived from the Constitution which would grant a general right of privacy.

Judge BORK. Well, certainly not a general right of privacy that is as free-floating as the one we have now because we do not even know what it covers. Privacy to do what? But it is true, Senator, I do not know, I do not have available a constitutional theory which would support a general defined right. But that does not mean that there is not one, and it seems to me I often am surprised to learn that there is an argument in a certain direction that I had not anticipated and I have not tried to anticipate one here.

And I can only say that if somebody has a constitutional theory, I will listen to it attentively.

Senator HEFLIN. Am I correct in saying that you do not expect to seek it and try to find it yourself?

Judge BORK. Well, if a case came before me I would, but, no, now I am in the business of hearing and deciding cases, and I really do not have time to go off and anticipate a question that may or may not ever come before me. But if a case comes before me—sometimes lawyers' arguments give you ideas that the lawyer has not expressed—I would send my clerks out and try to research that.

Senator Heflin. All right, now to the second one. If you cannot derive a general right of privacy, can you derive a right to an abortion which is "a" of two and you have "b", which is, can you derive a right to abortion from the Constitution, that is, obviously, that specifically gives somebody a right of privacy? So, we just dismiss—I mean, that I do not think is in the language there that could be construed that says you have a specific, implicit, explicit right to an abortion, in the Constitution.

All right, your "b" part of that is, at least which would provide a limitation upon anti-abortion statutes legitimately from the Constitution. What do you, at this time, see as a possibility of a limitation?

Judge Bork. Well, it would seem to me, Senator, that it would be easier to argue a right to an abortion. I am not saying it would work, but it would be easier to do that than it would be to find this generalized right of privacy. For example, I understand groups are working—I have not seen their work product, but I am told that groups are working on that. For example, some groups, I think, are trying an equal protection argument.

Only women have this specific burden and forcing a woman to carry a baby to term—some of the groups are arguing, I suppose, is a form of gender discrimination. I have not seen that argument worked out, but I know it is being worked on.

Senator Heflin. Well, that would be basically difficult from the language of the Constitution, since mostly parts of the Constitution is a conferring power on the federal government with a reservation to the States and to the people for the power that is not specifically granted to the federal government, under the 10th amendment.

Judge Bork. I was referring more to the equal protection clause of the 14th amendment, as the place in which that argument would be rooted. I do not suggest it would succeed. I do not suggest it would not. You asked me if one could begin to talk about where one might root such an argument, and I think the right to an abortion—you might attempt to root it there, successfully or not, I do not pretend to guess, but it is easier than a general right of privacy.

Senator Heflin. Well, that would go basically contrary to some of your feelings on the 14th amendment, extending in that area, would it not?

Judge Bork. In the area of women?

Senator Heflin. Well, in the area of trying to give it as to a particular right of a limitation upon the States to pass certain laws, which would, in effect, limit the anti-abortion statutes.

Judge Bork. Well, I do not mean, Senator, to try to offer anybody some hope or something that I would find that constitutional right. I am just saying that that is one area in which the argument might take place. And I do not think it is entirely contrary to my constitutional philosophy because I have been saying, this morning, that the equal protection clause applies to women as well as to men—obviously, because it would be ridiculous to say it applies only to men—and that for over 90 years, the Supreme Court has been using this question of is this a reasonable, fair classification.

I would suppose that is where the argument would be built, might be built. But, I can go no further than that. I have not seen the argument. It is not doctrinally absolutely impossible, but I cannot go any further than that.

Senator HEFLIN. All right, so now the third is the stare decisis, which would argue that this is the kind of case that should not be overruled. Do you have any thoughts pertaining to how you would approach the issue of Roe versus Wade from a stare decisis basis?

Judge BORK. Senator, I do not want to get too close to the actual case, but——

Senator THURMOND. Mr. Chairman, it seems to me he is bordering now on a question asking him to express an opinion on a matter that may come before the Supreme Court and I would think that would be improper.

The CHAIRMAN. Well, that is for the Judge to decide, what he thinks he can and cannot answer. Judge, how do you wish to answer that question?

Judge BORK. Well, I was beginning to say, Mr. Chairman, to Senator Heflin, that I do not want to discuss stare decisis in the specific context of *Roe* v. *Wade* because that is getting awfully close to how do the factors apply there and therefore, how would you decide. But I will be glad to discuss my general approach to stare decisis and the kinds of factors I would consider. I do not think I can discuss how they might apply in this instance, because that would be too close to committing myself to a particular vote later. If that is satisfactory to you, I will be glad to.

Senator HEFLIN. Yes, go ahead.

Judge BORK. All right. I think it has to be, in the first place, clear that the prior decision was erroneous. I mean, not just shaky but really wrong in terms of constitutional theory, constitutional principle. But that is not sufficient to overrule. I have discussed these factors before, but I will mention them again, and a number of factors counsel against overruling. For example, the development of private expectations on the part of the citizenry. Is this an internalized belief and a right? The growth of institutions, governmental institutions, private institutions around a ruling.

Now, I have given two examples of that. One was the commerce clause and one was the free press clause, in both of which cases many institutions have grown up in dependence upon that and they have become part of the fabric of our national life. The need for continuity and stability in the law, which is certainly always a factor to be weighed. The need for predictability in legal doctrine. I think the preservation of confidence in the Court by not saying that this crowd just does whatever they feel like as the personnel changes. And the respect due to the judgment of predecessors on a legal issue, if they have explained their judgment.

Now, of course, against that is—if it is wrong, and secondly, whether it is a dynamic force so that it continues to produce wrong and unfortunate decisions. I think that was one of the reasons the court in *Erie Railroad* v. *Tompkins* overruled *Swift* v. *Tyson*—a degenerative force, I think what Brandeis or somebody maybe called dynamic potential. That is the kind of thing you would have to weigh and that is a very fact-based consideration, a very particularistic consideration about whether this is the kind of case that goes one way or the other. I think the Court has got to work out a better theory of stare decisis than it has now articulated.

Senator **Heflin**. Well, is it fair to say that number one, that you think that the reasoning that brought about the decision of *Roe* v. *Wade* is wrong? That the decision, based on that reasoning, was wrong? And that unless some general right of privacy is shown to you to come from the Constitution or unless you can find, in the 14th amendment or somewhere else, some limitation on anti-abortion statutes, then basically you would have to, under your thinking, look to the area of stare decisis in determining whether or not you think *Roe* v. *Wade* ought to be reversed?

Judge **Bork**. That is correct, Senator. I would have to ask myself what the presumption in favor of preserving a prior precedent meant in this case and whether it was overcome by other factors.

Senator **Heflin**. Another question and a line of questions. We have had, from your writings, some of which you have recanted, others which you have not, that if—when I look at those, I can come to conclusions depending on the result that I or somebody else may want to reach on this matter. So, in trying to be fair to you, we ought to basically look at the overall total man.

On one hand, we have those that, in effect, contend that you are a right-wing extremist, who has, in the back lobes of his mind, a radical right-wing agenda that if you get on the Court, you want to put that agenda into place. On the other hand, there are those that say you are a highly intellectual individual and that you have been an evolving individual who has great intellectual curiosity who wishes to explore different, unconventional concepts and theories and experience the unusual.

From reading your history and background as reported in newspapers, publications and all sorts of things, I think that we could say that there have been unusual things. One interpretation is that you have great intellectual curiosity. I have gone back and looked at some of the things from your youth and have seen how you have either involved or, on the other hand, that you have displayed a background of being a zealot at times.

For example, in your early youth, they list you as being a socialist, that you stated that socialism sounded like a swell idea and rebellion also sounded like a swell idea, at one time. Then, there are writings in some of the papers to the effect that you succeeded in getting a young friend of yours to attend a Communist party meeting. That you were a champion boxer. You were also the president of your class and editor of the school paper. And yet you went into the Marine Corps and I assume—did you volunteer going into the Marine Corps?

Judge **Bork**. Oh, yes, you had to.

Senator **Heflin**. That is what I recall because since I am a Marine, too, my recollection of history might be a little bit different, but in World War II, as I recall, everyone that ever went into the Marine Corps was a volunteer. And then, after you came out of the Marine Corps—well, you have an interesting career in the Marine Corps. You were a Japanese language translator, as I understand it.

Judge **Bork**. Well, they started me in Japanese language school but then they dropped the bomb and they did not need Japanese language specialists any more. So instead, they sent me to China with a rifle to guard Chiang Kai-Shek's supply lines. It did not do them much good, but that is what we did.

Senator LEAHY. That is not your fault.

Senator HEFLIN. Then you came back and you went to the University of Chicago and, according to some of their reports, you were a liberal democrat. Then you went back into the Korean conflict in the Marines. According to some, you liked the discipline of the Marine Corps, the esprit de corps. Then you came back and I am not exactly sure, but after coming out of the Marine Corps, as I understand it, the second time, there was some instance in which you still exhibited maybe some socialistic leanings.

Judge BORK. I would not say socialistic. No, I think I was a liberal at that point. That was my period of support for Adlai Stevenson.

Senator HEFLIN. All right. Then after that, you, of course, I believe went to law school. You had the professor director, you got under the free market theory, and then after graduating, you started to work with a large law firm. And then, as a member of that law firm, took a position contrary to some of the policies of the law firm before, that the law firm ought to recruit Jewish lawyers.

Judge BORK. They had a quota.

Senator HEFLIN. And you endeavored to try to bring about the integration, in your law firm, of more Jewish members.

Judge BORK. Yes, it should be said about that firm, they had—well, it was not a rigid numerical quota, but they had, in effect, a quota and a young man came and applied—I was quite close to a couple of the senior partners and they said they did not want to take him because he was Jewish. That resulted in a considerable argument by me with them. He was a smashing success.

Senator HEFLIN. You left the law firm in 1962 where you were making a salary of around $40,000 to become a professor at less than $15,000.

Judge BORK. I don't think the disparity was that great, Senator. I would like to make it that dramatic, but the fact is I think I was making around $25,000 or $26,000 and I went to $16,000. The real disparity was in the years that followed because it was going up rapidly at the law firm and it was not going up rapidly at Yale.

Senator HEFLIN. Well, that makes me think that you were not a professorial zealot at that time wanting to get to be an academic and that sort of thing. In other words, if the salary—if you had been making $100,000, according to the free market concept it would have been difficult to leave.

Judge BORK. Oh, no. No, no, Senator. When I decided to leave the firm it was dissatisfaction with the life I was leading. I mean, it was a good practice, but I didn't want to do it for the next 40 years. And one of the senior partners came to me and said, "You know, we haven't spread the money around enough," and he mentioned a number. And I said, "No matter what number you mention I'm going."

I liked the firm but I didn't want to lead that life. I wanted to be an academic.

Senator HEFLIN. How long did you have that desire to be an academic? When do you think it generated——

Judge **Bork**. Oh, about—well, it came to me on and off. You mentioned my experience in the—I liked the Marine Corps, and when I was at the university I used to say that my ambition in life was to end up as a brigadier general in the Marine Corps Reserve and a full professor. But that faded away. When I began to practice law, I liked the practice so much for about 5 or 6 years that I thought I would never—I thought I would just drop the professor idea. Then it came back to me.

I wanted to work on theories of the law and I really couldn't do that in the firm, and that is why I went off. I now wish I hadn't worked on theories in the law, but I did.

Senator **Heflin**. Well, now there are those, and this is not my idea, that say, well, you can look at his attire and the way he wears his hair as some indication. I don't agree with that. I have got several members in my staff that have beards and everything else. Would you like to give us an explanation relative to the beard?

Judge **Bork**. Yes, I would. It is a very unromantic—it is a very unromantic explanation. In 1968-69 academic year I was on sabbatical leave in England with my family. I was writing a book. It was an antitrust book, and you may ask why I chose to write it in England. The answer is the alternative was to write it in New Haven. [Laughter.]

And I—we went on a canal boat trip. You drive it yourself along the canal, and the family was in there. And the bathroom, the sink was right against the wall, so when you tried to shave, unless you shaved with your left hand, I couldn't do it. And for about a week I didn't shave, and by that time my children had become fascinated with what was then the beginnings of a red beard and they asked me to let it go. So I did.

I grew a—I liked it much better when it was red, Senator. And I let it grow, and it kind of intrigued me and intrigued my children, and I have had it ever since.

Senator **Heflin**. There is nothing wrong with it. I would certainly clear that because there are a lot of bearded voters out there and I don't want to [laughter] make hair of them. [Laughter.]

You know, we got some in Alabama, so I don't—you know, you have had a varied career. You had a lot of things. Some of your writings are extreme. Some of them you have recanted. Some of your activities, you have gone through a lot of changing ideas. And really, it comes down to I wish I was a psychiatrist, rather than a lawyer and a member of this committee, to try to figure out what you would do if you got on the Supreme Court.

Judge **Bork**. I think, Senator, the best guide to that is what I have done in any position of responsibility when I wasn't speculating. As a partner in a law firm, I was a very regular lawyer, nothing wild about it. As Solicitor General, I carried out my duties in not a speculative or extreme fashion at all. And as a judge on the Court of Appeals, I think I have not been extreme in any way.

And I don't think I have said much extreme in my life. You know, Mr. Cutler had an article in this morning's paper, which I think was put in the record, showing that my positions on these various cases are shared by a lot of what nobody can doubt are mainstream Justices and professors.

Now I did make the remark about explicitly political speech. It was not a good idea. I have abandoned it. I prefer "abandoned" or "evolved out of" to the word "recanted," which sounds a little like something else. And a few other things I have grown out of, but a lot of the stuff I still believe.

Senator HEFLIN. Well, now there are those that raise the issue that your changing of your position and sort of renouncing your positions on certain positions came only at a time when a carrot was, in effect, being dangled before your eyes; and, in effect, you—and, in effect, that you changed your mind on certain writings when you knew that you would have to come up and face questioning before a Senate panel on confirmation on Solicitor General. Again, also when you came up for the U.S. Court of Appeals.

Judge BORK. Let me say this, Senator. You have recant—you have—not recanted, recounted a series of my positions, political positions, ranging from my socialism in my youth to my liberal positions to my more conservative positions. None of those changes took place in connection with any confirmation hearing and if you—not one of them took place in connection with any carrot.

And let me just point to a change in my legal philosophy which is the most dramatic change in my writing, and that is, from December 1968 when I wrote the Fortune article called "The Supreme Court Needs A New Philosophy," accepting the idea of *Griswold* v. *Connecticut* as a reasonable—not the penumbras and emanations, but the idea of reasoning from different provisions to a more general right, to 1971 when I took it all back, I was offered nothing in there. Nothing was in prospect. There was no reason for me to change my mind except that I changed my mind.

Senator HEFLIN. Well, they say that publicly that you have changed your mind. In effect, at the hearing or shortly before the hearings pertaining to the Solicitor General appointment and the appeals judge appointment.

Judge BORK. Well, the change from 1968 in Fortune to 1971 in Indiana, which was a dramatic change, there was no carrot or confirmation hearing or anything else anywhere in sight. And the change in my political positions from my youth to today never had anything to do with a confirmation hearing or a carrot or anything else.

Now it is easy to always say, well, it's—you know, on the one hand, this fellow is rigid, and if he displays signs of evolving that must be opportunistic. I can give you examples of changes, as I just have, that had nothing to do with a carrot or a reward, but that is as much as I can do. I can assure you that that is not the way I operate, never have.

The CHAIRMAN. Senator?

Senator HEFLIN. My time is up. All right.

The CHAIRMAN. Judge, anything else you would like to add?

Judge BORK. No thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey?

Senator HUMPHREY. Thank you, Mr. Chairman. When you are way down at the end of the table, as I am, and my colleague, Senator Simon, you think your turn will never come. It is like the 15-year-old boy who can't wait to turn 16 so he can get his driver's license. That last year seems interminable.

Judge Bork, my colleague from Wyoming, Senator Simpson, was certainly on target when he said he thought Senators would be unable, and others would be unable to resist the temptation to pick at the old scab of Watergate. And, indeed, that scab has been picked at in this room again, that very old scab, and I only want to come to it for just a moment. Since it has already been picked at, I hope to shed a little more light on that. So let me ask you a couple questions about the role you played in the firing of Archibald Cox.

You said earlier that at the time you discharged Cox you had the understanding from Eliot Richardson, the Attorney General, who had been to the White House with President Nixon, that the President was determined at all costs to fire Archibald Cox. Am I right in that?

Judge BORK. That is correct, Senator.

Senator HUMPHREY. In fact, Eliot Richardson said, 3 days later at press conference, that he found the President "absolutely firm" about firing Cox. And therefore my question is, in your opinion, was the President going to fire Archibald Cox no matter what you did?

Judge BORK. Of course. Of course. He had—I didn't see the President that night, Saturday, October 20th, until after I had signed the order discharging Cox. I had been discussing the matter with General—then General Haig. But when I saw the President, he was as gloomy and distraught a man as I have ever seen. He had not wanted to pay the price of losing his Attorney General and his Deputy Attorney General, and I think he would—he was now in a position where he would pay the price of losing his Solicitor General—certainly that wouldn't have bothered him—in order to fire Cox. That was quite clear.

Senator HUMPHREY. And if you had refused to fire Cox, what would have happened?

Judge BORK. Well, it seems to me there was nobody—according to the regulation in force at the Department of Justice, the succession regulation, I was the third and last person on that regulation. So there was nobody behind me, by regulation, to step into my shoes. That means the President would have had a free hand in appointing an acting Attorney General.

I suppose he would have learned, if I had resigned—he would have known and he quickly would have learned, since I was the first person without a promise to the Senate or other commitment, the others would not have done it either, if I had resigned. I don't think he would have even bothered to ask them.

The simple solution for him would have been to appoint one of the White House counsel, probably, as acting Attorney General, who would have fired Cox. And at that point, I don't think anybody would have stayed with that acting Attorney General.

You must remember that there was great resentment in the Department of Justice about Mr. Nixon already because he had demanded resignation letters when his new—when his second term started down as far as I think GS-16's or 15's. He made the really unprecedented demand that all the top echelon sign resignation letters, and they were not very happy with him. And if he had sent in an outsider whom they did not know to discharge Mr. Cox, I think there would have been massive departures. And Mr. Richardson thought so, too.

Senator HUMPHREY. And what about Ruckelshaus?

Judge BORK. I don't recall if he has ever spoken to that or not.

Senator HUMPHREY. Eliot Richardson, the Attorney General, expressed to you, before you discharged Cox, his opinion that the Department would be reduced to chaos if you did not follow the President's orders.

Judge BORK. I don't recall the exact—has he been quoted lately in the paper or something? I haven't—I don't recall the exact language he used.

Senator HUMPHREY. But did Richardson speak to you on that account before you fired Cox?

Judge BORK. Oh, yes. We discussed this morning the first conversation I had about this with Mr. Richardson and Ruckelshaus in which they said, if you do it, don't resign. After he came back from the White House late in the afternoon, he said some—I didn't regard this as urging me because I think he knew I was about to do it. But he said, somebody has got to do it. It has got to be done and you are the guy to do it.

Senator HUMPHREY. So he, he encouraged you—if it was within your own judgment to do so, he encouraged you to comply with the order and not resign?

Judge BORK. That is right.

Senator HUMPHREY. So Eliot Richardson, who is regarded as a hero for having resigned rather than fire Cox, in advance of your firing Cox advised you to fire Cox and to not resign; is that correct?

Judge BORK. Well, he—I want to be careful about this because at the time he said somebody has to do it and you are the guy to do it, you are the fellow to do it——

Senator HUMPHREY. You were the last one——

Judge BORK. I was the last one.

Senator HUMPHREY [continuing]. In the hierarchy to——

Judge BORK. But at the time he said that, he knew that I was inclined to do it. So I wouldn't put—I wouldn't put the responsibility for my actions upon Eliot Richardson.

Senator HUMPHREY. I wasn't trying to get you to do that.

Judge BORK. No, I know you weren't, but I just want to be very careful not to give that impression.

Senator HUMPHREY. I understand the distinction. But Eliot Richardson did confide to you that he thought it would be well if you fired Cox and did not yourself resign as he had resigned?

Judge BORK. I think that is accurate. But I think he knew I was going to do it when he said that.

I mean, I don't want in any way to rest upon Richardson as a crutch for me. I do—it is accurate to say that he agreed with my assessment, but I didn't do it because Eliot said that.

Senator HUMPHREY. Before the fact?

Judge BORK. No. That is right.

Senator HUMPHREY. Judge, I want to turn to the area of civil rights. I was intrigued by the matter that Senator Heflin brought up about the breaking down of barriers to Jewish lawyers or quotas or some such thing at the law firm——

Judge BORK. Um-hum.

Senator **Humphrey** [continuing]. Where you were employed. Can you expand upon that? You were responsible for——

Judge **Bork**. Well, I don't know that I destroyed the quota, but I began the destruction of it and—and there were other young people like me. It just happened to be that I had talked to this young man, who is even today a very good friend of mine. In fact, he was the best man at my second wedding. I talked to this young man whom I did not know but I liked, and it seemed to me grossly unfair that he should be excluded from the firm on the grounds that he was Jewish.

So I—and I went and talked to a classmate of his who was also then at the firm. A man named Alan Oaks. And Oaks confirmed me in my view of this fellow, and so I went to the senior partner, two senior partners, and said you can't do this. You can't—we can't operate a law firm that way. And one or two of them weren't too happy, but they finally agreed. They said, we will give him a trial. He was a great success.

Senator **Humphrey**. How long had you been at the law firm when you approached the senior partners?

Judge **Bork**. I would guess—let's see. I would guess two years.

Senator **Humphrey**. Two years. And you were approaching partners who had been with the firm for how many years?

Judge **Bork**. Forty.

Senator **Humphrey**. Forty years?

Judge **Bork**. Well, but I had been working with them. I mean, they knew me.

Senator **Humphrey**. Um-hum.

Judge **Bork**. I mean, it wasn't——

Senator **Humphrey**. Well, nonetheless——

Judge **Bork**. I didn't have to break in to see them or anything. I mean, it was not that dramatic.

Senator **Humphrey**. Well, it is still impressive to me, at least, that a junior member of the firm with 2 years' seniority only would go and talk to veterans of 40 years who were very fixed in their ways about changing an apparently longstanding policy at the firm.

Judge **Bork**. I am just trying to think, Senator. You know, if it turns out—it may turn out to be 4 years I had been there. I can't recall exactly when this young man came. But I don't—you know, something like 2 to 4 years.

Senator **Humphrey**. I am one of the three members of this panel, Judge, who is not a lawyer, and I hope that maybe that will help me to cut through some of this lawyerly fog which sometimes enshrouds this proceeding.

You have said, and I admire you for this because you not only say it but practice it. You have said that judges ought to—ought not to interpose their personal views when reaching decisions. Nonetheless, I want to probe your personal views, and then we will go and talk about your decisions a little later. I want to probe your personal views.

Some of your opponents, particularly those outside this room, have all but called you a racist. Maybe they have. I wouldn't be surprised. But they have all but called you a racist. Let me ask you how does it feel to be accused in front of your family and in front of tens of millions of your fellow citizens of being a racist?

Judge BORK. Well, it doesn't feel too good, but my family knows better and anybody who knows me knows better.

Senator HUMPHREY. Are you a racist?

Judge BORK. No, Senator.

Senator HUMPHREY. What are your feelings about racism, about racial discrimination?

Judge BORK. I have always said it was immoral. The only thing I ever did was, in my libertarian phase, doubt that law should be used to overcome private immorality. I have since decided that law should be used to overcome that private immorality, but I have—you will never find in any of my writings anywhere, or any of my statements anywhere, any statement or writing in any way supporting or favoring racial segregation or discrimination.

Senator HUMPHREY. Well, of course, you are not a racist because we examine the attitudes of nominees for the bench very carefully in that respect. Our staff investigate a candidate's or nominee's background very carefully in that respect, and you would not have been confirmed unanimously to the second most important court in this country 5 years ago if there were a shred of evidence that you were a racist. And so I am just shocked and really disgusted at the tactics of some of these groups which oppose you when they imply and all but state that you are a racist.

Do you support—personally again. We will get to your cases in a while. But personally, do you support all of the great civil rights legislation?

Judge BORK. Yes. I think the Fair Housing—I think the 1964 Act really did an enormous amount to bring the country together and bring blacks into the mainstream, and I think that is the way I should have judged the statute in the first place, instead of on these abstract libertarian principles.

I think the Voting Rights Act has been enormously successful in improving the quality of black life, particularly in the South, because they became a voting group that politicians had to listen to once they got access to the polls.

I think the Fair Housing Act was an extremely good statute. I have no problem with any of those statutes now.

Senator HUMPHREY. Your opponents have remarkably exploited the understandable concerns of black citizens on this subject, and I regret that as much as I regret the de facto and the de jure discrimination which existed for so long in this country against blacks and other minorities. And I regret that very much.

We understand the concerns of women. We understand how unscrupulous groups can so easily exploit these concerns given the fact that women traditionally, again de facto and de jure, have gotten the short end of the stick in this country. I resent that practice, for the sake of my wife, as I am sure you do for the sake of your wife; I resent it for the sake of my mother; I resent it for the sake of my sister, and I resent it for the sake of our country, and I know you feel the same way.

So let me ask you now your personal feelings about discrimination on the basis of sex.

Judge **Bork**. I have never remotely supported that, and it is unfortunate that these themes have been so confidently asserted by a number of people.

I have here, and I intend to offer when Senator DeConcini is here, the list of my Solicitor General briefs, amicus briefs, and the list of my decisions in the area of race and gender on the court of appeals.

It turns out—I did not know this when I spoke this morning—but if you make a count, it turns out that in eight cases I voted for the minority or the woman seven times. I do not know what more I can do to dispel any fear that somebody might have.

Senator **Humphrey**. You are saying that in your 5 years on the bench, eight cases have come before you——

Judge **Bork**. On the merits, yes.

Senator **Humphrey** [continuing]. Involving civil rights?

Judge **Bork**. Yes.

Senator **Humphrey**. Do not enumerate them now, because I have got them and I want to enumerate them.

Judge **Bork**. All right.

Senator **Humphrey**. But you are saying that in seven out of those eight cases, you have ruled with the minority or the woman?

Judge **Bork**. Or the woman, or women, yes.

Senator **Humphrey**. That comports with my statistics as well.

I would repeat at this point before I ask you to tell us about some of these decisions, that in discussing your personal feelings, I do not mean to suggest that your personal feelings will or ought to come into play when you act the part of the judge.

Judge **Bork**. No, but people always suspect that they will, Senator; I have learned that.

Senator **Humphrey**. Yes. People suspect the worst. That is the essence of judicial restraint, is it not? The essence of your judicial philosophy is that judges should not interpose personal feelings or biases?

Judge **Bork**. That is quite true. Fortunately, in the area of civil rights, my personal views do not vary from nondiscrimination.

Senator **Humphrey**. Well, then, we have looked at the person, however briefly. Let us look at Robert Bork, the judge. You have participated in decisions on eight civil rights cases which have come before you on the D.C. Circuit Court of Appeals. These were cases where substantive civil rights claims were at issue. And as you noted, you ruled in favor of the minority or the woman in seven out of the eight cases, the entire universe, as Robert Bork, the judge, seven out of eight cases. Do you know what that is in decimal—87.5, 87½ percent.

And I am going to talk about the one where you did not rule, because you were right there, too.

Judge **Bork**. I am sorry. I should say that there was one case—I have seven out of eight cases—*Paralyzed Veterans*, I dissented, saying that an airport was not covered by a federal program, and the Supreme Court adopted my view.

Senator **Humphrey**. You have often been upheld by the Supreme Court when you have been in the minority, haven't you?

Judge **Bork**. Yes.

Senator HUMPHREY. In fact, of all of the cases in which you participated, in which you were a minority participant—that is, in which you joined with the minority view—some 25, I believe it is—right——

Judge BORK. I think——

Senator HUMPHREY [continuing]. Six of those have been successfully appealed to the Supreme Court, and the Court found you right in how many of those six?

Judge BORK. I think, all of them.

Senator HUMPHREY. Six, that is right. Do you know what the percentage is, the decimal—1.0000. Even when Robert Bork has been on the minority side of the question, and when that case has come to the Supreme Court, the Supreme Court has upheld the views of Robert BORK.

Judge BORK. That is correct.

Senator HUMPHREY. And so he has never been overruled, has he, whether he has been in the majority or in the minority?

Judge BORK. That is correct, Senator.

Senator HUMPHREY. Pretty damned remarkable—pretty darned remarkable—we all change on reconsideration. [Laughter.]

Senator HUMPHREY. Now, some claim that all of this is irrelevant, that the record of Robert Bork, the judge, does not mean a thing because circuit court judges are bound inextricably by Supreme Court precedent.

Now, I want to ask you—I am not overlooking that charge, but I hope to lay it to rest in the next few minutes.

Let us take issues of sex discrimination. In the case of *Ososky* v. *Wick* in 1983, you voted to overturn the lower court, and you held that the Equal Pay Act—equal pay for equal work, ladies and gentlemen—you held that the Equal Pay Act in fact applies to the Foreign Service's merit system.

Judge BORK. Yes, I think——

Senator HUMPHREY. Let me finish, and then you can expand on it—that the Equal Pay Act requires equal pay for women, and you ruled that the Act applied to the State Department. In other words, you ruled in favor of a plaintiff who was a woman. And I would like at this point for you to tell us something more about this case, but before you do, let me say this is a "two-fer", if you will. Not only did you rule in favor of the plaintiff who was a woman, but this is a case where you ruled in favor of an individual against the institution of the Government. And there is hardly a worse institution within that institution than the State Department—but that is a political observation.

Now, would you tell us what you think more we need to know about that case?

Judge BORK. Well, to tell you the truth, Senator, I have not reread that case for quite a while, and I just remember there was an argument that the Foreign Service was not subject to the Equal Pay Act, and we ruled that it was. The case, I think, was *Palmer* v. *Schultz*.

Senator HUMPHREY. That is a similar case.

Judge BORK. Yes. Well, *Ososky* v. *Wick*, I think, was more the question of whether solely on statistical evidence of promotions and advancements and grades and classes, you could infer intentional discrimination, and we held that you could.

I do not think either of those decisions was dictated by Supreme Court precedent, but it certainly was in line with Supreme Court precedent.

Senator HUMPHREY. Okay. Well, that comes to the point I wanted to raise next. In ruling in this case, did you feel in any way bound by Supreme Court precedent to reach your decision?

Judge BORK. I do not recall that I did, Senator. I think I felt bound by the statute and by the——

Senator HUMPHREY. Intent of Congress.

Judge BORK. Yes, and by the logic.

Senator HUMPHREY. So you were not inextricably bound to reach this decision in this case by Supreme Court precedent?

Judge BORK. Not at all. If I had a desire to reach a result contrary, I am sure I could have crafted an argument that would have sounded moderately plausible, but I had no such desire.

Senator HUMPHREY. Okay. Now, if that is not good enough for those who contend that your decisions on the circuit court are immaterial, let me ask you this. If the same case under the same circumstance came before you as a Supreme Court—Supreme Court—Justice, would you decide it the same way?

Judge BORK. My reasoning would be identical. It is a question of whether the statute applies. I thought it applied when I was on the court of appeals; I would think it would have applied on the Supreme Court.

Senator HUMPHREY. So you are saying two things, that (a) you had latitude as a circuit court justice in this case, and (b) even where you would have had unquestioned latitude within the constraints of stare decisis and so on, that you would have ruled the same way as a Supreme Court Justice.

Judge BORK. Yes.

Senator HUMPHREY. Well, I hope that satisfies the cynics. But if it does not, we have got a few more to go through.

The next case was *Laffey* v. *Northwest Airlines* in 1984. In that case, you upheld a lower court decision which found that an airline had discriminated against women employees.

Tell us about that case.

Judge BORK. Well, as I recall that case, Senator, these were stewardesses who could not get the job of purser. And as I recall the job of purser, only men had that job, and it was a much higher-paid job, and they would not let women be pursers. And as I recall, there was really no significant, or maybe no difference in the duties of stewardesses and pursers. So the Equal Pay Act applied, and we directed that they determine the back pay awards by calculating total job experience.

Senator HUMPHREY. With interest?

Judge BORK. Yes, as I recall.

Senator HUMPHREY. Back pay with interest. And did you feel somehow bound by Supreme Court precedent in this matter?

Judge BORK. Well, I cannot recall exactly what the precedent was, but I remember sitting down with my colleagues and then with my clerks and deciding that this is the way it had to come out, and going through a process of reasoning; so I suppose I did not feel that I was bound by Supreme Court precedent, but I cannot swear to it. I have not re-read the opinion.

Senator HUMPHREY. I understand. Like legislators, you go through a lot of business, and it is hard to remember all the details. But in any event the record shows that that is the case as stated.

And just for the record, had you been a Supreme Court Justice and that same case came before you, would you have ruled otherwise?

Judge BORK. Identical; I would have given an identical result, Senator.

Senator HUMPHREY. Let us take a case that will be of interest to citizens who are homosexuals, or to all citizens who are concerned about the legitimate rights of citizens—which is most of us.

In the case of *Doe* v. *Weinberger*—Secretary Weinberger, that is—excuse me. Let me back up, because I skipped one. And this is one that you alluded to a moment ago. In 1987, in the case of *Palmer* v. *Schultz,* George Schultz, of the State Department, you ruled in favor of women Foreign Service officers who allege discrimination by the State Department, and you overturned the district court, the lower court, in this case.

Can you recall the details of that?

Judge BORK. *Palmer* v. *Schultz*?

Senator HUMPHREY. Yes.

Judge BORK. I do not recall the details, I am sorry to say. I just remember that there was such a case and that we—if you want me to, I can overnight take a look at it——

Senator HUMPHREY. No, that is all right. If anyone else wants to question you in detail, they can. Perhaps it is unfair for me to put you in a position where I am asking you to recall the details. I was just hoping that you could reinforce it a little bit.

Judge BORK. Well, sometimes, I do—not always, though.

Senator HUMPHREY. In any case, the record clearly shows that you overturned the opinion of the lower court, district court, and found in favor of women—I think it was seven or eight in number—who alleged discrimination by the State Department. And you agreed with them, you upheld them, you overturned the lower court case.

Did you feel somehow unduly bound by precedent, Supreme Court precedent?

Judge BORK. I do not recall that I did, Senator, but I do not really recall much about the case, so I cannot be as enlightening as I would like to be.

Senator HUMPHREY. Do you suppose if it had come before you as a Supreme Court Justice, you would have ruled otherwise?

Judge BORK. No, no. I must say that the case on the Supreme Court for reading a statute consistently is very strong, even if there were precedent—I do not know if there was precedent.

Senator HUMPHREY. Okay. Now to go to the case of *Doe* v. *Weinberger,* you ruled in favor of a man who had been fired from the National Security Agency for homosexuality. You ruled that he had been unlawfully denied his right to a hearing.

Judge BORK. That is correct.

Senator HUMPHREY. I will not ask you about the details of that, but was that a decision you arrived at because you were bound by precedent?

Judge BORK. No. We thought the regulation about what kind of a hearing he would get, and the statute, I guess, pretty clearly required that he have a hearing before his security clearance was lifted and he was discharged.

Senator HUMPHREY. Would you have reached some other conclusion if it had come before you as a Supreme Court Justice?

Judge BORK. Not at all, Senator; the same conclusion.

Senator HUMPHREY. Okay. Let us look at race discrimination cases. In 1987, the case of *Emory* v. *Secretary of the Navy,* you overruled the district court which had dismissed the claim of racial discrimination. In this case, a black officer charged that the promotion board, which was comprised entirely of Caucasians, presented a case of discrimination against him; he lost in the lower courts; he won in the circuit court, where you sat.

Judge BORK. That is correct.

Senator HUMPHREY. Here is another case of Robert Bork standing against the Government in favor of the individual, as well as these others I have cited. And would you have reached a different opinion if that case had come to you in your capacity as a Supreme Court Justice?

Judge BORK. No, Senator, I would not. I would reach the same conclusion because it was clear that this man was entitled to go to trial to try to prove discrimination. And it got dismissed before he got to present his evidence.

Senator HUMPHREY. All right. In the 1984 case of *County Council of Sumter County, South Carolina* v. *United States,* you held that the county had failed to prove its new voting system had neither the purpose nor the effect of denying or abridging the right of black South Carolinians to vote.

Judge BORK. That is correct. I remember that case fairly well because it is the first time I sat on a three-judge district court and took evidence. And we held not only that—the first argument was that the at-large election system involved in that case did not require pre-clearance by the Attorney General, and we held that it did. And then we went on to hold that the county had failed to establish that the switch from a district system to an at-large system had neither the purpose nor the effect of submerging the black vote. So we ruled for the black plaintiffs in the case.

Senator HUMPHREY. Your finding was not based on the intention to discriminate, but the effect of discrimination; is that not correct?

Judge BORK. Yes. Actually, the plaintiff was the county council, and they were claiming that they did not have to be pre-cleared and so forth, so it was their burden to show no purpose and effect, and we said they had not shown the absence of either.

Senator HUMPHREY. In this decision, you were roundly criticized by conservatives, weren't you?

Judge BORK. I do not recall.

Senator HUMPHREY. Well, you were.

Judge BORK. Oh, okay.

Senator HUMPHREY. Take it from me. But nonetheless, you upheld the standard enacted by the Congress.

Judge BORK. Right.

Senator HUMPHREY. Now let us talk about the exception. You were with the minority person, or the woman, in seven out of eight of the entire universe of civil rights cases you have handled as a judge. Let us talk about the exception. That was the case of *Rollis* v. *Radio Free Europe/Radio Liberty.*

Judge BORK. I am afraid that is not on my list. I guess we did not classify it as a women and minority rights case.

Senator HUMPHREY. Well, maybe I have been given some incorrect information.

Judge BORK. I have one here——

Senator HUMPHREY. Excuse me. This is a case of age discrimination, so I think it is valid in the context of the discussion we are having here.

Judge BORK. Oh, oh, oh, yes, yes.

I guess my list is on women's and minority rights——

Senator HUMPHREY. Yes.

Judge BORK [continuing]. And I guess we did not have age discrimination as a minority rights case.

Senator HUMPHREY. Yes. Well, why not age? We have looked at everything else, right?

Judge BORK. Fine, fine. I am at the mercy of the people who categorize these things for me.

Senator HUMPHREY. Yes. In any event, the plaintiff alleged that—the finding was—and from which you dissented—the finding was—I had better read this carefully, because it has been some time since I looked at it.

[Pause.]

The CHAIRMAN. Senator, after this question, your time is up, but keep going. I just want you to know——

Senator HUMPHREY. Yes, I will just finish up very quickly.

The CHAIRMAN. Go ahead and finish the whole line if you would like, but I just want you to know we are at 30, so we can go to Senator Simon.

Senator HUMPHREY. Fine.

The district court had dismissed an age discrimination case, and you joined with the majority. In any event, your view was that the Age Discrimination Act does not apply extra-territorially, is that correct?

Judge BORK. That is right.

Senator HUMPHREY. Do you remember that case?

Judge BORK. That was *Radio Free Europe*, or something of that sort?

Senator HUMPHREY. Yes, *Radio Free Europe/Radio Liberty.*

Can you fill in the details of the case?

Judge BORK. Oh, I just recall, I think it was an argument over the meaning of the statute, its text and legislative history. And I wish I could reconstruct it for you better than that, but I am afraid I cannot. I did not even remember I was in the minority. It seemed to me that the Act applied, as I recall, to the United States, but not to Americans in foreign countries.

Senator HUMPHREY. Yes.

Is that accepted wisdom, that U.S. statutes don't apply extraterritorially?

Judge **Bork**. That's a very complex field, and sometimes—it depends upon what Congress says, of course—but sometimes Congress doesn't make it clear either way and then you have a lot of presumptions and so forth to go through to figure out whether or not the statute should be applied that way.

Senator **Humphrey**. The point I wanted to make is that in this age case, where you did not find with the plaintiffs in the discrimination case, it sounds to me like a very reasonable interpretation of the law.

Judge **Bork**. Well, Senator, I thank you for one thing. You have just changed my statistics. Now it looks like I voted for the plaintiff in seven out of nine cases, rather than seven out of eight. I hadn't included the age discrimination case in here.

Senator **Humphrey**. I had hoped to have the time—and I guess I will wait until the next round—to talk about your efforts to uphold civil rights in the capacity as Solicitor General.

Let me just ask very quickly—and I promise I won't prolong this—some have alleged that this doesn't, either, that the Solicitor General is working for a client. Can you tell us whether that is a true assertion or not, or does the Solicitor General have some latitude and, if so, how much?

Judge **Bork**. Well, he has latitude in different kinds of cases. If he is working for the Government as a client, and there's a lawsuit, I think my view of the Solicitor General's job is that he must take the Government's position so long as it is intellectually and morally respectable.

If he is filing an amicus brief, I think he has more latitude, because he is speaking to the Court not for a client but about a position that he thinks the Court should regard as making sense.

Senator **Humphrey**. Thank you very much.

The **Chairman**. Thank you.

Senator Simon.

Senator **Simon**. Thank you, Mr. Chairman.

Judge Bork, if it's any comfort to you, I'm the last questioner here.

I might note that you have had read to you a few things that you now disagree with. I did find this one sentence of yours in your opinion in *Ollman* v. *Evans*. You say "Those who step into areas of public dispute and choose the pleasures and distractions of controversy must be willing to bear criticism, disparagement, and even wounding assessments." My guess is you still will hold by that statement here today.

Judge **Bork**. Yes, Senator. I hope that isn't a prelude to a wounding assessment. [Laughter.]

Senator **Simon**. One area that is of concern to me is an area where you on the Court would have a great deal to say, where Congress has to a great extent stayed out, and that is the whole question of where we draw the line between church and state.

What we have evolved is a system that is basically very healthy, both for religion and for government. I am concerned that we don't make major modifications of it.

In 1984, in a speech at the University of Chicago, you talked about the three tests that are used. Let me quote Justice Powell on what is called the *Lemon* test. Justice Powell, in *Wallace* v. *Jaffree*, wrote "I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test. *Lemon* v. *Kurtzman* identified standards that have proven useful in analyzing case after case, both in our decisions and those of other courts. It is the only coherent test the majority of the Court has ever adopted."

In your speech at the University of Chicago, you talk about that test rather critically. You say, if this text is accurate, "The third test, no excessive entanglement between government and religion, is impossible to satisfy. Government is inevitably entangled with religion." You then talk about entanglement, though the third part of the test is not simply entanglement but excessive entanglement.

Then in a speech at Brookings, in 1985, if this is correct, you say, "Many observers expected a major recasting of doctrine. But the Supreme Court this past term surprised them by adhering to the old test. Eventually, however, we may see such a reformulation, not because I think the attitude of the Court will change—although, of course, it may—and not because of political pressures, but because, as observers of this area commonly remark, present doctrine is so unsatisfactory."

Then let me skip a few sentences. You say, "Constitutional doctrine cannot separate either religion in law or religion in politics." Then I will skip several sentences, but I don't think I'm taking things out of context. "A relaxation of current, rigidly-secularist doctrine would in the first place permit some sensible things to be done." And then I'll skip a sentence. You say, "I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools."

Now, do these texts that I have quote you accurately, as far as you know?

Judge BORK. Yes, they do, Senator.

Senator SIMON. What do you mean by this phrase, "I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools"?

Judge BORK. There are only two cases I have ever criticized in this area, and they're both very marginal cases. In this case, I thought the Supreme Court had gone fairly far when it said—not unanimously, as I recall—that a school could not put up the Ten Commandments in the school on the wall, even though it put underneath the Ten Commandments the statement that "this is not an endorsement of a religion; it's part of our cultural heritage", as, indeed, it is fundamental to both the Jewish and Christian traditions. That's all I meant by that. It seemed to me it was getting a little excessive, I thought.

The other thing I said, "some sensible things to be done"—I was talking about *Aguilar* v. *Felton,* in which, under a federal program, the city of New York had public school teachers go into private schools, including religious schools, to teach educationally deprived children who were far behind in their subjects, remedial reading and remedial arithmetic and so forth.

The program was conducted in rooms bare of religious symbolism; the materials used had no religious content; there was no interaction between the public school teacher and the religious people—they often weren't even of the same faith.

That passed the first two tests of the *Lemon* test, secular in purpose and did not advance religion, but it failed because they said there was excessive entanglement since the city had to make sure that religion didn't creep into the program. That struck me as kind of an odd thing to strike down a program.

The lower court judge, who agreed—Henry Friendly, a famous judge—who agreed that the program failed the third aspect of the *Lemon* test on excessive entanglement, because the city had to police to make sure that religion didn't get into it, said that it was a program that had done much good and little, if any, discernible harm. So it seemed to me to be kind of too bad.

Now, there was some suggestion, I guess, that if they had taken the children out of the school and walked them down the block and into a trailer, they could have had the program. That seemed to me a little odd.

But this area is full of line drawing and sometimes you think they draw the line too far on one side or the other. I have not in any way questioned, and would not in any way question, the basic importance of the establishment clause in preventing the establishment of religion, or the basic importance of the free exercise clause. But sometimes, and it's often 5 to 4, a case like *Aguilar* or a case like the Ten Commandment case doesn't seem to me as essential to prevent the establishment of religion. But, you know, that's on the margin. I'm not talking about anything more than that.

Senator SIMON. Let me ask another question on line drawing, without projecting how you might rule in the future. Let me give you a very practical example.

When I served in the House, my colleague, Congressman Dan Glickman, told me about when he was in the fourth grade. He happens to be Jewish, growing up in a community that was largely not Jewish. Every day he was excused from the classroom while they had a prayer, and then he was brought back in. Every day, all the other fourth graders were being told that Danny Glickman is different, and yes, every day he was being told that he was different.

We have the *Engel* decision in 1962, of a prescribed prayer that was to be required daily. The courts ruled that was unconstitutional. As you reflect on that, was that a sound decision?

Judge BORK. I have not ever thought through that subject. This is not an area I ever taught. The reason I want to say that is that the Washington Post carried a story that at the Brookings Institution, in the speech you quote, I had endorsed school prayer, which is entirely false. But I thought I should bring to your attention, therefore, two letters, one of which went to the Post, one of which was printed and one of which was not. I would like to put these in the record, but I would like to cite them——

The CHAIRMAN. Without objection, they will both be placed in the record.

[The documents follow:]

The Brookings Institution

1775 MASSACHUSETTS AVENUE N.W. / WASHINGTON D C 20036 / CABLES BROOKINST / TELEPHONE (202) 797-6000

Center for Public Policy Education

July 28, 1987

To the Editor
The Washington Post

Dear Madame:

I am quite concerned about the article of Al Kamen on Thursday, July 28 which made reference to a Brookings Seminar for Religious Leaders which Judge Robert H. Bork addressed on Thursday, September 12, 1985. When Mr. Kamen asked me about the Seminar, I replied that it was my understanding as the Chairman of that meeting that the meeting was off-the-record. Since other attendees have elected to report their recollections of the meeting, I thought, in fairness, that I should also respond to their comments.

Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision, but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer, but only the comment that the current turmoil in constitutional law may force some revisions.

One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of Church and State, in an aura of reconciliation not confrontation. While Judge Bork was challenged frequently by members of the Seminar, he responded with grace and an inquiring mind, and willingly extended the discussion period well beyond its adjournment time.

Let the debate on Judge Bork's confirmation go forward on its merits, in this same aura of the tenacious but gracious pursuit of the truth!

Sincerely,

Warren I. Cikins
Senior Staff Member

THURSDAY, AUGUST 6, 1987

THE WASHINGTON POST

LETTERS TO THE EDITOR

The Bork Nomination (Cont'd.)

It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but The Post's account of that evening [front page, July 28], I would draw entirely wrong conclusions about Judge Bork's views on church-and-state issues.

The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

In fact, the judge showed great sensitivity to the ambiguities and dilemmas of the First Amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and open-minded. He threw back at us as many questions as he answered—a Socratic approach I found most stimulating.

I do not recall the judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church-and-state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues, which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices—a policy that is now advocated even by the staunchly liberal People for the American Way.

JOSHUA O. HABERMAN
Washington

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The Post is to be commended for what appears to be a surprisingly evenhanded series of articles on Judge Bork by Dale Russakoff and Al Kamen [July 26, 27, 28].

I now understand better why there has been such rabid opposition to Judge Bork's nomination to the Supreme Court. The judge has apparently committed at least two cardinal sins: he kept an open mind as he grew older and matured, and he "converted" from liberalism/socialism/leftism to a philosophy reflected by the pragmatic old cliché: if you're not a socialist at 20, you don't have a heart; if you're still a socialist at 30 (or 40), you don't have a brain.

Judge Bork also apparently believes that if a law or the Constitution doesn't allow, or disallow, an action, then a judge should not give or take away. I find that hard to argue with. But then I have tried to keep my mind from closing.

WALTER M. PICKARD
Alexandria

Judge **Bork**. The first is from Mr. Warren I. Cikins, who is a senior staff member at Brookings and ran this seminar program at which I spoke—and he was there. Mr. Cikins doesn't say in the letter, but he tells me—and I'm sure he wouldn't mind my saying it—that he's devout Jew. He kept notes. It's his program and he kept notes of the evening.

He starts off by saying that he's quite concerned about the fact that people—it was off the record, meaning a give and take—that people said what happened. He says:

> Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer but only the comment that the current turmoil in constitutional law may force some revisions.
>
> One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of church and state, in an aura of reconciliation, not confrontation. While Judge Bork was challenged frequently by members of the seminar, he responded with grace and an inquiring mind and willingly extended the discussion period well beyond its adjournment time.

Since this is a serious matter, Senator, I do not come at this with either a religious or an anti-religious bias. I come at this—But this letter, which was printed in the Post, is from Rabbi Joshua O. Haberman.

He said:

> It is a good thing that I was there when Judge Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September, 1985, because if I had nothing but your account from the paper of that evening's discussion, I would draw entirely wrong conclusions about Judge Bork's view on church and state issues. Your reporter was not present at the meeting. I was. As a rabbi, with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom inequality. I heard nothing of the sort.

As a matter of fact, the rest of the letter is so laudatory that I think it would be improper for me to read it, but I would like you to read it, Senator. [Laughter.]

Senator **Simon**. I shall.

Judge **Bork**. Because I have never taken a position on school prayer, I have never taught the school prayer cases, I have never written about it, I have never even fought my way through the problem. The only thing I am convinced of is that the principle of non-establishment is essential to our society, and I know the framers thought so, particularly with the memory of the religious wars in Europe in mind, and I think the principle of free exercise is also vitally important. But where the adjustments are made at the margin is a question that goes case-by-case.

Senator **Simon**. One of the things in this area that we also have to do is to protect the rights of religious minorities, the Seventh-day Adventists, Jehovah's Witnesses and so forth. Do you have any reflections upon the Supreme Court decision on saluting the flag by the Jehovah's Witnesses?

Judge **Bork**. I have never taught that case or thought about it. May I say something, that there is so much in a constitutional law casebook that in one semester you have to choose and select pretty severely, so those are just areas that I never taught.

Senator SIMON. Let me just add—and I think my colleagues would agree, whether they happen to be for you or not—that you have gone into much greater detail on cases than any recent witness that we have had before this committee.

Let me get into an area where I have some concerns with your answers, both yesterday and today, and that is that I think I sense a tendency to view the Constitution as fairly rigid, in terms of the expansion of liberty. The Supreme Court is the basic guarantor of liberty.

As we look at the application of it, wherever possible, that liberty should be expanded. You mentioned Justice Harlan in the *Griswold* case that Senator Biden mentioned. Justice Harlan in his opinion referred to his earlier opinion in *Poe* v. *Ullman*.

Justice Harlan says, in a couple of sentences that I had never seen before, that I think really are significant, and I'm going to use them on other occasions in the future. In that opinion he says, "Liberty is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press and religion, the right to keep and bear arms, the freedom from unreasonable searches and seizures and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints." That's pretty powerful, pretty eloquent.

Judge BORK. Yes.

Senator SIMON. It seems to me, as we look at some of these cases, that we have to look at how liberty can be expanded without doing harm. One point, in a speech at Berkeley in 1985, you say—and I would be interested in any comments you have here—"What a court adds to one person's constitutional rights it subtracts from the rights of others." Do you believe that is always true?

Judge BORK. Yes, Senator. I think it's a matter of plain arithmetic. I think our Constitution gives a constitutional right or a liberty in areas where the Bill of Rights or the Civil War amendments don't prohibit it, of citizens to sit down and elect their representatives and make their laws.

If a court strikes down such laws on behalf of a plaintiff claiming a liberty, it automatically deprives the first group of its liberty. So what you're talking about here is a redistribution of liberty.

Now, that seems to me to be arithmetically solid. I don't think there is any way you can get around it. But if the Constitution says the majority doesn't have that liberty, they shouldn't; where it says they do have that liberty, it should.

Senator SIMON. But that arithmetic equation isn't always quite true. In other words, if you give slaves freedom, I suppose, using your analogy, you then take away the freedom of slave owners.

Judge BORK. That is a redistribution of liberties, commanded by the 13th amendment to the Constitution. I certainly have no objection to a redistribution of liberties whenever the Constitution requires it or authorizes it. No objection whatsoever.

What I was talking about was judges who make up new liberties and say that they are expanding liberty. Well, they are for some people, but they're contracting it for other people. That's all I was saying.

Senator SIMON. All right.

We have talked about the 1954 *Brown* decision. In 1954 you were an attorney for one year. Do you recall what you thought about the *Brown* decision at that point?

Judge BORK. Yes, I did, but I thought—I was not an attorney. I was working then on—Edward Levi hired me as a research associate on what he called the antitrust project. That's where I picked up the basic economics such as I got.

I recall that in law school, I think it was argued and then reargued, and I always thought it would come down the way it did. I must confess that at that time it seemed to me good enough that it would come down that way, because that was the moral result. That's all I needed.

Since then I have tried to give a rather more sophisticated constitutional support for the case.

Senator SIMON. What about the 1942 decision of the Court on Japanese Americans? I mention this because I recall my father—we lived in Eugene, Oregon then—I recall my father, speaking up and saying this is wrong to do to Japanese Americans. And I remember so few people standing up, it was a very unpopular stand my father took, and I remember that even as a very young boy, then—the Court failing to stand up for Japanese Americans.

Judge BORK. They certainly did, they certainly did. It failed, and I think that case has been regarded as a constitutional disaster ever since.

It was a period—I guess when the interning took place, I must have been around 15 or 16, and I lived in the East, so I do not have any first-hand experience with it. But I do recall that there was considerable hysteria about the war, and about rumors of what was going to happen on the West Coast with sabotage and invasion, and I think that was probably accelerated or multiplied by racial animosities as well, and the Supreme Court should have made sure that something real was going on, which it was not. There was no real espionage or sabotage program.

The Supreme Court took the word of some authorities for it, and that was that. And I think that was a constitutional disaster.

Senator SIMON. And as you examine Robert Bork, if you are in a situation where you are demanded to make a very unpopular decision, but it complies with the Constitution, is your personal constitution of such a nature that you can make such an unpopular decision, as it would have been in the case of the Japanese Americans?

Judge BORK. I think so, Senator, because as you may have noticed in these hearings, I have been taking unpopular positions frequently in my life. I remember when I was one of the only two professors at all of Yale—not the law school, but at all of Yale, in a faculty of 2,000—who would admit to being for Goldwater. And every morning as I walked in to work, I had to have 15 arguments, and by the time I got to my office I needed a shower again.

No—I have been in a minority position many times. I do not love it, but I am not afraid of it.

Senator SIMON. I had my staff dig out the *Dred Scott* decision, and I read the majority opinion by Justice Taney. It sounded an awful lot like Robert Bork in terms of saying we cannot read into the Constitution what is not there, when they denied free blacks the right to be citizens.

Judge BORK. Well, Senator, I take that a little hard. That does not sound a lot like Robert Bork. It happens to be that the *Dred Scott* decision, I think, is the first time the doctrine of substantive due process was raised by the Supreme Court—substantive due process being the doctrine that the due process clause imposes limits on government, and the Court makes it up. It is one of these free-floating things again which the Court used in the past to strike down economic regulation.

Chief Justice Taney in *Dred Scott* said that it would be a violation of the due process clause to take away a black slave from a white owner.

So you see, these doctrines which give judges power to make up their own constitutional law, which was what Taney did in that case, do not always produce results that today we think are fine; sometimes, they produce disastrous results. And *Dred Scott* produced a disastrous result not only for Dred Scott, but for the Nation and helped to lead up to the Civil War.

Senator SIMON. Let me just quote the Chief Justice at that point. "It is not the province of the Court to decide upon the justice or injustice of the policy or impolicy of these laws. The decision of that question belonged to the political or lawmaking power, those who formed the sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it according to its true intent and meaning when it was adopted."

Judge BORK. Senator, anybody—the Devil can quote scripture, and Taney can talk about original intent, as people did. But the fact is he used the due process clause in a way he never should have used it, against the black man, and Curtis' dissent, I think, is the original intent position in that case.

Senator SIMON. Let me ask one more on the *Griswold* case. The ninth amendment grew out of Hamilton and others questioning whether the rest of the Bill of Rights was going to be so explicit it would deny other rights, and so Madison wrote the ninth amendment.

In theory, if the State of Connecticut can ban contraceptives, could not in theory—and you are a legal theorist—could not in theory the State of Connecticut require the use of contraceptives?

Judge BORK. I may be a legal—I doubt that I am even a legal theorist; I engage in legal theory from time to time—but I do not usually engage in legal theory instantly. I never thought about a statute requiring the use of contraceptives, nor do I know exactly how you would police it or what you would do with it. And I do not want to imagine how you would police it.

Senator SIMON. That is a problem with the original law, of course, too.

Judge BORK. Yes.

Senator SIMON. But my concern is that I do not want someone on the Court who is going to be so rigid in the application of liberty that there is not some expansion and growth in liberty for the people of this country.

Judge BORK. Let me put it this way, Senator, and this is the best I can do. If you will read those cases—I have got a good voting record on civil rights and constitutional rights and so forth, but if you will read the one essay—I wrote an extended essay on this, largely because my good friend, now Justice Scalia, was going the other way on the case, and we got into a wrangle about it—and that is *Ollman* v. *Evans,* in which I apply and expand a first amendment freedom for the press. I do not believe that constitutional freedom should be given a narrow or a crabbed construction, and I have never given such a narrow or a crabbed construction to them. In fact, just the other day, I think a case came down on the double jeopardy clause in which I reversed a new sentence on double jeopardy grounds. That, I should say, before somebody makes the accusation that has been made, that was a case that was voted on and assigned to me long before this nomination came up, assigned to me by Judge Mikva, who was the senior member of the panel.

You look at my opinions, and you will see no reason to expect any crabbed or narrow interpretation of any clause. And those clauses have to evolve as circumstances and technologies and other things change, so that they are continued to be given their full and fair value.

But, Senator, I must confess, if you say to me here is an outrageous statute, and that is all the lawyer can say to me, that is not enough for me to strike it down. It may be one of the worst statutes the world has ever seen. Well, why should I engage in hyperbole myself? It may be just a terrible statute, and you and I would agree that no civilized community could really live with a statute like that. But unless I as a judge, unelected, unrepresentative, have a warrant in the Constitution, fairly applied, fairly interpreted, I will not strike it down because I regard it as outrageous.

Senator SIMON. And I would not want you to. But I guess I would want you to do what Justice Harlan referred to in that *Poe* v. *Ollman* case that I read just before—let me read it just once again.

"This liberty is not a series of isolated points, pricked out in terms of the taking of property," talking about the use of the word "liberty" in the 14th amendment, "the freedom of speech, press and religion, the right to keep and bear arms, the freedom from unreasonable searches and seizures, and so on. It is a rational continuum which, broadly speaking, includes the freedom from all substantial, arbitrary impositions and purposeless restraints."

Judge BORK. That, I think—that purpose, I think, can more usefully be served—and I hate to bring this up again—by a reasonable basis test under the equal protection clause, because if you get an unreasonable restraint or a purposeless distinction, it is not going to meet a reasonable basis test. And I suppose I should fill that out by saying that I think the Court, using the reasonable basis test—which Justice Stevens does, and maybe some others do—I think I would come out just in about the same position that the Court is in on such matters as racial discrimination, gender discrimination, and so forth. I just regard it as a much more satisfactory methodology than this each group has its own tier of analysis kind of constitutional theory that we have now.

But I do not think the results would differ substantially. I cannot think of a Supreme Court gender discrimination case that would come out differently in my mind under a reasonable basis test. And

I think that is a better constitutional methodology to accomplish what Justice Harlan was saying there than is a substantive due process methodology.

Senator **Simon**. I thank you, Judge Bork, and Mr. Chairman.

The **Chairman**. Thank you very much.

Judge, I know you will be pleased to know that is it for today. We have finished one round of questions from myself and all of my colleagues. Tomorrow, we will resume at 10 o'clock, and with a little bit of luck, we will be able to finish tomorrow. But again, why don't you and I confer. We will probably break around noon or one again tomorrow, and we will confer to see how late we go, if we have to go.

Senator **Leahy**. Mr. Chairman, what will be the procedure tomorrow on time?

The **Chairman**. The procedure tomorrow, my view would be that since a number of Senators have indicated that they thought they were going to have substantial questions—I do not mean to imply there is anything new, I mean, to go back over material, or new material; I do not know—that we would stick to the half-hour. If Senators do not wish to use the whole half-hour, they don't have to; if they wish to use the half-hour, they can. Hopefully, that will allow all the questions to be asked at that time. But it will be the half-hour again.

Is that all right with you, Judge, the half-hour question period?

Judge **Bork**. Oh, yes, that is fine.

The **Chairman**. Fine. With that, the hearing is adjourned until tomorrow morning at 10 o'clock.

[Whereupon, at 6:05 p.m., the committee was adjourned, to reconvene Thursday, September 17, 1987, at 10 o'clock a.m.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, SEPTEMBER 17, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Thurmond, Kennedy, Metzenbaum, Leahy, Heflin, DeConcini, Simon, Hatch, Simpson, Grassley, and Humphrey.

The **Chairman**. The hearing will come to order.

We welcome back Judge Bork. With a little bit of luck—let me be more precise. With a lot of luck, we can have you home tonight and not have to come back.

I would like to suggest how we are going to proceed the remainder of the day. I am going to start the second round of questioning. We will use the same format, a half hour for each of my colleagues in order of those who wish to ask a second round, and I do not know about you, Judge, but every hour and a half or so I would like to take a break since you and I and most of us have to sit here, if that is all right with you.

Judge **Bork**. Sounds good to me, Mr. Chairman.

The **Chairman**. Okay. Then that is the way we will go if we can.

Judge, I would like to go back to questions that I started with you on Tuesday, and I suspect you are going to find that happening with all of us going back to where some of us left off. It is kind of hard to go bouncing back and forth like this, I realize so if there is anything you do not understand about my asking and you want to slow it down, just holler.

I asked you about the, quote, "dozens of cases" that were wrong, that the Supreme Court decisions were wrong, and you said in response to me that you would have to go back and start through the case books again to pick out what they were so we did not get to discuss really the dozens of cases that were wrong, and it is an area that is important because I think it ties into what I think you have sensed on both sides of the aisle here into this question about precedent and how binding precedent is, how important it is.

Many of my colleagues have expressed concern that decisions that we have come to accept may be upset. So I would like to begin this morning by talking about precedent.

Judge, you said when you testified before this committee, and I mentioned this before, back in 1982 that "a judge ought not overturn prior decisions unless he thinks it is absolutely clear that the prior decision was wrong and perhaps pernicious."

Now, again, I am not trying to nail you to quotes but just the ideas. You said yesterday in your response to questions from Senator Specter that the substantive due process clause which, I might add, is the place from where the general right of privacy has been derived that I like and you do not like too much, not that you do not like privacy but you do not like it being found in the 14th amendment; that you indicated that substantive due process was "pernicious." You used that phrase again yesterday.

Based on your own standard about what you do when a case is pernicious, it seems to me that the entire line of privacy decisions would be in some jeopardy. It is through the right of privacy that the Supreme Court protected married couples in their decisions and found a "marital right to privacy."

It is through the right of privacy that the Court protected the right of a grandmother to live with her grandsons in spite of an ordinance saying that you had to be a nuclear family. It is through the right of privacy that the rights of a father to see his children have been protected.

What has been protected, in other words, are, at least from my perspective, important and fundamental liberties that, in my view, predate the Constitution. I have them because I exist, at least from my point of view.

Now, if the decisions recognizing these rights and liberties, some of the ones I mentioned, are as you put it, pernicious—and you did not say they were pernicious; you said using the due process clause was pernicious—if they are pernicious, then I have a problem.

It seems to me that the cases, some of which I mentioned—I did not mention the case names, but the subject matter in those case—then those cases are up for grabs. So what I am trying to get a sense of is putting your view of when a case is wrongly decided or pernicious then a Supreme Court Justice should overturn it and you are labeling the due process clause and finding the due process clause, within it a right to privacy, as pernicious.

Putting them together, and I am not trying to play with words, putting them together, it seems to me that you are—bound may be the wrong word, but at least would be inclined intellectually to overrule these decisions or similar decisions that will come up, and there will be similar decisions off all these issues, you might rule that the "right does not exist."

Could you comment on that generally?

Judge **Bork**. I would be glad to, Mr. Chairman.

The clause of the Constitution to which you refer, and I seem to have left my copy in the briefcase, says that no person shall be deprived of life, liberty or property without due process of law.

It seems to me historically clear that that is a clause that protects procedures. You are entitled to fair procedures before you are deprived of anything. Its only substantive content is that it is used to incorporate most of the Bill of Rights which originally applied only to the federal government, it is used to incorporate most of the Bill of Rights against State governments with which I have no quarrel.

But there is yet a third meaning which is that judges decide when they do not like a law that somehow due process has a substantive content other than incorporation by which they can make law.

The **Chairman**. If they begin to define what liberty means for them.

Judge **Bork**. That is right. Applying it against legislative action, and I think I mentioned yesterday, and I brought it because there is a good discussion of it in this book by Professor David Currie, I think the first use of substantive due process came in the *Dred Scott* decision, a case in which a black slave claimed that he had become free because he had entered into territory where the Missouri Compromise forbad slavery.

Chief Justice Taney ruled against the black slave, and he said this—this is the first use that I know of—he said an act of Congress which deprives a citizen of the United States of his liberty or property—he is talking about the slave master—an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular territory of the United States and had committed no offense against the laws, could hardly be dignified with the name of due process of law.

What Taney did was decide that an act of Congress forbidding slavery in certain territories was unconstitutional under the due process clause. I just want to point that out because that indicates that the due process clause when it is used substantively has every capacity to be pernicious.

I would like to go on with the cases you mentioned, if I may, Mr. Chairman.

The **Chairman**. Please, yes.

Judge **Bork**. We are using the word "pernicious" in two senses here. When I said in my prior hearing which was not a prepared statement, just response to a question, that a case should not be overruled unless it was clearly wrong and perhaps pernicious, "pernicious" I meant there in the sense of capable of having dynamic force, generative force, that would produce new wrong decisions.

There are some cases that may have been decided on the wrong rationale but that rationale has never been extended anyplace else, and there is no particular point in overruling a case like that. It is there and so forth.

The **Chairman**. Well, some of the cases I mentioned, though, I think, for example, in the *Franz* case, although you were a circuit court judge, but you were worried that that may be a pernicious case because there you are extending a right of privacy to an area that had not been extended before. Would that qualify as one of those cases under the second definition of pernicious?

Judge **Bork**. No, I do not think so, Senator. The *Franz* case, my entire concern was not to face the constitutional issue because I did not think Congress had faced the issue before us. The issue before us was the Congress' witness protection program, and as we mentioned the other day, in that a woman who was divorced but had children remarried and remarried a criminal who testified for the government and the government hid him from everybody, new name, new identity, et cetera, new location, and she went with him with her children, and the father of the children could not find them.

Now, it was not necessary it seemed to me to go right to the constitutional question because under Pennsylvania law, it looked as if the father had a right under State law to visit his children, and there was no evidence that Congress had thought about that problem and decided to preempt or wipe out State law on the subject.

I wanted to remand for consideration of that question and in my opinion, I was trying to call the problem to the attention of Congress so that Congress could decide initially whether it wanted to wipe out those rights.

Then I would have faced the constitutional question if it had come back.

The CHAIRMAN. What did you mean—I do not have the language in front of me. I cannot find it, but I am trying to remember, "embarking on a chartless sea"?

Judge BORK. Well, see, the father may have had constitutional rights, but if I recall the case correctly, was the majority using a substantive due process approach?

The CHAIRMAN. I believe so. Yes, I think so.

Judge BORK. Well, as I said, I do not like substantive due process because I think it leaves judges free to legislate.

The CHAIRMAN. That is the point I am trying to get to. Here is a case where the majority used substantive due process.

Judge BORK. Yes.

The CHAIRMAN. And it seems to me that to fall within the definition, your second definition, or maybe that is the wrong way to phrase it, your second usage of the word "pernicious" which, as I understand what you said, you said, "A case is pernicious when, in fact, its progeny might continue the bad." It seems to me this is a perfect example of that.

Judge BORK. Well, just—I am sorry. Go ahead, Mr. Chairman. I have a bad habit of answering before somebody is finished questioning. I am sorry.

The CHAIRMAN. That is all right. Sometimes it helps me because my questions are not all that good sometimes. So go ahead and answer what you think I am going to ask. I think that as I understand you, your criticism of the majority beyond the issue that the State—there are several points that you make.

Judge BORK. Yes.

The CHAIRMAN. One is you say, "Hey, look, let the state decide this first before we go jumping in." And then you say, "And by the way," which is totally appropriate, in a sense intellectually chastising your fellow members on the court who are the majority, you kind of slap their hand and you say, "Now, look, you are embarking on a chartless sea here. You are using substantive due process." And again we are sounding like lawyers which we both are, but substantive due process means, to make sure we all understand it, that a court is saying, liberty means the following.

Judge BORK. Yes.

The **CHAIRMAN**. Or life means the following, pursuit of happiness. They are going in and making a value judgment as you would say from your neutral principles article.

Judge **BORK**. Yes.

The **CHAIRMAN**. Now, this is a place where the court did extend substantive due process beyond where it had ever been extended before, and you pointed out they were embarking on a chartless sea.

It would seem to me that is one of those cases that are pernicious by your definition because you said, "Look, if they are going to be going out and extending this due process thing, then that is pernicious." Is that right?

Judge **BORK**. Yes. I did not decide because I did not think I had to decide since I thought the states and Congress should initially decide it, that there was no constitutional right in that case. I did not like the substantive due process approach because there is no guidance from anything in the Constitution about that.

I should say that the substantive due process approach has been severely criticized by Hugo Black, Felix Frankfurter and a number of justices on the Court because it is without guidance for judges.

But in *Franz* I did not say there was no constitutional right. I just said we did not have to reach it yet, and if we did reach it, we should not reach it through substantive due process.

The **CHAIRMAN**. I should also point out, as you well know, that distinguished jurists like Harlan, Jackson, Cardozo, Frankfurter, Burger and Powell all at one time or another have used substantive due process as you know.

Judge **BORK**. Or the concept of ordered liberty which is not quite the same thing.

The **CHAIRMAN**. Both of which you reject.

Judge **BORK**. The concept of ordered liberty I do not know about. That comes out of *Palko* v. *Connecticut,* and I have never really made up my mind about it.

The **CHAIRMAN**. Now, let me move on here.

Judge **BORK**. May I add something, Mr. Chairman. It just suddenly occurs to me.

The **CHAIRMAN**. Please do.

Judge **BORK**. We are talking about this line of cases, and you suggest some cases in which the result the Court reached is certainly very appealing, including the *Franz* case. The result is appealing.

In that kind of case, where we are talking about a father's rights to see his children. We are talking about a grandmother's rights to live with her grandchildren and so forth, I have not approached those.

But I would certainly, and while I do not like substantive due process, I would certainly as a judge do my utmost to see if there is a legitimate constitutional ground to uphold that freedom. I think that is a judge's duty.

The **CHAIRMAN**. I do not doubt you would attempt to do that. What I doubt is, based on your writing and your cases, whether or not your philosophy of the law and the integrity with which you apply it, and I mean that sincerely, would allow you.

By the way, Judge, I have no doubt in my mind, none, that whether it's *Griswold* or *Franz* that you personally would like to have a decision that said, "Hey, look, Connecticut should not be able to tell a married couple or any couple whether or not they can use birth control." I believe that.

Judge **Bork**. Well, I am glad. That is all I was trying to make clear.

The **Chairman**. As I said at the outset, the disagreement that you and I have relates not to you as a man, not to your personal views, but to your judicial philosophy, because I think you are a man of integrity and you are applying a judicial philosophy with which I think I have—just as you had strong disagreement with the majority on the court on substantive due process, I have strong disagreement with you and your dislike of it.

Judge **Bork**. Yes.

The **Chairman**. Now, having said that, let me move along the same lines to this notion that has come up in the past of core ideas that people mention. Let me be more specific.

Yesterday you indicated that although you did not like the generalized right of privacy or use of substantive due process, you time and again pointed out that certain core ideas were protected and they were protected in first amendment you pointed out, privacy. First amendment, fourth amendment, fifth amendment, eighth amendment. You went down the list.

Now, what I would like to ask you is this. If Justices Harlan, Powell, Frankfurter, Jackson, Cardozo had found a fundamental right of privacy or a fundamental liberty to be protected under another specific amendment to the Constitution, there would not have been any occasion to see that the Constitution also contains the basic right of privacy.

Obviously they could not find it in any single amendment. Therefore, my question is putting aside all the specific amendments you have mentioned either now or during the past several days do you believe that the Constitution recognizes a marital right to privacy?

Judge **Bork**. A marital right to privacy? I do not know. It may well. I have seen arguments to that effect, but I have never investigated that. It is certainly one that I entirely agree with. I mean, I agree with the concept, and I think it is very important that it be maintained.

But I have never worked on a constitutional argument in that area.

The **Chairman**. As you know, in *Griswold*, for example, both the concurrent opinion and the lead opinion uses and refers to a marital right of privacy.

Judge **Bork**. Yes.

The **Chairman**. And it seems to me, Judge, that you can't find that marital right to privacy in the first, the fourth, the fifth, the eighth amendments. The only place you can find it, that anybody has been able to find it, is either in the ninth and/or in the 14th amendment, and both of which either through substantive due process or through the ninth amendment, you reject—"reject" may be the wrong word—you are very leery of the use of the ninth amendment at all as you have outlined for us, and you don't like substantive due process.

So quite frankly, Judge, I don't see how you can find—you, and by your theory, a marital right to privacy.

Judge **Bork**. I have two answers to that. Let me just clear up the ninth amendment business. If somebody shows me historical evidence of what they meant by the ninth amendment, I have no problem using it. I just don't know the historical evidence.

You mentioned a book. I have not read it.

The **Chairman**. I know, but at some point, because I do not want to take the time of the hearing, at some point I really would like to know fully and sit down with you. It would be an education for me, and maybe I could even show you something on the ninth amendment.

Judge **Bork**. All right. As to the marital right of privacy, I think it is essential to a civilized society. I do not know of any state, including Connecticut, that has ever tried to interfere with it because even the law in Connecticut was never used—nobody ever went in an arrested a married couple for using contraceptives or even threatened it, and I do not think it could be enforced given the fourth amendment and given the lack of enforcement.

So I don't know offhand—I cannot construct just sitting here a constitutional argument. Maybe I could if I spend a few days at it, but I don't think it is a live issue because no state has ever tried to enforce such a law.

The **Chairman**. Well, as I said earlier, Judge, we are going to see a lot of things start to come up in the law that we are going to have to face that are going to relate to marital rights to privacy, just the way technology is changing and we are going to have everything from legislation I predict to you in the next 20 years on everything from test tube babies to cloning to——

Judge **Bork**. I think we are, and I do not know what the answer to that is because I have never thought about it, but no state has ever tried to stop married couples from using contraceptives.

The **Chairman**. I am not just talking about contraceptives.

Judge **Bork**. I know.

The **Chairman**. I was talking about the broad right or marital right to privacy. Now, let me move on because I only have 10 minutes left.

I would like to move to another area where your publicly stated views would affect what I consider to be strongly established Supreme Court precedent. It does not necessarily mean you would overturn them, but they conflict.

Judge, you explained that you no longer hold to some of the views you expressed in an 1971 article in the Indiana Law Journal—by the way, that is probably the most purchased law journal in America now. I mean, they are probably going back and making reprints of that like they never have.

Judge **Bork**. I wish I had kept the copyright, Senator.

The **Chairman**. In particular, you said that you no longer agree with some of what you said about the first amendment in that article, and I believe you said that you first began to move away from these views in 1973 when you were at your confirmation hearings as Solicitor General.

Judge **Bork**. Publicly.

The **Chairman**. In a 1971 article you drew a bright line you said that only speech protected was explicitly political speech, and you have said at some length yesterday that you now think that that bright line was wrong.

But it seems to me that as of 1979 and 1985, you had drawn a new line, not as bright, but a new line. Your new line, it seems to me, by some of the testimony yesterday and what I have read, seems to me would protect more speech than your old line did but not nearly as much as the currently Supreme Court does.

In your 1979 speech at Michigan, you explained your view that political speech is at the core of the first amendment, and you spoke to that yesterday, and you went on to say, and I quote, and again I do not want to hold you to a specific quote but it is the idea that is expressed.

If you just let me go through my thing, you might be able to explain it here. You said, "But there is no occasion on this rationale to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art or indeed any form of expression are capable of influencing attitudes, but in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities such as sports or business which are also capable of affecting political attitudes, but are not on that account immune from regulation."

In a 1985 interview with the California Lawyer, you told the interviewer about an argument with Professor Harry Kalven. You said Professor Kalven argued that the first amendment should be interpreted by, and I quote, "starting with political speech and moving all the way out to paintings, statutes, dancing and so forth. Anything that is expressive is protected." That was Kalven.

This was the view, you said, of Professor Kalven with whom you had said you disagreed. You went onto tell the interviewer, and I quote, "that it seems to me that to be able to level a generality that goes well beyond what the framers intended, I doubt if they intended to protect some forms of dancing from regulation."

Now, as I understand it, that meant that you believed that the first amendment only protected speech that related to politics or to the political process. It did not have to be speech explicitly discussing politics. It did not have to say it was dealing with politics, but it had to be related to the political process.

That was not your 1971 view but it was your 1979 and 1985 views. That new line, it seems to me, you have drawn. Now, that view, quite frankly, troubles me. All sorts of artistic speech—paintings, hanging a nude in a gallery or your home of some great artist, dancing, the Joffrey Ballet or any other ballet that some are more expressive than others and in some conservatives their attire somehow is viewed as being provocative—have nothing to do with politics, that is, paintings and dancing.

But they are still, in my view, very important and I believe protected by the first amendment. I do not believe that State legislatures or any government body should be able to sensor or suppress expressions just because it is unrelated to expression of a political notion.

I am not talking about obscene expression. I am talking about nonpolitical expression like, as I said, the American Ballet Company, Reuben's nudes, or dancing on American Bandstand.

Now, under your 1985 theory, Judge, the government, as I see it, a government, a county council, city council, State, could sensor this nonpolitical speech. Is that still your view and do I have that correct?

Judge **Bork**. When I said some forms of dancing, I had in mind what I regarded as a peculiarly odd enterprise the Supreme Court once engaged in. I forget which way they came out. But they had a lot of trouble with a question of whether a community could ban dancing in the nude in a bar, and that struck me as not something they should have had a lot trouble with.

I think they went to the amendment allowing states to control liquor to finally bar the nude dancing.

The **Chairman**. Well, let us stick with that for a minute. I am trying to get at your political—there has to be a political nexus.

Judge **Bork**. No, I do not think it is a political nexus. I said that there are all kinds of forms of—well, there are two lines I want point out. There are all kinds of forms of expression, discourse, literature that seriously affect the way we view our society and the way we view ourselves and so forth, and I am willing to protect that.

As a theoretical matter, I could draw a different line. There is now a vast corpus of first amendment decisions, and I accept those decisions as law, and I am not troubled by them. If I wanted to start over again and say what line would I draw, I do not know. I do not know.

The **Chairman**. Gee, Judge, in 1985 though you——

Judge **Bork**. No, no, I said if I was starting over again I might sit down and draw a line that did not cover some things that are now covered. But there is a body of law now that covers those things. It does not disturb me and I have no desire to disturb that body of law.

The **Chairman**. How about the case, for example, where an African dance troupe is going through and the women who do the African tribal dances that they are having on this tour are topless because they do not wear anything.

I mean could the county council of Newcastle County ban them?

Judge **Bork**. I think on the current law it could not, and I would not attempt to——

The **Chairman**. But under your view, could they?

Judge **Bork**. If I were going back to redraw a theoretical line, I do not know where I would draw it. I would probably would not ban that because that is also a cultural display, and it does affect our view of things, and I probably would not ban that.

But I have not gone back to redraw a theoretical line. It seems to me the current body of doctrine, the current body of law which is well-settled protects that, and I certainly have no desire to go running around trying to upset settled bodies of law which are not, to say the least, pernicious. Those decisions are not pernicious.

You may argue and say that, well, a different line could have been drawn. I do not know if it could or not, but those are cases which I would certainly not classify as pernicious. I would not classify them as clearly wrong, and I would accept that line of first amendment cases gladly, not grudgingly, gladly.

If I were being a theoretician again and starting from scratch with the first amendment, I would struggle long and hard to find out where line should be and currently I do not know what I would do as a theoretician because I have not revisited the area for some time, but as a judge——

The CHAIRMAN. In 1985 you did, Judge.

Judge BORK. I did not revisit it. I was talking about what I had said before.

The CHAIRMAN. Oh.

Judge BORK. But as a judge, I accept those decisions and have. If you look at my first amendment decisions, they are quite--when I use the word "liberal", I am not talking about political inclinations but they are liberal constructions of the first amendment.

The CHAIRMAN. Only on libel as I read them, but I won't get into that.

Judge BORK. Well, libel is not different from other things.

The CHAIRMAN. Well, it is. It is. As you know, we used to teach it—at any rate, because my time is up, let me conclude by suggesting that in 1984 your letter to the ABA that you have spoken to, as I read that letter, you still focused on the relationship to the political process of speech and after you started off by saying that the first amendment applies to more than just speech, that is, quote, "explicitly political" you went on to say, and I quote, "I have long since concluded that many other forms of discourse such as moral and scientific debate are central to democratic government and deserve protection. I continue to think that obscenity and pornography do not fit this rationale."

In 1984, you did not decide that moral and scientific speech should be protected for its own sake. Instead you said it should be protected because you had decided that it fit your rationale for protection.

Do you understand what I am driving at here?

Judge BORK. Sure, Senator, I do, but that is a letter to the editor in which I decided not to try to spell out in detail my views on the first amendment, and I said, as you just quoted, I have decided that other—did I say many other forms of discourse?

The CHAIRMAN. Yes.

Judge BORK. Many other forms of discourse such as, and I mentioned moral and scientific speech. That means that there are other categories as well, and I was not trying to spell out a jurisprudence of the first amendment in detail in a letter to the editor.

The CHAIRMAN. Well, the last point. You did an interview with Worldnet. In June of 1987, you did an interview with Worldnet where you still focused on whether speech relates to the political process.

You said there that a spectrum of speech with political speech at the core, excuse me. You said there was a spectrum of speech with political speech at the core. You explain the political speech was speech about public affairs and public officials.

You went on to say the protection spread out from the core to scientific speech into fiction and so forth, but then you went back and stressed that some speech had no relationship to politics, and you said that that speech has no protection.

In your words, and I quote, "There comes a point at which speech no longer has any relation to these processes," and there you refer to the political processes, and as mentioned above, again quoting, "when it reaches that level, speech is really no different from any other form of human activity which produces self-gratification.

Judge, it seems to me to be far from where you started.

Judge **BORK**. Well, let me read that again, please, Mr. Chairman, because I think I said something that I did not hear. Nobody, I think, doubts that the core of the first amendment is political speech. Harry Kalven did not doubt it and Alexander Meicklejohn did not doubt it.

The *New York Times* v. *Sullivan* case, which threw protections around people from libel actions, focused upon public officials, public figures and so forth because they are the subject of politics and comment.

Everybody, including the Supreme Court, starts from the political speech core, and that is the most strongly protected. But let me read what I did say in this thing. The German professor, they were in, I forget, in Hamburg or someplace, asked me something, and I said, "I cannot tell you much more than that there is a spectrum of, I think, political speech. Speech about public affairs and public officials is the core of the amendment. Protection is going to spread out from there as I say in the moral speech and the scientific speech into fiction and so forth."

That statement explicitly contemplates protection for fiction and so forth. Whatever that is. Then I said there comes a point, which you quoted, where it is no longer related to these.

I think when you get the speech or print which is purely for sexual gratification, pornography or obscenity, I fail to see its connection to anything.

The **CHAIRMAN**. But how about just speech for speech sake that is not pornographic but that people do not like it. It has no relationship to the political process?

Judge **BORK**. Well, I just said that fiction and so forth is protected. I said that in this interview you quote.

The **CHAIRMAN**. Can fiction reach a point where it is no different from any other form of human activity and produces only self-gratification?

Judge **BORK**. Produces only self-gratification? I think about the only form of fiction that does not affect ideas and attitudes or affects them in ways that are not particularly healthy is obscenity or pornography. I use the terms interchangeably. I think I am using them interchangeably.

The **CHAIRMAN**. Well, my time is up. I will come back again. Thank you, Judge. I yield to the ranking member, Senator Thurmond.

Senator **THURMOND**. Thank you very much, Mr. Chairman.

Judge Bork, over the past two days you have made comments on the equal protection clause of the 14th amendment. Some have criticized you for what they understand to be your position. This morning I would like to explore your understanding and analysis of the 14th amendment.

The 14th amendment reads, "Nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Now, let us start with the basics. The language says, "No State shall deny equal protection to any person." Does that mean every person in the State must be treated the same by every law?

Judge **Bork**. It means every person in the State must be treated the same unless there is a valid basis for making a distinction. Obviously to take the extreme example, we do not treat burglars and honest people the same way. We make a strong distinction between those two groups, and that is a valid distinction.

Now, when we come down to other groups, to other people, the question is is the distinction made between them by a law valid? I can go on about that, Senator, but if you want to ask a further question in this area, I can wait for that.

Senator **Thurmond**. Then naturally states draw distinctions among its citizens. The Court must then decide if the distinctions drawn by the states are reasonable under the 14th amendment. How does the Court do that? What standard is currently used in race cases, strict scrutiny; in gender cases, heightened scrutiny; all other cases, rational basis?

Judge **Bork**. No, I hope not, Senator. The Supreme Court is a little bit divided on this issue. There are two schools of thought up there. One is that you identify a group and then decide what level of scrutiny you will give to any law that disadvantages that group in some way, and I think that is a little paradoxical given the language of the amendment which you have quoted which means it applies to all persons so that I would think that no group could be excluded from the protection of the amendment as a group.

What the equal protection clause requires is that people who are similarly situated be treated equally, and in the case of race, there is no valid basis for a distinction, and so the 14th amendment requires equality absolutely.

In the case of gender, there are only a few bases of distinction, and I got into this topic with Senator DeConcini yesterday. I mentioned some of the extreme cases, but I think those are almost the only cases in which a distinction between the sexes would be allowable.

For example, gender is irrelevant to your ability to work as a lawyer or as a doctor or anything else. I agree completely with the Supreme Court case of *Reed* v. *Reed,* which said that a State statute saying that if there is a man and a woman in the family, the one who is preferred, who becomes the administrator of an estate, must be the man. That is an irrational distinction and it was struck down, and it should have been.

The fact is a reasonable basis approach which rejects artificial distinctions and discriminations would arrive at all of the same results, I think, or virtually all of the same results that a majority of the Supreme Court has arrived at using a group approach and an intermediate level of scrutiny approach. There is really no difference in anything except the methodology, but women are covered, every person is covered by the qual protection clause.

I am glad to have a chance to go into this because people seem to think that a reasonable basis test is a very weak protection. It is not. It has become a weak protection in economic areas because the Court has found distinctions there to be allowable that we do not allow elsewhere. But it is not a weak protection in areas of race, gender, and so forth.

Let me point out what the Supreme Court has done in the past in this area because these are cases I disagree with. I disagree with the Supreme Court in these cases. In *Kotch* v. *Board of River Port Pilot Commissioners*—this is my Indiana article, by the way, on page 12. The Court decided that a State could grant pilots' licenses, river boat pilots' licenses, only to persons who were related by blood to existing pilots, and they could deny licenses to persons otherwise as well or better qualified. The Supreme Court upheld that ridiculous distinction back then, not too long ago. That seems to me a distinction that would fail on a reasonable basis test.

Then in *Goesaert* v. *Cleary,* a case from 1948, the Court said that a State could refuse to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments. That was upheld in *Goesaert* v. *Cleary.* That, too, is a ridiculous distinction and would fail under the reasonable basis test. And so forth.

The reasonable basis test would give us all of the protections, maybe more than you would get by identifying particular groups and deciding which level of scrutiny we get. I have just been shown Justice Stevens' remark in *City of Cleburne* which was a distinction about retarded children. It says, "In every equal protection case"—this is Justice Stevens—"we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a tradition of disfavor by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answers to these questions will tell us whether the statute has a rational basis. The answers will result in the virtually automatic invalidation of racial classification and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an intermediate standard of review in those cases; rather, it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or more specifically, to the purpose that the challenged law is purportedly intended to serve."

I think it is important to say that because I think there has been a misimpression that the reasonable basis test is a weak test. It is weak only in the area of economic distinctions. It is not weak in the area of race or gender or other persons.

Senator THURMOND. You may have covered this next question, but I am going to ask it and you can decline if you feel you have covered it.

You have been accused of two errors in your analysis. First, you were charged with using a different standard for women; that is, gender cases. Is it not true that the current Court standard for gender cases is different than race cases?

Judge **Bork**. Well, the reasonable basis test is probably applied in both. It is just that the difference between races is irrelevant, and, therefore, distinctions may not be made. In discussing this with Senator DeConcini, I mentioned that, for example, things that you would not allow in a race case, you might allow, you would allow in a gender case; such as different toilet facilities, difference about going into combat and so forth.

Now, that makes my point. There are very few areas in which a distinction between men and women is allowable, and those are among the few. But that distinction would not be allowable on the basis of race.

Senator **Thurmond**. The next question I have is that, at any rate, you are accused of having a lower standard for gender and race cases than is currently employed.

Judge **Bork**. That is not the case.

Senator **Thurmond**. I think you have covered the situation.

Judge **Bork**. I think so.

Senator **Thurmond**. Now, is it not correct to say that analysis under the 14th amendment, while certainly involving important issues, really turns on how much deference the Court gives to State legislatures to elected officials.? The higher the regard for elected officials, the more deference a judge is likely to allow.

Judge **Bork**. Well, I suppose it depends on whether you allow deference or not. I would think that it is not a question so much of deference as to whether the State, if it makes a distinction in its laws, states a reasonable reason for the distinction that is a valid reason. I do not think it is a question of deference, exactly; it is a question of listening to what they have to say and deciding whether what they have to say makes sense.

Senator **Thurmond**. Now, let us explore one other issue. Over the past several decades, the 14th amendment has been used by the Court to inject its policy objectives into law. While some may like the particular results of that analysis today, is it the thrust of your objection that without a principle analysis the tables can be turned on any issue at the whim of the Court, so that some who like a free-flowing equal protection analysis today may regret it tomorrow?

Judge **Bork**. Oh, that is quite true, Senator Thurmond. I made the same point just a minute ago, that the substantive due process approach, which is equivalent in its legislative capacity by judges, to a free form equal protection analysis is capable, as it was in *Dred Scott* v. *Sanford*, of producing horrible results, just as it is capable of producing what some would regard enlightened results.

When you hand this power to judges, if you allow this power to judges, you have no guarantee that the judges will always produce what we or any number of us would like. Judges, once they begin to put their personal preferences into law, may come up with dreadful results, as they did in *Dred Scott* and as they did in the early 1930s when they were striking down reform legislation.

Let me say something about why I prefer a reasonable basis analysis to a group-by-group analysis. It is not just that the language of the amendment refers to "any person," therefore all persons. It is that if one thing is clear about the 14th amendment, it is that the framers of that amendment, the people who ratified it, had no intention of wiping out distinctions between men and women that we would now regard as very discriminatory. They went ahead and did it.

So if you say group by group are women included or not, you have a hard time, as a matter of the intention of the people who passed that, of saying women as a group are included. But we have been using a reasonable basis test as a means for implementing the broad language of the equal protection clause now for all of this century. I think it makes more sense in this sense.

I said in this case of *Ollman* v. *Evans* that we talked about, that the Constitution evolves as society changes. I said that about the first amendment and its relation to libel actions, but it is also true here. Distinctions that we made between genders in the 19th century and which we assumed to be reasonable then, or the society assumed to be reasonable then, no longer seem to anybody to be reasonable. And those distinctions are beginning to fall. I think they are beginning to fall because the place of women in society has evolved rapidly and changed rapidly, and now we see only a few distinctions that may reasonably and rationally be made between men and women. And I have mentioned two. Some people say those are extreme cases, and they certainly are. Only extreme cases in this area can be justified.

Senator THURMOND. Judge Bork, you were asked yesterday whether your approach to women's rights would afford women constitutional protection against invidious discrimination. I think you have already very eloquently explained your reasoning. Your approach, as I understand it, would afford equal protection to all persons under the 14th amendment.

Generally, your approach is more in line with Justice John Paul Stevens' rationale. Justice Stevens has written, "A reasonable basis test would not lead to results very different from those under the Court's current analysis. For example, one need not employ a complex intermediate scrutiny test to determine whether a particular gender classification is reasonable. Although all-male combat units may be reasonable, disabilities based on outmoded stereotypes are not."

The Supreme Court's decision in *Rostiker* v. *Goldberg* upholding the all-male draft registration appears to confirm this conclusion. Do you think your approach would protect women's right as adequately as they are protected now? And would you explain your answer.

Judge BORK. Senator, I do think they would be protected as adequately as they are now, and I explained my answer by much of what I have just said; that rational distinctions cannot be made between men and women, usually, except on physical strength or something of that sort, which is the combat example. It is rational to have all-male combat troops. But in the ordinary occupations of life and in social intercourse and so forth and so on, there is no rational distinction between men and women.

I think the Supreme Court has about arrived at that decision using intermediate scrutiny and so forth. I arrive at it, as Justice John Paul Stevens does, using a reasonable basis test. Is there a reasonable basis for a distinction?

Most of the distinctions that survive in the law are old ones made long ago which no longer seem to reasonable to us. They are not reasonable. In a different state of culture, in a different state of society, they may have seemed reasonable. They are not now.

Senator **Thurmond**. Judge Bork, I think there may be some confusion as to your position on first amendment rights. For example, in a case of written materials that fall within a State's classification of pornographic, the question is whether that State's classification meets the Supreme Court standard of pornography.

If the State's classification and the Supreme Court's are in accord, then the individuals concerned are not entitled to judicial intervention. However, I think confusion arises because of the characterization to protect judicial intervention. I think some people view this characterization as a Court declining to make a judgment on whether protections of the first amendment extend to certain materials.

I think what you are saying is the Supreme Court or lower court must review the material itself and then make the determination whether the materials are, in fact, pornographic; and if they are pornographic, they do not get first amendment protection. If they are not pornographic, they may be entitled to first amendment protection.

Would you again please clarify your position on this subject?

Judge **Bork**. Yes. The Supreme Court has repeatedly said that there are some categories of speech—a very few—which are simply outside first amendment protection. They have mentioned obscenity; they have mentioned fighting words, words that are likely to start a fight; and a few others.

Now, in order to make sure that the first amendment is being complied with, when a State punishes words as obscenity or as fighting words or any other category, the Supreme Court has to look, or some court has to look and say, Did the State correctly classify those words as obscenity or as fighting words under the constitutional standard? If the State did not, then the Supreme Court should reverse the conviction and say you may not punish that speech.

But it is for the Supreme Court to define what is obscenity and the Supreme Court to define what is fighting words, and to ask in each case, Did the State correctly act against those words, or did it incorrectly act against those words?

I trust I make myself clear on this point, but I am not sure. All I am saying is that the ultimate control of the definitions and categories of words must be in the Supreme Court, not in the State, if the first amendment is to be upheld.

Senator **Thurmond**. Judge Bork, would you again explain your theory of the relationship between the *Brandenburg* test and Justice Holmes' theory of the clear and present danger test?

Judge **Bork**. Well, the views I expressed in 1971—it was a bad year. The views I expressed in 1971 and Justice Holmes' clear and present test, I think that the *Brandenburg* case falls somewhere in between that.

Now, let me explain. I think that I have been getting criticism first because I never change my mind; now I am being criticized because I change my mind. And I want to explain where I stand about this so that I can be criticized on the right grounds.

There is only one difference between what I said about advocacy of law violation and the *Brandenburg* position. I am not talking about here somebody advocating violating the law in order to test its constitutionality. I am not talking about the *Martin Luther King* case; because if you advocate the violation of law in order to test its constitutionality, certainly the speech is protected if the law is unconstitutional. It may well be protected if the law is unconstitutional. I do not know where the law stands on that right now.

I am talking about the advocacy of law violation which is not related to a claim of unconstitutionality in any way.

I had really said, I did say that I thought theoretically the advocacy of law violation in such circumstances could have been punished under the first amendment. What *Brandenburg* did was say there must be a closer nexus between the advocacy and the lawless action. It said the advocacy of law violation must be in circumstances where there is the likelihood of imminent lawless action. So it added one factor to what I said, the closeness of the danger.

Now, I have not changed my mind about what I said upon this subject. I could have accepted a first amendment law that developed the way I thought in 1971 it ought to have from the beginning. I could accept that.

The law did not develop that way. It developed to require a closer nexus between the advocacy and the violent action or the lawless action, imminent lawless action. That is a change in the thing, but it does not involve me changing my mind at all. I can accept either position.

I accept the fact that the Supreme Court has added an additional safeguard to the position that I took in 1971 for speech advocating lawlessness. As an academic, I thought that was not theoretically justified. As a judge, I accept it, and that is all there is to that.

I think you will see that I have no trouble with a strong reading of the first amendment from my court of appeals record, which is more relevant, I think, than speculations in the past.

In any event, there is not that much difference between my past position and the decision in *Brandenburg*.

Senator THURMOND. Judge Bork, yesterday, in response to a question, you indicated that there are some rights that are not enumerated in the Constitution, but are recognized because of the structure of the Constitution and government.

Could you give us an example of one of these.

Judge BORK. Well, the right to travel, I think, Senator, was first derived—I have not re-read the case, recently, but I remember, it is in *Crandall* v. *Nevada,* a couple of years before the 14th amendment was ratified.

Nevada was taxing people a dollar every time they left the State, and the Supreme Court struck down that tax in saying there was a right to travel without hindrance by the State, and it did so on structural reasoning about the nature of the Federal Union, and how you have to travel, and so forth.

But the oldest example of structural reasoning in the law—I do not know if it is the oldest, but the best—is Chief Justice John

Marshall's opinion in *McCulloch* v. *Maryland*, where entirely on structural grounds, he first establishes the right of the United States to create a national bank, the Bank of the United States, and then establishes that that bank must be free from State taxation of its commercial instruments. An entirely structural argument, entirely sound argument.

Senator THURMOND. Thank you very much. My time is up. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Bork, the framers of the Constitution recognized the unchecked powers of the executive branch of government as perhaps the greatest threat to liberty. That is what the fight for independence was all about. They did not want another King George, and they certainly did not want an all-powerful President.

One of the ways in which the Constitution protects our freedom is by dividing the powers of government among the three branches—the President, the Congress, and the Courts—and ensuring that each branch is in a position to check any abuses by the others. That is what the checks and balances are all about.

First, I would like to talk about the War Powers Act. When the Congress passed that legislation in 1973, a very broad bipartisan majority of the House and Senate expressed the view, in the wake of Vietnam, that no President should ever again be able to lead the country into an undeclared war without the approval of Congress.

Judge Bork, that was passed over President Nixon's veto by a vote of 75 to 18 in the Senate of the United States.

Isn't it true, that in an article in "The Wall Street Journal," in 1978, you stated that the War Powers Act was—and I quote—"probably unconstitutional, and certainly unworkable?"

Since then, have you expressed any different view about the War Powers Act?

Judge BORK. I do not know if I have, Senator, but I think I can clarify that, not that I am going to take it back. I am just going to clarify it.

That was a sentence leading into a different topic, and I do not recall whether I have ever made any extensive analysis of the War Powers Act.

But there are certainly problems with workability, and I do not today recall all the details, but a lot of Presidents, and so forth, have complained about aspects of it.

I remember when President Ford—I think it was the Mayaguez episode—and in order to notify the Speaker of the House he had to call him where he was, in China, flying on a Chinese airliner, to tell him about a military action. It seemed a little odd, but I do not really care about that. Those are policy questions, and they are not for me.

When I say it was probably unconstitutional, that is a very complex act, and let me say, I think the consultation requirements probably seem constitutional to me. The notice requirement seems constitutional. But you know, that act, as I recall, contains a legislative veto. I may be wrong, but I think it contains a legislative veto, which, at the time, I thought was probably unconstitutional, and the Supreme Court in the *Chadha* case has since said that it is unconstitutional.

So that, I do not think, to that degree mine was a bad prediction. If I had to construe the statute—and I do not know that I ever will because there are problems with justiciability, and I do not know the answer to the justiciability problems but they are there.

I would construe it in order to save its constitutionality as any judge should. There is one other area of possible problems with the act, and that is this. The major questions of war, or peace, or questions affecting that, are most certainly for the Congress. Only Congress can declare war.

In fact the Congress need not give the President a single soldier. There is no constitutional requirement that it do so.

But at the other end of the spectrum, tactical decisions in the field seem to me to be for the Commander in Chief, and, for example, I would—to take the extreme case—I would have very much doubted that during the Battle of the Bulge, Congress could have ordered the President to surrender the airborne troops at Bastonne rather than continuing the battle.

Now there is a vast spectrum between the ultimate strategic question of war or peace and tactical decisions in the field, and it may be that some constructions of the War Powers Act might get Congress into clearly tactical decisions, but I am not sure about that. I have not looked at that for a long time.

Senator **Kennedy**. Of course your article in The Wall Street Journal does not relate to the legislative veto and there are many other provisions in the War Powers Act itself.

In 1971, you suggested that it was unconstitutional for Congress to stop the President from invading Cambodia. We all agree that the President is the Commander in Chief, and the Congress cannot manage and should not manage military tactics. That was very clear during the hearings, and during the debate on the War Powers Act. We cannot run a war, but we ought to be able to stop a war. That is just common sense in a democracy, and the American people have learned, with good reason, to be skeptical of presidential wars.

We all know what happened in Vietnam, and the same concerns were there when President Reagan sent the troops into Lebanon, and the American people are obviously concerned today in regard to our policy in Nicaragua as well as the Persian Gulf.

So the War Powers Act simply insures that the President has the support of Congress and the country for these sorts of military actions, but you say the Congress does not have any such power in this absolutely vital area of war and peace.

You say it is unconstitutional and you say it is unworkable.

Judge **Bork**. Senator, I just said precisely the opposite. I just said the question of war or peace is entirely for Congress. Only Congress can declare war.

As far as Vietnam is concerned, Congress could have cut off the funds and ended that war, whenever. That would have been entirely constitutional.

My only question was a question of tactics within a war.

Senator **Kennedy**. Let's go to the Foreign Intelligence Surveillance Act which was passed in the Congress in 1978 by 95 to 1, to correct some of the abuses by the FBI and the Central Intelligence Agency during the Nixon administration.

It requires that a warrant be obtained from a special federal court before electronics surveillance can be conducted on United States citizens in the course of a national security investigation. It contained an exception for a limited number of top-secret wiretaps by the President.

In June 1978, you testified before the House Judiciary Committee, and I quote:

> The plan of bringing the Judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well. The law is very probably a violation of article II and III.

Since your testimony before the House Committee, have you expressed a different view regarding that?

Judge BORK. I do not recall that I have, Senator, but let me explain that view.

We are talking now about electronic surveillance of people we have good reason to believe are agents of a foreign power. Every President since Franklin Roosevelt has claimed the power to engage in electronic surveillance of foreign agents without a court warrant. Every President has claimed it.

In addition to that, the United States has won two court cases at the court of appeals level. In the fifth circuit, the court of appeals upheld a warrantless electronic surveillance against a foreign power.

In the third circuit, the court sitting, *en banc*—that is the full court, not just three judges—the court sitting, *en banc,* said the President had the constitutional power to engage in electronic surveillance of a foreign agent without a warrant.

When I was Solicitor General, we had the *Butenko* case which involved a Soviet KGB agent who was caught through electronic surveillance without a warrant, and I knew we had won this case in two lower courts, that the President's power included that.

So when *Butenko*—I think it was called *Ivanov* by that time—when he petitioned for certiorari, having lost in the lower court, I told the Supreme Court that I had no objection to the Court taking the case because I wanted to get a Supreme Court ruling on the President's power to conduct electronic surveillance against foreign agents without warrants.

We had been winning those cases in the courts, and that is why I thought it was the prerogative that every President since Franklin Roosevelt had claimed. That is the article II point, Senator.

The article III point is this. Article III requires that the judicial power be used where there is a case, or a controversy. In the ordinary warrant case, you certainly have the potential for a case or a controversy because the judge or a magistrate issues a warrant.

If any arrest, or anything goes wrong, or damage occurs in the execution of that warrant, that warrant may be challenged in court.

What troubled me about this new warrant procedure was that it is a secret court. There is no challenge to challenge the procedure unless somebody is arrested, which may not be the case because you are just surveilling for intelligence purposes—there is no challenge to the procedure and you have got a body of secret law growing up, that nobody knows about except the judges on the court and the Government people who go to talk to that court.

That worried me, under Article III of the Constitution. I was not sure that was a judicial function.

Senator **Kennedy**. Well, the fact is, under the Constitution Congress must have the power to limit surveillance of U.S. citizens. The fact is we have had that on the law books now for a number of years.

Judge William Webster, who is now the Director of the CIA, also the former Director of the FBI, when he was questioned about whether he believed it was any hindrance in terms of trying to follow or surveil foreign agents, subversives, those that might be treasonous to the United States, said that the act—and I quote—"worked beautifully."

Obviously that particular law is an important safeguard now. I think of the administration's opposition to the sanctuary movement for refugees from El Salvador—we are talking about American citizens now. We certainly do not want Ed Meese running around with unlimited power to put wiretaps on churches.

You seem to feel that the law infringes on the national security power of the President, but the Congress did not think the President has any inherent power to violate the privacy of American citizens in the name of national security, and I do not think that the President has any such power——

Judge **Bork**. I quite agree with you, Senator. The President has no power just to violate the privacy of American citizens.

Senator **Kennedy**. Under the guise of——

Judge **Bork**. Well, under the guise, that is right. All I was saying is that two courts of appeals had held that he did have the power to conduct electronic surveillance of foreign agents. He may not. All I know is that two courts of appeals held it. I do not know if he does, or not, but that was the way the law stood at the time I was saying that.

Senator **Kennedy**. Let's talk about another area. That is the role of special prosecutors.

Many of us in Congress and the country are troubled by charges in the Iran-Contra scandal that officials in the executive branch broke the law and ignored statutes enacted by the Congress prohibiting U.S. military aid to the contras in Nicaragua. It seems fundamental to the rule of law, that the President must obey the same laws that bind every other American. No President, no official, is above the law.

And after the unsatisfactory experience with Watergate, particularly your firing of Special Prosecutor Archibald Cox, Congress enacted a law so that special prosecutors could be appointed by the courts, with their independence guaranteed.

In November 1973, a few weeks after you fired Mr. Cox, you testified,

> The question is whether congressional legislation appointing a special prosecutor outside the executive branch, or empowering the courts to do so, would be constitutionally valid, and whether it provides significant advantages that make it worth taking a constitutionally risky course.

I am persuaded that such a course would almost certainly not be valid, and would, in any event, pose more problems than it would solve.

Would you tell the committee whether you have ever publicly expressed a different view regarding the constitutionality of the special prosecutor legislation.

Judge **Bork**. I publicly——

Senator **Thurmond**. Mr. Chairman, I would like to make this point. That is a question that may come before the Supreme Court, and I would caution the witness to be careful of what he says on that point.

Judge **Bork**. I was just going to repeat what I said back in 1973, because for one thing—and I think those proposals were very different statutes than the one that is now in effect. They contemplated judicial appointment and judicial control, and judicial termination of the special prosecutor. The present one does not.

I was complaining about control of the prosecutor by the courts, which I think is right. Also, the question arose in those hearings whether Congress could, by statute, protect a special prosecutor, so he could only be fired for cause.

And as I recall what I said then—and I do not, heeding the warning given me by Senator Thurmond, I am just repeating what I said then—was that Congress probably could protect the special prosecutor from discharge except for cause, if that special prosecutor was a subordinate official, that is, somebody appointed by the Attorney General, rather than somebody appointed by the President and confirmed by the Senate, because the case law seems to suggest that the President has much more power over an official he appoints and the Senate confirms, than he does over a subordinate official appointed by a department head. So I made that distinction back then.

Senator **Kennedy**. That is a welcome one because as you very well know, the special prosecutor statute has been invoked several times, both by the Carter and the Reagan administrations. In fact five separate special prosecutors are now investigating the President and former members of the Reagan administration, including an investigation of the Attorney General himself.

Judge **Bork**. Senator, I want to stress, particularly in light of what Senator Thurmond said, that I am merely calling to your attention what I said in 1973. I am not in any way passing judgment on the current statute or any aspect of it.

Senator **Kennedy**. No. But you have not published anything since 1973.

Judge **Bork**. Not that I recall.

Senator **Kennedy**. So that is the last public statement that you have made on it.

Judge **Bork**. That is correct.

Senator **Kennedy**. That matter has been before the Congress, been debated, been discussed by this Committee. There is a wide range kind of involvement of special prosecutors in this administration, and your last statement is the statement on the special prosecutor I referred to above, which I think we have to take at face value since you have not published, or at least stated, or put in any of your speeches, anything else to change that.

Judge **Bork**. Pardon me?

Senator **Kennedy**. I mean, I respect that you may not want to comment on a particular matter that is even now before the Court, but I think it is fair for us to draw certain conclusions from the statements that you made in 1973, your last statements with regard to it, particularly since you have been so involved in the whole question of special prosecutors.

Moving to another area, I would like to ask you about congressional standing to bring law suits challenging abuses of the Constitution by the President.

Obviously, as in the case of the War Powers Act, Congress cannot run the executive branch, and we cannot take the President into court every time we disagree with a policy of the administration. But that is not the issue. In a few very important situations, members of Congress should have the right to resort to the courts to preserve the constitutional role of Congress. That is what we call the doctrine of congressional standing, the right of members of Congress to sue in the courts.

In a dissenting opinion in 1985, is it not true you said, and I quote, "We ought to renounce outright the whole notion of congressional standing"? Then you went on to state in that opinion, and I quote,

> When Federal courts approach the brink of general supervision of Government, as they do here, the eventual outcome may even be more calamitous than the loss of judicial protection of our liberties.

Since you issued that opinion, have you expressed any different view?

Judge **Bork**. No, I have not. Perhaps I should explain a little bit about that.

The doctrine of congressional standing, as you and I know, Senator, but perhaps not everybody listening to us knows, is the theory that if the President does not enforce the law the way Congress thinks it intended the law to be enforced, a Congressman may sue to get an injunction or a declaratory judgment against the President to make him do what the Congressman wants him to do.

That is an entirely novel constitutional doctrine which I think was never heard of before 1974 in the case you brought, *Kennedy* v. *Sampson* and it is confined to the circuit court on which I sit. I do not think any other circuit has ever picked up that doctrine. So it is a constitutional novelty, and it is by no means settled. And the Supreme Court has not passed upon it.

The reason I am troubled by it as follows: What it will lead to is, I think, other domination of the Government by the judiciary. If a Congressman has something akin to a property interest or something in the law he passes, if it is not carried out properly, so that his official capacity is in some sense diminished, then I think the President has an equal interest in not being forced to do things he regards as improper or unconstitutional. Therefore, if Congressmen may sue the President because he is not doing something under the law they would like, if the Congress overrides a presidential veto and the President thinks that cuts into his constitutional office too much, the President can sue the Congress.

For example, I spent some time as Solicitor General trying to get a case on the legislative veto. I wanted to see whether that thing was constitutional. If I had understood the theory of congressional standing, which is really governmental standing, I could have stopped hunting for a case. I could just have had the President sue the Congress and get a declaration right away.

But if it is true of a President and Congress, it is also true of judges. If Congress passes a statute that I think cuts into my powers, I can go to the Supreme Court for a declaration of unconstitutionality. In fact, that happened. Two judges in the Northern District of Illinois were reversed by the seventh circuit, and the judges petitioned for certiorari to the Supreme Court on the grounds that the seventh circuit had done things to their office which were improper.

Everybody is going to be in the federal court defining their rights of office instantly. What is important to remember about congressional standing is it is not the only way you can get those issues before the Court. If the President does something that is not in accordance with the law, there is almost always a private individual who can sue and who can show injury; and he can then challenge the President's action, which is exactly what happened in the old pocket veto cases.

Senator **Kennedy**. Well, I must say that I have difficulty in quite accepting the premise that we would find each of the various respective branches suing the others, because the speech and debate clause forbids lawsuits against members of Congress for actions in their official capacity. For any speech or debate in either House, they shall not be questioned in any other place. Judges under the *Stump* v. *Sparkman* decision are immune from suit for decisions they make.

Congressional standing may not always be appropriate, but it clearly is appropriate when the President unconstitutionally claims a duly enacted law is not a law at all. I think we are not opening the floodgates by giving Congress the power to go into court in a narrow range of cases where the President has abused his power and denied the rights of Congress under the Constitution. You say that the Congress cannot even raise the question in court because that sort of litigation would open up the doors to all sorts of other abuses. I believe that is just another example of your attempt to draw a bright line that just does not make any sense. In——

Judge **Bork**. That was not a bright—I am sorry, Senator.

Senator **Kennedy**. I will just finish this thought, and whatever comment you have, obviously we would welcome.

In recent years, a number of Senators and Congressmen of both parties thought the President was not acting in accord with the Constitution. They tried to take the administration to court. I think Barry Goldwater would be surprised to hear that you did not think he had standing to challenge President Carter on the Taiwan Defense Treaty. I think Jesse Helms would be surprised to hear that you do not think he had standing to challenge President Carter on the Panama Canal Treaty. Many other Senators have filed actions in federal courts, including Senator Melcher, Senator Metzenbaum, Senator Pressler, Senator Proxmire, Senator Riegle, Senator Trible and others.

The issue has nothing to do with the merits of the cases. The point is, Mr. Bork, you seem to think that the members of Congress are in these instances second-class citizens. You close the courthouse door on all of us, and we never get our day in court.

Senator **Thurmond**. Mr. Chairman, I want to say again——

Senator **Kennedy**. Could I hear from the witness?

Senator **Thurmond**. Well, I am making a point. I want to say again that there is a case pending that may be before the Supreme Court. Again, I would caution the witness on this point.

Judge **Bork**. I will just answer two points that seem to me to be——

The **Chairman**. Judge, let me make clear, you are the one to make the judgment as to whether or not it is something that may in any way compromise you. I appreciate the Senator's admonition, but please proceed.

Judge **Bork**. I will say, then, something that does not compromise me. I have written what I have written. It is a long opinion, and it is all laid out.

But let me just say this: Senator Goldwater would not be surprised to learn that I have these views, because when he brought that case about the Panama Canal, some of the lawyers working with him called me about my involvement. And I said, "I do not think you have standing." And they never called back. So he will not be surprised to hear this.

Senator **Kennedy**. I cannot understand why.

Just a follow-up on the Foreign Intelligence Surveillance Act, when we discussed the Foreign Intelligence Surveillance Act you mentioned two cases. Were those cases challenges to the Foreign Intelligence Surveillance Act?

Judge **Bork**. Oh, no. They were challenges to the President's constitutional power to issue a surveillance order without a warrant.

Senator **Kennedy**. So the Foreign Intelligence Act has never been found to be unconstitutional?

Judge **Bork**. Oh, no.

Senator **Kennedy**. Just to summarize, Judge Bork, the American people rely on the Congress to protect them from abuses of power by the executive branch. But, Judge Bork, whenever Congress has tried to curb abuses, you always seem to side with the President. You broke the law in Watergate when you obeyed President Nixon and fired Archibald Cox. You have testified that court-appointed special prosecutors are unconstitutional, which suggests that you would let the administration investigate itself when corruption is the issue.

You oppose limits on the national security power of the President, even when the issue is wire-tapping and eavesdropping on American citizens. Those cases you mentioned did not address the constitutionality of the act.

You believe that Congress can never use the courts to challenge the President when he abuses his power. You wrote that the War Powers Act was probably unconstitutional. You suggested that Congress has no power to stop the President from taking us into a wider war in Vietnam. And that same reasoning would apply to sending U.S. military aid to the contras in Nicaragua or even selling the arms to the Ayatullah in Iran.

The Constitution calls for checks and balances. You seem to feel that when it comes to the relation between Congress and the President, instead of checks and balances the President has a blank check and the Congress exerts no balance at all.

You say you believe in the original intent, Mr. Bork, but the Founding Fathers certainly did not intend an all-powerful President.

Judge BORK. Senator Kennedy, I must say I think those are most unfair characterizations of my views. Let me start—I hardly know where to start.

In your case, when you challenged President Nixon's pocket veto, and that pocket veto was held unconstitutional by the D.C. Circuit, I did not take certiorari because I thought the D.C. Circuit was correct.

When the Ford administration began to use a combination return veto and pocket veto, I announced that that was incorrect, and I would not argue their case in the Supreme Court.

I then prepared a lengthy analysis of the constitutionality of the pocket veto and concluded against the President, which I sent to Attorney General Levi. He sent it to the White House with a notation that he agreed with my analysis and that I would not argue the case if they had to go to the Supreme Court, which would be a clear signal that the Solicitor General disagreed with him.

I concluded in that analysis that when Congress adjourns and leaves behind an officer to receive a return veto, which is quite different in its consequences from a pocket veto, the President may be required to use a return veto and not a pocket veto, because that was the original understanding, so far as I could tell, of the pocket veto clause.

That is an example where I sided with Congress against the President when I was in the executive branch.

Now, you said a number of other things, that I broke the law in Watergate. I said yesterday that I did not break the law in Watergate. There is no existing court opinion that says I did, and I gave Senator Metzenbaum the reasons why I thought I did not break the law in that case. And I should say, I was not in Watergate. I came down here June 27th of 1973. I did not even know the principal characters in that. I have never met them.

Senator METZENBAUM. You said there is no existing opinion? There certainly is.

Judge BORK. There is not. That was a vacated opinion, Senator.

Senator METZENBAUM. The opinion is there.

Senator HATCH. But it was vacated.

Judge BORK. It is in print. It has been declared to have no legal force or effect whatsoever.

Senator KENNEDY. Mr. Chairman?

The CHAIRMAN. Senator Kennedy has the floor and Judge Bork. Let it proceed that way.

Senator KENNEDY. Before we leave standing, did you think the Court was correct on the standing?

Judge BORK. The congressional standing? No. I said that in *Barnes* v. *Kline,* Senator.

You said I think the special prosecutor statute is unconstitutional. I must remind you, Senator, that I said the ones that were being proposed back in 1973 I thought unconstitutional. It is a very different statute now.

You said I think the War Powers Act is unconstitutional. I think there are parts of it, if applied in certain ways, may be unconstitutional, and I think the legislative veto aspect of it has been held unconstitutional. I do not know about the rest of it. In fact, the notice provisions and the reporting provisions seem constitutional. So I do not think my views are accurately characterized by your final remarks.

Senator **Kennedy**. Just finally, did you also decide not to bring the *Sampson* case before the Court because you were afraid of the decision upholding congressional standing by the Court?

Judge **Bork**. Well, I thought that pocket veto was so unconstitutional, the President's use of it, that it would put pressure on the—sometimes courts in order to get to an issue tend to overlook the jurisdictional issue. I thought the poorness of the case on the merits might damage the case on the standing issue. I do not know if it would have or not, but any litigator thinks about things like that.

Senator **Kennedy**. Did you think it would, at the time?

Judge **Bork**. I was not sure, but since I had no interest in trying to uphold that pocket veto, I saw no point in going up—in fact, I was sure I would lose on that pocket veto. I saw no point in going up and putting just the question of congressional standing in issue, and I certainly had no power or authority to go up and said, "I want to discuss congressional standing, although I agree with Senator Kennedy on the pocket veto." That would not be a case or controversy.

Senator **Kennedy**. My time is up, Mr. Chairman.

The **Chairman**. Thank you. Judge, as I said, we will take a 5-minute break. If there happens to be a vote, it will be more like ten minutes, and we will come back. Before we adjourn for lunch, we will do Senator Hatch and Senator Metzenbaum. Then we will adjourn for lunch.

We will probably be recessed for approximately 10 to 15 minutes while we go vote.

[Recess.]

The **Chairman**. The hearing will come to order. We will, as I said, take two more Senators, and then break for lunch.

Senator Hatch.

Senator **Hatch**. Thank you very much, Mr. Chairman.

Judge Bork, I have sat through hours and hours of these hearings with you. I personally want to compliment you because I think that on this particular day, September 17, 1987, 200 years of history and the Constitution, I think you have done as much as anybody else or any program on television or any commentator to talk about the viability of our Constitution and how it works and how great minds help it work than anybody else will today. I think it is a very historic occasion to have you sitting here in front of this committee answering these very, very technical and difficult questions.

Over the last three days, you have taken some of the toughest issues I have ever seen, and you answered them with aplomb, with credibility, no question with erudition, and no question within the mainstream of the law of this country, or any law anywhere.

I find it kind of interesting that Senator Kennedy's questions ranged from the War Powers Act—and I thought you made it very clear what some of the real discrepancies and problems are with regard to that particular bill; the Foreign Intelligence Surveillance Act, you could not have given a better explanation off the top of your head than you did on that; the Special Prosecutors or Independent Counsel Act, the question of standing—very, very difficult, complex constitutional and legal issues.

Once again, we heard Senator Kennedy suggest that you broke the law when you followed President Nixon's order to fire Archibald Cox. Now, that is false. No court opinion remains valid today, or even remains on the book, that says that you have broken the law. In fact, to the contrary. A single federal judge who was caught up in the momentous events of that occasion basically said something to that effect, and his opinion was vacated. I think Senator Kennedy knows that. That is why you were right when you said he was being unfair in some of these characterizations. And I only choose that one unfair statement to bring to the attention of you and our public out there.

That case is a nullity. It was erased. It was wiped off. It is zip as far as the laws of this land is concerned. It was so fallacious that it had to be erased. As a matter of fact, the people who asked for it to be erased were the plaintiffs. You wanted the case to be appealed as far as I know.

Judge Bork. Right.

Senator Hatch. Because you were so sure that it would be reversed—so were the people who brought it because they also, I presume, were sure it would be reversed. Upon reversal, it would be erased in a way that would be much more persuasive than the plaintiffs just voluntarily asking for a vacated order.

Let me just ask you a question about the significance of the vacated opinion. Is it not true that the Supreme Court in the *U.S.* v. *Munsingware* case said a vacated opinion "does not spawn any legal consequences"?

Judge Bork. That is entirely true, and the reason they vacate an opinion under circumstances like that is that the party never had his chance for his rights to get appellate review. If the case no longer presents a live controversy, the party who appeals—and that was me—does not get his day in the appellate court. So when they hold that a case is moot, no longer a live controversy, they remand with instructions to vacate under *U.S.* v. *Munsingware*.

Senator Hatch. That is why you called it unfair to characterize it as having broken the law.

Judge Bork. That is true. And I also think there is good legal reason, which I gave yesterday, to think that that was not covered by prior cases.

Senator Hatch. I think that makes the case pretty well. I think it is unfair the way a number of these outside groups have been characterizing your legal decisions. I think some of the inflammatory rhetoric you have dispelled, almost all of it, in your discussions here over the last three days, the misuse of statistics, the unfair methodology, the unfair ads, the unfair rhetoric that has been used all over the country. You know, we are not talking about appointment of a local dogcatcher here. We are talking one of the most important appointments in the history of our country, and we are talking about it on the most important day in a long time, the 200th year bicentennial anniversary of our Constitution. I just suspect that you deserve fair treatment.

I also get a kick out of the fact that Senator Kennedy seemed to say that with regard to the War Powers Act, this was a very important bill, that almost an overwhelming majority of the people in Congress passed it.

Does the fact that a bill is passed by an overwhelming majority of Congress guarantee its constitutionality?

Judge **Bork**. Not in the slightest, Senator.

Senator **Hatch**. You bet it does not. As a matter of fact, Gramm-Rudman is a perfect illustration. A lot of these people voted for Gramm-Rudman that hate the bill. But one aspect of that was stricken down. It was your colleague—I was going to call him Senator Scalia, to misuse the term—but Justice Scalia and others who struck that provision down.

How about the *Chadha* case? The *Chadha* case is a perfect illustration—the one that you brought up here—the famous veto case. In that particular case, when it was stricken, invalidated hundreds—at least probably a hundred—mostly overwhelmingly passed statutes of the Congress of the United States.

Judge **Bork**. It certainly did.

Senator **Hatch**. So the fact that Congress thinks something should be done in an overwhelming fashion does not necessarily mean that it is constitutional.

Judge **Bork**. I think the number of Congressmen voting for a statute has nothing to do with its constitutionality. If it passes by one vote or passes unanimously, it is still a statute and its constitutionality must be judged in the same way.

Senator **Hatch**. The thing that has interested me over the last 3 days is I do not see how anybody, whether you are trained in the law or not, would not be impressed with the way you have handled these very intricate, difficult questions. And you have done it off the top of your head. There is hardly anybody in this country that can do that.

It is difficult for me to understand why the furor about your nomination here. It ought to be automatic, just as your nomination was approved and confirmed to the second most important court in this country, the Circuit Court of Appeals for the District of Columbia.

I wonder why 5 years later all of a sudden you are in a contest here, and I think the people out there are wondering too. If they really look behind it and they see some of these unjust accusations and some of these unjust characterizations, some of these rabid, radical groups out there trying to destroy a reputation that has been built very, very well over many, many years, I think they are going to be a disgusted as I am, and I hope they are getting that point.

Let me go to some specifics, though. We have been talking about a number of civil rights cases and in particular I would like to dwell on the *Katzenbach* v. *Morgan* case, the 1966 case. That is where the Supreme Court upheld a Congressional statute that redefined the words of the Constitution itself as I view it. Is that a fair characterization?

Judge **Bork**. That is exactly what happened, Senator.

Senator **Hatch**. This case involved the constitutional validity of a non-discriminatory literacy test. Earlier, in 1959, the Supreme Court had upheld the validity of non-discriminatory literacy tests and *Lassiter* v. *Northampton* is a perfect illustration.

But Congress then disliked that 1959 decision and therefore it overturned it by statute. Have I been fairly accurate in my characterization?

Judge **Bork**. That is correct. Congress did not overturn all literacy tests. It overturned literacy tests in particular kinds of cases. But they were, as you say, non-discriminatory.

Senator **Hatch**. Some commentators have suggested that your comments in opposition to *Katzenbach* were an effort to reinstate literacy tests for voters.

Judge **Bork**. Absolutely not.

Senator **Hatch**. Let me ask you directly, so nobody has any question about it, was your criticism of the *Katzenbach* case based on your approval of literacy tests?

Judge **Bork**. Absolutely not, Senator. I have, in matter of fact, no view of literacy tests. I have never looked at how they operate. I know some of them are discriminatorily used, but if they are non-discriminatory, I have no view of how they operate and none of my criticisms of any of these cases implies agreement with the statute which was being discussed. None of them.

That is only for a result oriented judge, a judge who wants results. I do not care about that. I care about whether it comes out of the Constitution and whether it is reached by proper constitutional reasoning.

Senator **Hatch**. Other commentators have suggested that your criticism of this case indicates opposition to Congressional attempts to overcome or to remedy past discrimination. Now, do you agree that Congress has the power and should use those powers to prohibit any literacy test that is employed to discriminate on the basis of race?

Judge **Bork**. Of course. Congress has the power and so does the Supreme Court. No literacy test that is used to discriminate can stand scrutiny under the equal protection clause of the 14th amendment. And Congress, in the Voting Rights Act, has gone further under its remedial powers under section 5 of the 14th amendment, to establish prophylactic measures to prevent discrimination from creeping into the voting process.

Senator **Hatch**. If I understand your argument, you said in the *Katzenbach* case that if Congress can undertake its own interpretation of the Constitution by a mere majority vote, then the Constitution is not going to be the anchor holding our nation in place during political crises; is that right?

Judge **Bork**. Well, let me make two points about that, Senator. In 1803 Chief Justice John Marshall decided the case of *Marbury* v. *Madison* in which he for the first time gave an extensive rationale for the power of the judiciary to strike down statutes. Central to his reasoning was the fact that the Constitution would be meaningless if Congress could alter it by a mere statute.

Katzenbach v. *Morgan* is in direct conflict with that historic decision because it did allow Congress to alter a constitutional provision by statute.

The other point I want to make is this, when I wrote suggesting the—not deciding—but suggesting the constitutionality of the President's 1972 bill placing limitations on bussing—not abolishing bussing—placing some limitations on it, I could easily have relied upon *Katzenbach* v. *Morgan* if I were result oriented. In what I wrote I explicitly said, it is a bad decision, I will not rely upon it to get my ends.

Senator HATCH. In other words, you could have used a conservative approach to get what you wanted if you were results oriented——

Judge BORK. That is right.

Senator HATCH.——as they have used a liberal approach by using *Katzenbach* to get whatever liberal result they want.

Judge BORK. Yes. But my views in judging are not liberal or conservative.

The other episode is, of course, my opposition before Senator East's subcommittee to the Human Life Bill which would have overturned *Roe* v. *Wade,* the abortion decision, by statute. And again, I opposed that bill—Senator East's bill—because it rested upon *Katzenback* v. *Morgan*—that is, the power of Congress to change the Constitution by statute—and I said Congress cannot do that.

Now, Congress can participate in changing the Constitution, but it does so by proposing an amendment to the Constitution which must go to the States.

Senator HATCH. Yes, by doing it pursuant to Article V of the Constitution.

Judge BORK. That is right. There is a constitutional procedure for Congress to participate in altering the Constitution, but it is not by passing a statute. It is by proposing a constitutional amendment.

Senator HATCH. Well, it is interesting that we on this 200th anniversary bring up the venerable case of *Marbury* v. *Madison* because basically that established the principle of judicial review and if we go the route of the *Katzenbach* case the way you have discussed it, then it would become the principal of political review rather than judicial review.

Judge BORK. That is right. It would be a revolution in our constitutional structure and would mean the Constitution effectively controls nothing that the Congress wants to do.

Senator HATCH. Anytime Congress wants to overrule it, they can do it, basically, under the *Katzenbach* theory.

Judge BORK. Under *Katzenbach*. *Katzenbach* could be a disaster for minorities. I mean, we all assume that Congress will only use its powers to alter the Constitution in ways that we like. That is by no means true. One cannot be sure of that.

Senator HATCH. I think your position not only is logical, it sounds like the only sound course of constitutional interpretation. Let me just say, Justices Harlan and Stewart dissented from that decision, saying it would be a, quote, "sacrifice of fundamentals in the American constitutional system, the separation between the legislative and judicial function," unquote.

Four years after *Katzenbach* the Court refused to extend the doctrine to uphold the constitutionality of Congress' attempt to lower the voting age from 21 to 18. So they refused to extend *Katzenbach*. That was in *Oregon* v. *Mitchell*. And as a result of that, Congress then did act pursuant to constitutional authority, went to article V and passed an amendment by the appropriate two-thirds vote and went out and got it ratified by three-quarters of the States and today 18-year-olds can vote. That is the appropriate way to resolve these matters. Not by mere statute.

Judge BORK. That is correct.

Senator HATCH. That is a principal position. I might add that in that case, *Oregon* v. *Mitchell*, which said that Congress cannot just go out and by statute use *Katzenbach* to allow 18-year-olds to vote without going through the constitutional procedure that was required. In that case Justices Burger, Stewart, Harlan, Black and Blackmun voted against the *Katzenbach* principal.

Moreover, Justice Powell cited Harlan's *Katzenbach* dissent with approval in the *City of Rome* case. Of course, that was a voting rights case and the very person you are to replace cited those dissents as reasonable.

Now, he too endorsed the view that you have taken of this particular case, so once again you are in excellent company, even though your critics have tried to distort what you have said in this particular area. So those who criticize your view it seems to me it is incumbent upon them to also explain why they are criticizing Justices Harlan, Black, Burger, Stewart, Blackmun and Powell.

So when anybody says you are outside of the mainstream, then I suspect they are saying they are too.

Judge BORK. There seem to be a lot of us out there, outside the mainstream.

Senator HATCH. There seem to be a lot of you top experts out there. That is right.

Let me ask another question. You testified, as you have mentioned, against the Human Life Bill in 1981. That was an attempt by certain Congressmen to redefine the term "person" in the Constitution to include unborn children. You are criticized by some for opposing this right-to-life initiative, albeit a misguided right-to-life initiative.

Now, did you anticipate the consequences of opposing this right-to-life initiative before your testimony in 1981?

Judge BORK. Certainly. I knew that a number of groups who were part of—who were the conservative coalition—if you want to put it that way, would be extremely angry with me for opposing it.

Senator HATCH. They were.

Judge BORK. They were extremely angry with me for suggesting—in fact, I think I had a debate on McNeil/Lehrer once—you were not angry with me, but a lot of people were angry with me.

Senator HATCH. I was on your side on that one.

Judge BORK. They were suggesting that I said the Congress could not constitutionally take away the Supreme Court's jurisdiction in abortion cases. I do not think the exception clause of article III can be used to take away jurisdiction because you do not like the results of a case.

Senator **Hatch**. Had you wanted to, you could have used *Katzenbach* to justify that type of a decision.

Judge **Bork**. Certainly.

Senator **Hatch**. You could have just said that Congress can do this under a Supreme Court decision establishing that Congress by majority vote in these types of cases could do exactly that. But you held to a principle ground that it did not make any difference what is liberal or conservative, but whether it is right judicially. I think that needs to be pointed out.

You pointed out the issue on bussing. You could have easily taken that case to justify overturning some of the bussing decisions in this country.

Judge **Bork**. I certainly could have. I could have also taken the position that Congress has the power to take away the jurisdiction of the Supreme Court under article III, and I refused to take that position.

Senator **Hatch**. The reason I am pointing this out is because you have been accused of being potentially one of those who would use the powers of the judicial branch to bend the law to meet your personal ideological beliefs, and I think these instances are perfect illustrations as to why you stood tall against ideology and did what was right under the law.

Judge **Bork**. That is what I thought I was doing, Senator. I still think so.

Senator **Hatch**. That is what I think you were doing, as well, and I think that the criticisms that you have undergone are baseless and false and I think, basically, scurrilous.

Now, let me just go to a couple of other things. Let's talk about your civil rights record as Solicitor General. We have heard many allegations that you, Judge Bork, are insensitive to civil rights of minorities and women. One distorted charge even alleged that you find no basis for the rule that the federal government may not engage in racial discrimination.

Now, these allegations continue to say that the—one of them said, quote, "the vigor with which you would enforce the *Bolling* v. *Sharpe* case would be colored by your conviction that *Bolling* itself is bad law."

Now, would your enforcement be hindered by an academic concern about the way that decision was reached?

Judge **Bork**. No. A lot of people have had concerns about the way that decision was reached, but it is firmly in place. A lot of expectations, a lot of institutions and so forth have grown up around it. The due process clause has now been repeatedly used as if it had an equal protection component in it. I have no desire and I would not attempt either to overrule *Bolling* v. *Sharpe* or to get the equal protection component out of the due process clause. That is established law.

Senator **Hatch**. That is twice you have made that point and I think it ought to now be made moot on that particular question.

Judge **Bork**. Pardon me, Senator. You know, it occurs to me, somebody suggested to me overnight—and I do not want to take a position on it—but I was asked whether I could think of a way to justify *Bolling* v. *Sharpe* on some other grounds and somebody suggested to me that it might be like my analysis of *Pierce* v. *Society of*

Sisters, which was an attempt to stamp out private schools that taught religion, and I said that could be stopped—the attempt to stamp them out—could be stopped on first amendment grounds.

There was a statute in *Meyer* v. *Nebraska* which prohibited the teaching of students in a foreign language, and I said that statute could be invalidated on first amendment grounds.

It has been suggested to me, and I do not take a position on it either way, that *Bolling* v. *Sharpe,* which struck down the statute segregating students on the basis of race, might also conceivably be justified on first amendment grounds. That is just a theory. I was asked whether I could think of a way one might approach it legitimately. That might be a way. I do not take a position on it.

Senator HATCH. Without reference to any specific cases, is it fair to say that you would feel compelled as Justice of the United States Supreme Court to refuse to enforce any law or policy that denied any citizen the right to vote or the right to equal protection of the laws because of his or her race?

Judge BORK. That is absolutely true, Senator. I have endorsed everything from *Brown* v. *Board of Education* on up. The Voting Rights Act, I have decided a case under and upheld the Voting Rights Act.

Senator HATCH. Let's get into that. Your words, I think, again, completely dispose of the charge that you are insensitive to civil rights. Moreover, I would suggest, again, that your actions speak a lot louder than words; certainly the words of your detractors.

And your actions are even more impressive than your words with respect to civil rights because both as Solicitor General and as a judge on the D.C. Circuit, my research indicates that you have never advocated a position less sympathetic to minority or female plaintiffs than that ultimately adopted by the Supreme Court or Justice Powell.

In other words, you have consistently been just a sympathetic or more sympathetic to civil rights than the current Supreme Court and the justice that you would replace.

Now, I realize that the one exception to this rule would be cases where a federal law or policy was challenged under civil rights law. In such cases, the Solicitor General is compelled to defend the legality of government actions, except in the most egregious cases.

I realize that you may not have analyzed your own record from this standpoint, but outside of your duties as Solicitor General, can you think of a single time where you as Solicitor General or as a judge advocated a position less favorable to minorities or women than that adopted by the Supreme Court and/or Justice Powell?

Judge BORK. There is no such case, Senator. This reminds me of questions asked by Senator DeConcini, and when the Senator is here, I did collect or have collected the briefs—well, I may as well do it now—the briefs I filed in the Supreme Court when I was Solicitor General supporting the rights of women, including amicus briefs, where I had more latitude, and I have collected, as well, my substantive decisions on women's and minority rights, and as I said yesterday, in seven out of eight cases I held for the women or the minority.

Now, Senator Humphrey mentioned yesterday that he had a case I did not have on here, which was age discrimination. But I think since the subject that was raised by Senator DeConcini was women and minority rights, I have not included the age discrimination case on this. But I would like to submit those for the record, these compilations of my briefs and my opinions.

The **Chairman**. Without objection, they will be put in the record.

[Material follows:]

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK SUPPORTED THE RIGHTS OF MINORITIES

1. Runyon v. McCrary, 427 U.S. 160 (1976), which affirmed that Section 1981 applied to racially discriminatory private contracts. (Amicus)

2. Lau v. Nichols, 414 U.S. 563 (1974), which ruled that Title VI and possibly the 14th Amendment reached actions discriminatory in effect, even where the actions were not intentionally discriminatory. (Amicus)

3. Fitzpatrick v. Bitzer, 427 U.S. 445 (1975). The United States, as amicus, successfully argued that the 14th Amendment effected a basic change in the constitutional relationship between state and national governments and that Section 5 of that Amendment gives Congress complete power to remedy violations of that Amendment, including the power to abrogate sovereign immunity. (Amicus)

4. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which held that an employee may sue in court under Title VII employment discrimination statute even though the Union had lost on the issue of discrimination in arbitration. (Amicus)

5. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), which made it significantly easier for plaintiffs to prove employment discrimination claims on the basis of a discriminatory "effects" test. (Amicus)

6. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). As in Albemarle, Bork's amicus brief successfully urged the Supreme Court to make it significantly easier for plaintiffs to prove employment discrimination and receive full relief for such violations.

(Amicus)

7. Beer v. United States, 425 U.S. 130 (1976), Solicitor General Bork argued that although a new reapportionment plan increased minority voting strength, the plan nonetheless had a discriminatory "effect" because other proposed plans would have done more to increase the influence of minority voters. The Supreme Court (per Justice Stewart) (5-3) rejected Bork's expansive interpretation of the Voting Rights Act. Instead, the Court held that the Act was satisfied so long as the new electoral scheme did not further dilute the minority vote.*

8. Washington v. Davis, 426 U.S. 229 (1976), Bork unsuccessfully argued that employment tests having a discriminatory "effect" violated Title VII.

9. Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court rejected Bork's argument that wholly race-neutral seniority systems violated Title VII if they perpetuated the effects of prior discrimination.

10. Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976), Bork argued that a school district which had already faithfully implemented a wide-spread busing plan could be required by a court to achieve a more perfect racial balance. The court disagreed, holding that the lower court's action directly contradicted Supreme Court precedent foreclosing the use of busing to achieve perfect racial balance.

11. United Jewish Organizations v. Carey, 430 U.S. 144 (1977), which held permissible under the 14th and 15th Amendment race-conscious electoral redistricting to enhance minority voting strength.

12. Virginia v. United States, 420 U.S. 901 (1975). In this case Bork successfully urged the Court to hold that the State of Virginia was not entitled to be relieved of the special burdens imposed by Section 5 of the Voting Rights Act.

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK SUPPORTED THE RIGHTS OF WOMEN

1. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Bork's amicus brief argued that employment discrimination based on pregnancy violated Title VII of the Civil Rights Act of 1964. Six Justices rejected this argument. In 1978, Congress adopted Bork's position when it amended Title VII to prohibit discrimination on the basis of pregnancy.
(Amicus)

2. Vorchheimer v. Philadelphia, 430 U.S. 703 (1977), where the United States as amicus argued that single-sex schools are unconstitutional and illegal if not equivalent in the educational offerings, and said the Court should not reach the question whether such schools are unconstitutional even if educational offerings were equivalent. The Court was equally divided and issued no opinion.
(Amicus)

3. Corning Glass v. Brennan, 417 U.S. 188 (1974), a landmark "Equal Pay Act" case which ruled that men could not be paid more than women for similar jobs on different shifts.

Senator HATCH. Let me just say, on the other hand, can you think of any cases where you have advocated an advance in civil rights that was rejected by the Supreme Court and/or Justice Powell?

Judge BORK. Yes, I can think of one offhand. I think that was the *General Electric* case.

Senator HATCH. *General Electric* v. *Gilbert* case.

Judge BORK. Yes, where the brief argued that employment discrimination based on pregnancy violated title VII of the Civil Rights Act of 1964, and six Justices rejected my argument. But then Congress, in 1978, adopted my position when it amended title VII.

Senator HATCH. Now, is that not interesting. Here is a situation where you are being accused of being insensitive to civil rights where you advocated more than the Supreme Court was willing to do; and then later the Congress adopts your position—I might add with my vote for it, out of my committee. That is interesting.

Congress passed the Pregnancy Discrimination Act in 1976, as I recall, to overturn the Supreme Court's restrictive rating in title VII, and we really adopted the position that you argued in the Court at that time.

Let me look at another example. Would you sketch the issue in the case of *Washington* v. *Davis.* That is a 1976 case where the disparate impact on minorities appeared with regard to written examinations given to job applicants, if you recall that case.

Judge BORK. Well, I am looking for it here. I do not know if it is in my——

Senator HATCH. Let me see if I can help on that. In that case, you contended that the employment test with a discriminatory effect should be unlawful under title VII of the Civil Rights Act of 1964. The Supreme Court decided against your broader reading of the law and in favor of the intent test.

Now, do you recall how Justice Powell voted on that case?

Judge BORK. No, Senator. I cannot say that I do.

Senator HATCH. He disagreed with your broad reading of the civil rights law. Again, you were broader than Mr. Justice Powell was since you advocated as Solicitor General. I would like to emphasize that I do not offer these observations as a commentary on Justice Powell's record. I thought he was a great Justice and a wonderful man. I think we all revere him as a great jurist.

My only point is that it flies in the face of the short-sighted and, I think, misleading effort to resort to labels to characterize your work with regard to civil rights. It again adds to my position and my case that I think we are making here that you have been equal to or more than an advocate in civil rights than your predecessor, assuming you are confirmed to this position.

Judge BORK. Well, Senator Hatch, actually, I do not know where these charges that I would not decide cases in favor of minorities or women come from, because I have done that consistently in both government positions I have held.

Senator HATCH. You sure have. Let me just read the list of a whole bunch of cases. Let me list them at one time, and let me mention them all together.

In *Beer* v. *U.S.* in 1976, you contended that a New Orleans reapportionment act violated the Voting Rights Act because it diluted black voting strength.

In *Teamsters* v. *U.S.* in 1977, you argued that a seniority system that perpetuated the effects of discrimination violated title VII.

In *Pasadena* v. *Spangler* in 1975, you contended that even a school district with a busing plan can be ordered to achieve even a better racial balance.

Now, in each of those cases, Justice Powell voted against your effort to advance civil rights.

Judge **Bork**. As you say, Senator, you by no means intend to criticize Justice Powell.

Senator **Hatch**. No, I am not.

Judge **Bork**. I want to make sure everybody understands that because I, too, think he is a great Justice and I, too, know him personally and think he is a great man. He voted against me, but that does not say anything about him.

Senator **Hatch**. I agree with that, and I would just say that I agree with you that Justice Powell has an excellent record. Yet in these five cases I have just named, his actions were actually less sensitive to civil rights than yours, which I think flies in the face of the arguments against you: that you are out of the mainstream; that you are going to upset the balance; that you are going to hurt the Court, et cetera, et cetera. And I think, again, it goes to some of the scurrilous things that have been said about you that I think have no basis whatsoever.

Now, I think people could read those five cases, and they could conclude that Justice Powell was not in tune with the minority needs. Just the opposite is true. You know it and I know it, yet we have heard in one or two isolated quotes, far less authoritatively than those five votes that you did, that have been cited by the opposition to your record on a specific issue.

I might just make one more comparison with the current Justice. In the 19 amicus briefs you filed, friend-of-the-court briefs that you filed as Solicitor General, do you know which Justice who is still on the Court sided with you most often?

Judge **Bork**. I do not, Senator.

Senator **Hatch**. That is not a fair question because you probably did not analyze that.

Judge **Bork**. No. I used to just count whether I won or lost.

Senator **Hatch**. Well, it was actually Justice Brennan.

Judge **Bork**. Is that right?

Senator **Hatch**. That is right. In fact, during your tenure as Solicitor General, you filed 19 friend-of-the-court briefs in civil rights cases other than those where a federal law or policy was challenged. In those 19 cases, you as Solicitor General sided with the minority or female plaintiff 17 times, 17 out of 19 for those who would like to know.

In the two cases where you felt compelled by law to argue against the minority or female, the Supreme Court agreed with you in those arguments.

My time is up. Let me just finish my remarks on this one point. I am sorry, Mr. Chairman.

Thus, 19 out of 19 times, you were at least as sensitive to civil rights as Mr. Justice Powell and the Supreme Court, and in 17 of 19 times, you sided with minorities and women. Now, some have said this means little because you were only defending government policy. Does a Solicitor General have to file amicus or friend-of-the-court briefs?

Judge BORK. Oh, no.

Senator HATCH. Can you explain the amount of discretion that a Solicitor General enjoys with regard to litigating strategies and positions?

Judge BORK. Well, I think the Solicitor General, if he is defending the government, has very little discretion unless the government's position is not intellectually respectable. And I have confessed error in the Supreme Court when that was the case.

But when he is filing an amicus brief, he has more latitude to decide whether or not the position being taken is not just intellectually respectable, but really ought to prevail or come close—you know, I do not mean ought to prevail. It is kind of hard to state a precise calibration of the degree of his latitude, but I think when he is filing an amicus brief he has to be more in sympathy with the position than he does when he is defending a client.

Senator HATCH. My time is up. I have a lot more I would like to go into to show that the accusations against you are not only scurrilous but unfounded. I would also like to, before we are through here, go into your record as a judge because I think people out there need to hear this, because some of the scurrilous, unfounded, ridiculous, I think scandalous and libelous comments made about you need to be dispelled. It is unfortunate that in this forum you really do not have enough time to do it. If we had enough time, we would dispel every doggone one of them.

I think the American people need to know that. It is about time they realize what a tremendous nominee they have, and I hope everybody out there is listening to your comments on the very, very important 200th year anniversary of the Constitution.

Judge BORK. Thank you, Senator.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Judge Bork, this question of your action in firing Arch Cox is a matter I addressed yesterday, and I had no intention of returning to it today. But since I have heard Senator Kennedy, Senator Hatch—even somebody when I walked outside, a member of the media—raise the question of whether it is appropriate to question the illegality of an act that you did in view of the fact that the decision was vacated, let me put that in my own context.

That is the only ruling of any court in connection with your action, and that court decided that your action was illegal. Now, it is a fact that thereafter you were precluded from having an opportunity to appeal that decision because the case had become moot. There was no longer an issue before the court. That was because Archibald Cox had gone back to Harvard; he had been replaced with a new person.

Under those circumstances, Judge Bork, it seems to me that it is very appropriate to point out the illegality of that act. It is the only court—it is true you did not have a chance to appeal it. But I must say to you that I still consider it to be a relevant matter in connection with this hearing.

Judge **Bork**. Well, Senator, I think it is important when we say an illegal act, the illegal act was not illegal, and I will explain that, too. But the illegality, if one existed, was merely that a regulation was not rescinded before the discharge but afterwards. Now, that is not a matter of great moral turpitude because I could have rescinded the regulation at any time.

But the reason I think it was not even technically illegal was that the cases relied upon by the district court judge were cases in which a department head, like an Attorney General, had issued a regulation and then had gone ahead on his own discretion and violated it. In this case, the President gave me an order to discharge Archibald Cox which I think overrides an Attorney General's regulation. That is why I think the action was legal.

Senator **Metzenbaum**. Judge Bork, in the *Nixon* case, the court specifically decided that the President did not have the legal authority to override a regulation put into place by the Attorney General. That is right on point in that particular case.

Judge **Bork**. If I remember that case, Senator, I think what they said was that the President had not attempted to rescind the regulation. That was a jurisdictional argument. Does anybody have the *Nixon* case? Do you have a copy of it?

Senator **Metzenbaum**. Let me read you a quote that my staff just handed me. Said the court,

> It is theoretically possible for the Attorney General to amend or revoke the regulation defining the special prosecutor's authority. So long as this regulation remains in force, the executive branch is bound by it, and, indeed, the United States as the sovereign composed of three branches is bound to respect and to enforce it.

That was the *Nixon* case.

Judge **Bork**. That is right.

Senator **Metzenbaum**. As you remember, in the *Gesell* case, the one that found it to be illegal, they indicated that your subsequent revocation of the regulation and then putting the same regulation back in place three weeks later, they said that was a ruse, a ruse to get around the law. That is their phraseology, not mine.

Judge **Bork**. I know. That is his phraseology. There was no ruse and no evidence of a ruse. If anybody thought up a ruse by which he would replace Archibald Cox with Leon Jaworski, he did not gain anything because Leon Jaworski was a very tough prosecutor.

Senator **Metzenbaum**. I am not taking issue with that.

Judge **Bork**. And let me say one other thing. The argument in *U.S.* v. *Nixon* being advanced by the White House lawyers, by the President's lawyers, was that there was no jurisdiction in the case because Mr. Jaworski was a subordinate official to the President, and the President could give Mr. Jaworski an order. The court responded that as long as the regulation was in force, until the President rescinded the order, there was jurisdiction; but there was no doubt that the President had the power to rescind that charter. In fact, in the letter from the President to me that night, he said, "You are to discharge Mr. Cox and abolish the office of special prosecutor." The abolition of the office was on paper only. The office continued intact. But that was a presidential rescission of the regulation.

Senator **Metzenbaum**. Yes, but the court said in the *Nixon* case, "So long as this regulation is extant, it has the force of law."

Judge **Bork**. So long as it is extant. It was not extant after the President issued that order.

Senator **Metzenbaum**. I think the case also held, as I previously stated, that as long as it was there the President did not have the authority; that he did not have the legal authority to revoke the regulation that was in effect. It was the Attorney General's regulation.

Senator **Thurmond**. Senator Metzenbaum, would you mind providing a copy of that?

Judge **Bork**. The fact is the President has the legal authority by ordering the Attorney General, which is the way it is done. The contrary position means that an Attorney General, by giving somebody a charter, can give him life tenure in the Department of Justice like a professor, and nobody can ever revoke it. That just is not the way this government runs.

Senator **Metzenbaum**. Let us say the Secretary of Commerce or Transportation issues a regulation saying clerical workers will not be fired without 2 weeks' notice. Or the Secretary of Interior issues a regulation saying that whistleblowers—that is, employees who reveal problems—will not be fired without a hearing. Would you say that the President has the authority to order their firing over and above that regulation?

Judge **Bork**. I think the President has the authority to tell the Secretary of Commerce to rescind that regulation and fire.

Senator **Metzenbaum**. Correct. He has that authority to tell the Secretary to rescind the regulation, but not to move in in spite of the regulation and order the firing or denial of the employee's hearing.

Judge **Bork**. Well, that letter from President Nixon, we can debate the legality of this forever, and we are debating the legality of a technical deficiency about which came first, the rescission or the firing. But the letter itself from the President called for the rescission of the regulation by saying abolish the office. So that is what I thought I was doing.

Senator **Metzenbaum**. Let us go on. Let us talk about antitrust, a subject dear to you and dear to me. I must say that your book, "The Antitrust Paradox," which is certainly well written, attempts to make the point that the antitrust laws do not help consumers but that, in fact, they hurt consumers.

Judge **Bork**. Senator, may I respond to that?

Senator **Metzenbaum**. May I just finish?

Judge **Bork**. I am sorry. I thought you were.

Senator **Metzenbaum**. You certainly can, and I would expect you to but let me at least finish.

Judge **Bork**. I am sorry. I thought you were finished.

Senator **Metzenbaum**. I believe that the antitrust laws are nonpartisan. They first came into being when John Sherman, a Republican Senator from my own State, authored the law. They have been in effect for many years. They have been effectively enforced by Republican and Democratic Presidents, and some Republican Presidents were particularly strong in enforcing them.

I believe the effective enforcement of antitrust laws and those antitrust laws are important to the free enterprise system. I think it makes competition work in this country. And I think competition is important to the consumers of this country, the people who go to the store and buy something.

What concerns me is that your position with respect to antitrust is that somehow you are getting something called consumer welfare, and then you have an economic efficiency, and that business will operate better, and somehow it will help the consumers down below.

What bothers me, Judge Bork, are those people in my State and throughout the country who are presently going to a store and buying products at a discount price, at a competitive price, and you would take away the right of those retailers to compete; you would take away the right to keep competition in the country and permit only two to three companies to operate in the whole nation in any particular area.

I am frank to say to you, you can write 460 pages—and they are marvelously written—but the little guy out in Ohio, the little woman who is trying to buy clothes for her children, or the person who wants to buy a bicycle for their kids, they want to buy it at the cheapest possible price. And if we were to follow your theory of the law, they would not be able to do so.

Judge **Bork**. Senator, my entire book, which was published in 1978, is premised on the question of what best serves consumers, what best serves consumer welfare. I have not made a single argument in this book which is not based upon that, and it could be that I have made some arguments which are wrong. I do not think they were wrong when I wrote them. Economics continues to advance. Maybe it will be shown that I am wrong in some respects. I would be very surprised if eventually I am not wrong in some respects because I do not pretend to have come to the end of economic theory. In fact, I am simply an amateur economist. I was then; I am not now.

But everything in that book is an argument from consumer welfare, including the argument that you refer to.

Now, the Supreme Court in the case of restraints upon dealers' competition has adopted part of my thesis since I wrote it. Part of it, not all of it.

Senator **Metzenbaum**. Judge, let us talk about price fixing for a minute, because it is part and parcel of this whole issue.

You believe that the rule that we have had in this country since 1911 which prohibits manufacturers from fixing the retail price of their products should be overturned. You have written, and I quote, that "it should be completely lawful"—that is your phrase, "completely lawful"—"for a manufacturer to fix retail prices."

In other words, if somebody like K-Mart or Toys "R" Us or some discounter is selling children's shoe at $25 and the manufacturer wants them sold at $50, under your theory it would be entirely lawful for the manufacturer to require the retailer to charge the higher price. Now, that is price fixing, pure and simple, and it has been illegal since 1911.

My question to you is, and I know you are profound in this area. I know you studied this area. I know you are an authority on it.

But the people in this country who go and want to buy things at the lowest possible price—and I conducted hearings on how much lower prices were in discount stores than the regular retail price, and it was amazing how little people came in and said what it means to them to be able to buy a little piece of clothing for their child for $6.95 instead of $10, or to buy a wheelbarrow or something for their children at a lower price, and those dollars mean so much.

Tell me in language that you and I can understand, and the American people can understand, how you can argue that price fixing is going to help the consumer?

Judge **Bork**. Well, in the first place, Senator, I think it is essential to distinguish between price fixing between competitors, which is illegal per se, meaning that it cannot be justified on any grounds. I have agreed emphatically with that rule. I think if competitors fix prices they should be punished. They should be sued for treble damages. They should be criminally prosecuted. No doubt about it.

We know why people fix prices; they want to make fatter profits than they should get under competition. We are now shifting to the case that you bring up, which is, say a manufacturer who wants to set the minimum price at which his retailers can sell. In 1911 the *Dr. Miles* case examined the practice and said, we would not let the dealers fix the price themselves and therefore it follows that we should not let the manufacturer fix their price for them.

That argument does not follow. The manufacturer who is fixing the price of the dealers has no reason in this world to want to give them a fatter profit. What he wants them to do, usually, is to compete in a different way; compete by providing information, compete by providing selling services, compete by adding things to the product.

Now, those are not bad activities and if he could own those dealers himself, or if he owned them himself, he would probably sell at the price he fixed and add those services. It is merely a way of doing by contract what he could do if he owned them, and the purpose is to get these people to compete in other ways and not below a certain price.

Now, that may be pro consumer or not. It can be viewed as pro consumer because the manufacturer has no incentive. He is not getting any monopoly profit out of this. The manufacturer has no incentive to do that unless more consumers respond to the particular behavior of dealers that he encourages with that price limitation.

Now, we are into a kind of arcane area——

Senator **Metzenbaum**. But it is not arcane if you are a housewife. I took a survey in Cleveland and it showed that consumers generally save up to a third at discount stores—$450 a year on clothes, nearly $60 a year on electronics, over $40 a year on toys for the children. The Justice Department has found that prior to repeal of Miller-Tydings in 1975, the so-called fair trade laws, prices were nearly 30 percent higher, costing consumers billions of dollars. That was their determination.

As a matter of fact, I have a pretty good ally on this particular issue, and that is, President Reagan spoke out against fair trade laws, saying they hurt consumers by keeping prices up. Do you think that the President was wrong?

Judge **Bork**. It is only fair, Senator. He can oppose me on resale price maintenance. I oppose him on the balanced budget amendment. It seems to me we are even up.

But yes, I do not think the President—the President may be right or wrong, but I do not think he has engaged in this analysis of the economics of the situation. And remember, consumers—if the manufacturer sets a minimum price, consumers get something else. They get the additional services and information.

Senator **Metzenbaum**. What kind of service do you get when you buy a toy for your child or you buy a little dress for the baby?

Judge **Bork**. Manufacturers do not typically find it useful to maintain prices on a product like that. Let me give you an example from real life. There was a time when you could set resale prices on things like television and big appliances and so forth. And when you did that, a store like Marshall Fields in Chicago would carry the full line of the manufacturer's products so they could show you every one, and they would have a knowledgeable person there to explain the differences and so forth, because it paid them to do that.

Then, when resale price maintenance became impossible, a discount store opened up, and that is quite right. Prices dropped. But people would come in and shop at Marshall Fields, look at all the models and get all the information and explanation, write down the model number, and go over to the discount store and buy it. That is fine, except what happens is, Marshall Fields stopped supplying the information, showing all the models and so forth.

Now, that cost consumers, too. Some consumers want the information and want the services and the manufacturer would not put in resale price maintenance unless he thought more consumers would respond to that package of information services and so forth than would respond to a lower price. Because his only interest is in selling as many as he can.

Now, I may be wrong about resale price maintenance. That was the analysis I went through in 1978. There may be new information. As I understand it—I have not been reading the economic literature since—as I understand it, there is new economics about transaction costs, costs of providing information and so forth. It may conceivably alter my view if that is brought to my attention.

I am giving you the line of argument I followed in 1978.

Senator **Metzenbaum**. I understand your line of argument. I am not at all certain that the consumers of the country who would have to pay higher prices if your line of argument were followed could understand it that well.

Judge **Bork**. Well, they might if they understood they were getting additional services and information in exchange. But I do not know that I can provide all of that argument to them today. But let me say this, Senator. If the Congress disagrees with me, all they have to do is say, no resale price maintenance.

Senator **Metzenbaum**. I am glad you said that, because Congress has made it as clear as day that it agrees with the Supreme Court's original decision outlawing resale price fixing. Despite Congress' approval of this decision, you have written that the Supreme Court is free to overturn the law. In fact, I think you wrote that the law was adopted by the Supreme Court and may be properly abandoned by the Court.

But the fact is that the Congress has repealed the anti-trust exemption for fair trade laws. We have cut off funding, led by a Republican member of the Senate. When the Justice Department wanted to go in with an amicus brief on a resale price maintenance case, we have cut off the funding and we have resisted legislative changes in the law.

Under those circumstances, Congress does not want to change the law, but you are the one who apparently wants to change the law through the Supreme Court.

Judge **Bork**. No. The matter is somewhat more complex than that. You may be reading from—I do not know—you may be reading from an article I——

Senator **Metzenbaum**. No. I am reading from "Antitrust Paradox" at page 298.

Judge **Bork**. All right. In about 1978 or 1979, after the *Sylvania* case came down allowing a manufacturer to divide his dealers territories—which is market division, which has the same effect as price fixing—I then wrote—that is, the Supreme Court is somewhat inconsistent in allowing market division of dealers' territories so they cannot compete but not allowing setting the dealers' prices so they cannot compete on price—but be that as it may, the Supreme Court has reached that.

Now, it may be, as I wrote in that article in the "Supreme Court Review"—I think it was, 1978 or 1979—that Congress' repeal of the Miller-Tydings Act and the other act, whose name escapes me at the moment, should be taken as Congress' will that the Court not allow resale price maintenance.

I suggested that in that article. I said, that may be the way it should go. But if that is the case, then the Supreme Court should say, we do not feel free to revise the rule as to resale price maintenances because we think Congress has indicated something with its repeal of the Miller-Tydings Act. But I said they should say that.

Senator **Metzenbaum**. I say, Judge, that in this area your view is very troublesome. You are on the opposite side of where you usually are, because here Congress has passed this law, Congress indicates that they like it, and for a court to change it today would be a rejection of Congress' will. It would be the court making law.

I am concerned, Judge, as to what assurance can you give us that the antitrust laws will be enforced and consumers protected if you should become a member of the Supreme Court?

Judge **Bork**. I can give you every assurance, but it will have to be according to my understanding of what the law means and what the economics means.

Let me go back. In the Sherman Act, which is the act we are talking about, which merely says that restraints of trade are illegal, the Congress rather clearly gave a mandate to the courts to evolve the rules that would protect competition. And Senator Sherman said as much. He said he was really aiming at three classes of cases—in his speech on the floor of the Senate—he was aiming at price fixing between competitors, he was aiming at monopolistic mergers, and he was aiming at predatory conduct by a firm which prevented competitors from competing effectively.

Beyond that he said, the courts will have to evolve the rules to protect consumers from time to time. In the great 1911 cases of *Standard Oil* and *American Tobacco,* written by Chief Justice White, he explicitly said that these statutes are aimed at practices which restrict output. He gave three categories of cases.

Senator **Metzenbaum**. They just told me I have 6 minutes. I do not want to cut you off.

Judge **Bork**. All right. I will cut the thing short, but he said, the statute is aimed at the elementary and indisputable concepts of the common law about hurting competition. And he built into the rule of reason, which he announced in that case, a mechanism for evolving the law as economic understanding progresses. That is quite clear in the legislative history of the Sherman Act. It is quite clear in the great rule of reason cases, *Standard Oil* and *American Tobacco.*

That is all I have said on this subject, that as economic understanding progresses the law just evolve.

Senator **Metzenbaum**. I will come back to that, possibly, later. But I want to talk with you before I conclude today about large corporate mergers. Today we meet here with an unprecedented wave of mergers. And from your writings I get the impression that this greater concentration of power in large corporations does not disturb you.

It disturbs this Senator and I think it disturbs many people in this country. In fact, you have written that such trends are desirable and should be allowed to continue until there are only two companies. That is the "Antitrust Paradox" at page 205 and 206, your book on this subject.

I quote: "We are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is they should not. And therefore, that mergers up to 60 or 70 percent of the market should be permitted."

From this I can only conclude that you would look favorably on a merger which left only two firms in the oil industry or the airline industry, the food industry or any other industry. I think at one point you said that maybe there ought to be three, but it does not matter to me whether it is two or three.

Judge **Bork**. Or four.

Senator **Metzenbaum**. You did say two, but the fact is, you would accept total concentration of economic power in just a couple of companies, maybe three, depending upon which day you were writing, and I am not questioning that point. But the point that bothers me is, competition is so vital to this free enterprise system, as I said earlier, and if we were to follow your line of reasoning there will not be any competition in this country because two companies will not effectively compete against each other. It will sort of be a laissez-faire approach where they will let each do their own thing.

I would like to get your views on that.

Judge **Bork**. Yes, Senator. My views—I was arguing what the evidence showed about competition in concentrated markets at that time. I do not know if there is additional evidence or not. The Congress' statutes have been most imprecise about the size of allowable mergers. Section 7 of the Clayton Act, which is the primary statute dealing with mergers, just says, stop it if it may tend towards a monopoly or to lessen competition. It does not say anything about what market share should be allowed.

If you look at the legislative history, you cannot find out what market share should be allowed. If Congress has an economic theory and says, no fewer than 10, no fewer than 20 firms, that is fine. I will follow that law. If the economic information—and I do not think Section 7 of the Sherman Act——

Senator METZENBAUM. It is what Bork says that concerns me, not what Congress says. Because I am concerned about your position that two or three companies can control a market and that is acceptable in the free enterprise system.

Judge BORK. I do not think two or three companies can control a market unless they conspire.

Senator METZENBAUM. But they can buy up all of their competitors. That is what is happening in America today.

Judge BORK. Well, I think most of those are conglomerate mergers, which are a different problem than a horizontal merger.

But if you have three companies in a market and they are not in collusion, it seems to me that the evidence from various industries, some of which I cite in the book, suggests that you get hard competition. If they conspire, you do not. But the structural theory is that.

Now, I do not think section 7 of the Clayton Act is going to allow me—even if I still believe that after I hear more evidence—is going to allow me to say, get down to three.

Senator METZENBAUM. Judge, you say that if you get three companies. The fact is, you have six major oil companies in the world today and you have a lot of competition besides. But give it a one-cent or two-cent increase in gasoline and they all go up at the same time, and that is just a given.

Now, with three companies and no competition beyond that, or two companies, as you have written, I frankly feel that not only will the American consumer suffer, but I am convinced that the American economic system, the free enterprise system, will suffer, and that is really disturbing to me.

Judge BORK. Well, it may be that you are right, Senator, and maybe the evidence will show up. But let me say something about these companies whose prices all go up at the same time. That happens in the wheat industry. You can have a thousand sellers and their prices will all go up at the same time. That is because they are responding to the same supply and demand conditions.

You know, if I walked by on a street corner and people are standing there and everyone has an umbrella over his head, if it is not raining, I think there is a conspiracy. If it is raining, I think they are all responding to the same conditions. And I think that is what we are talking about here.

Sure all the oil prices go up about the same time. So do the wheat prices. So do the hamburger prices. But let me say this——

Senator METZENBAUM. They tell me my time is up.

Judge BORK. I know, but I want to——

Senator **METZENBAUM**. You and I will have further time to discuss this.

Judge **BORK**. No. I do not want to discuss it anymore. I just want to say one thing. I never suggested that the law would allow just two companies to be left. I may have said I thought two companies would be enough for competition, but I do not think the mood of Congress in passing section 7 of the Clayton Act would allow me to do that.

Senator **METZENBAUM**. I used your quote on that one.

Judge **BORK**. Well, I said I thought two companies——

Senator **METZENBAUM**. Now you are saying, well I suggested that might be all right but I do not really necessarily believe that is the way the law should be.

Judge **BORK**. I also said that after saying that might be all right economically, I said, in deference to the incipiency concept and the mood of Congress in Section 7 of the Clayton Act, I would have to require more competitors than that. That is all.

Senator **METZENBAUM**. We will get back to this later.

Judge **BORK**. All right.

The **CHAIRMAN**. Thank you very much.

Senator **KENNEDY**. Mr. Chairman, just for a moment, Mr. Bork mentioned at the end of my round of questioning that he thought my statement of his views on Presidential power was unfair. I want to emphasize, Mr. Chairman, the issue in these hearings is Mr. Bork's views and the points I made were taken directly from Mr. Bork's own words.

Many of us who are concerned about Mr. Bork's views have questioned him about many controversial statements he has made as a professor and a judge. I have compiled a number of these statements on various issues and I would like to ask that a compilation that he made be made a part of the record for the hearings, and I am sure as the questioning continues Mr. Bork will have further opportunity to explain these and other statements that he has made on the public record during his career. He will have an opportunity to explain these later.

The **CHAIRMAN**. Without objection.

[Statements follow:]

Senator Edward M. Kennedy
September 17, 1987

BORK ON BORK -- THE WORLD ACCORDING TO ROBERT BORK

On respect for precedent:

When asked whether he could identify any Supreme Court doctrines that he regarded as particularly worthy of reconsideration in the 1980's: "Yes I can, but I won't." (District Lawyer 1985)

"The only cure for a Court which oversteps its bounds that I know of is the appointment power." (Senate Judiciary Committee 1982)

"Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with judges of different views." (Society Magazine 1986)

"I have been as severe, as unsparing, as anyone here in my criticisms of the judiciary, and I take back not one word." (Virginia Bar Association 1986)

"[T]he role of precedent in constitutional law is less important than it is in a proper common law or statutory model . . . So if a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn a precedent . . . [A]n originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy." (Federalist Society 1987)

"What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations this will be known, and revered, as 'Bork's wave theory of law reform.' . . . [T]he courts addressed what they regarded as social problems after World War II and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from the academies, in sympathy with the courts politically, began to construct theories to justify what was happening. So was non-originalism born. That wave has become a tsunami and its intellectual and moral excesses are breathtaking . . . [T]hese theorists exhort the courts to unprecedented imperialistic adventures. But the second wave is rising. When I first wrote on original intent in 1971, one of my colleagues at Yale told a young visiting professor not to bother with it because the position was utterly passe. And so indeed it was. But it was more than passe; it was, I think, the future as well. On that side of the issue there are now, to name but a few, Judges Ralph Winter and Frank Easterbrook, Professor Henry Monaghan, and former professor, now Chief Justice of the High Court of American Samoa, Grover Rees. There are many more younger people, often associated with the Federalist Society, who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years, for the second wave to crest, but crest it will and it will sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea." (Philadelphia Society 1987)

"Not to put too fine a point on the matter, what these [non-originalist] scholars are urging, and what an increasing number of students, lawyers, and judges are accepting, is civil disobedience by judges." (Canisius College 1985)

On his judicial philosophy:

"These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here." (Indiana Law Journal 1971)

"I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece." (Conservative Digest 1985).

When asked whether he had "eaten" his Indiana Law Journal article, he responded: "I've eaten the article -- one little sentence." When asked which is the sentence, he responded "I'll never tell." (Federalist Society 1986)

"It's always embarrassing to sit here and say no, I haven't changed anything, because I suppose one should always claim growth. But the fact is no, my views have remained about what they were. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. So when you become a judge, I don't think your viewpoint is likely to change greatly . . . Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it." (District Lawyer 1985)

"Teaching is very much like being a judge and you approach the Constitution in the same way." (Pittsburgh Radio Interview 1986)

"My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. . . By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals. That is why faculty members who don't like much else about Ronald Reagan regard him as a great reformer of legal education." (National Review 1982)

On the public accommodations and employment provisions of the Civil Rights Act of 1964:

"There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . The principle of such legislation is . . . a principle of unsurpassed ugliness." (New Republic 1963)

"There are serious and substantial difficulties connected with the public accommodations and employment provisions. . . The proposed public accommodations and employment practices laws, however, would . . . compel association even where it is not desired." (Chicago Tribune 1964)

On the Supreme Court's decision in Katzenbach v. Morgan (1966), sustaining a section of the Voting Rights Act of 1965 barring literacy tests in English, and Oregon v. Mitchell (19), sustaining a section of the Voting Rights Act of 1970 barring all literacy tests:

"These decisions represent a very bad and, indeed, pernicious constitutional law." (Senate Judiciary Committee 1981)

On the Supreme Court's decision in Shelley v. Kraemer (1948), striking down racially restrictive covenants:

> "Starting with an attempt to justify Shelley on grounds of neutral principles, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society." (Indiana Law Journal 1971)

On the Supreme Court's decision in Harper v. Virginia Board of Elections (1966), striking down the poll tax:

> "[T]hat case, an equal protection case, seemed to me wrongly decided . . . As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Senate Judiciary Committee 1973)

On the Supreme Court's decision in the Bakke Case (1978) upholding affirmative action programs:

> "Justice Powell's middle position -- universities may not use raw racial quotas but may consider race among other factors, in the interest of diversity among the student body has been praised as a statesmanlike solution to an agonizing problem. It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive . . . As politics the argument may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later." (Wall Street Journal 1978)

On the Supreme Court's decision in Reynolds v. Sims (1964), the reapportionment case establishing the one man, one vote standard for election districts:

> "On no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed." (Fortune Magazine 1968)

> "The state legislative reapportionment cases were unsatisfactory, precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument." (Indiana Law Journal 1971)

> "I think one man, one vote was too much of a straight jacket. I do not think there is a theoretical basis for it." (Senate Judiciary Committee 1973)

> "I think this court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause." (United States Information Agency, June 10, 1987)

On the application of the Equal Protection Clause to women:

> "The equal protection clause . . . does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause . . . [C]ases of racial discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the due process clause or the equal protection clause." (Indiana Law Journal 1971)

> "This court winds up legislating in this area with . . . entirely made-up constitutional rights. This is a process that is going on. It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them." (Federalist Society 1982)

> "It speaks volumes about the deterioration of the equal protection concept that it is even possible today to take seriously a challenge to the constitutionality of the male-only draft." (Seventh Circuit 1981)

> "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that . . . was to trivialize the Constitution and to spread it to areas it did not address." (United States Information Agency, June 10, 1987)

On sexual harassment:

> "Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.' Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove . . . [The court's] bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender." (Vinson v. Taylor 1985)

On the Supreme Court's early decisions on the right to privacy in Meyer v. Nebraska (1922) (striking down a state law prohibiting schools from teaching foreign languages) and Pierce v. Society of Sisters (1925) (striking down an anti-Catholic law prohibiting parents from sending their children to private schools):

> "[These cases] were also wrongly decided . . . perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." (Indiana Law Journal 1971)

On the Supreme Court's decision in Skinner v. Oklahoma (1942) striking down a law requiring sterilization of persons convicted of robbery but not embezzlement:

> "[The decision is] improper and as intellectually empty as Griswold v. Connecticut." (Indiana Law Journal 1971)

On the Supreme Court's decision in Griswold v. Connecticut, striking down a state law making it a crime for a married couple to purchase or use contraceptives:

> "Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it . . . Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups . . . Compare the facts in Griswold with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical . . . Unless we can distinguish forms of gratification, the only course for a principled court is to let the majority have its way in both cases." (Indiana Law Journal 1971)

> "The most dramatic examples of noninterpretivist review in our history are Lochner v. New York, Griswold v. Connecticut, and Roe v. Wade, which struck down, respectively, a law providing maximum hours of work for bakers, a law prohibiting the use of contraceptives, and a law severely regulating abortions. In not one of those cases could the result have been reached by interpretation of the Constitution, and these, of course, are only a very small fraction of the cases about which that could be said." (Catholic University 1982)

> "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." (Conservative Digest 1985)

On the Supreme Court's decision in Roe v. Wade (1973), establishing a constitutional right to abortion:

> "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority . . . [It] is in the running for perhaps the worst example of constitutional reasoning I have ever read." (Senate Judiciary Committee 1981)
>
> "The public is coming to understand that decisions like Roe v. Wade rest on no constitutional foundation." (Seventh Circuit 1981)

On the right of a divorced father to visit his minor child:

> "I cannot agree that the Constitution of its own force establishes any such right for a non-custodial parent . . . The [Supreme] Court has never enunciated a substantive right to so tenuous a relationship as visitation by a non-custodial parent. The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them . . . That cannot be said of broken homes and dissolved marriages. In fact to throw substantive and not simply procedural constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage and may thus partially contradict the rationale for what the Supreme Court has been doing in this area." (Franz v. United States 1983)

On the scope of the First Amendment's protection of free speech:

> "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." (Indiana Law Journal 1971)
>
> "But there is no occasion . . . to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are capable of affecting political attitudes, but are not on that account immune from regulation . . . I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law." (University of Michigan 1977)
>
> "My views on the First Amendment [in the 1971 article], I think, have changed only to the extent that in an effort to find a bright line for judges to follow, I said the First Amendment really ought to protect only explicitly political speech. It now strikes me that I purchased a bright line at the expense of a rather more sensible approach. There is a lot of moral and scientific speech which feeds directly into the political process . . . I cannot tell you much more than that there is a spectrum of, I think political speech -- speech about public affairs and public officials -- is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and in the scientific speech, into fiction and so forth. There comes a point at which the speech no longer has any relation to those processes. It is purely a means for self-gratification. When it reaches that level, speech is really no different from any other human activity which produces self-gratification. Where you draw the line there, I cannot state with great precision." (United States Information Agency, June 10, 1987)

On freedom of the press:

> "[It] seems plain that the press has done quite well before the Burger Court. In Pentagon Papers the press was permitted to publish state secrets it knew to have been taken from the government without authorization. In Miami Herald Publishing Co. v. Tornillo the Court struck down a right-of-reply statute that had significant scholarly support. In Cox Broadcasting Corp. v. Cohn a statute prohibiting publication of a rape victim's name was held invalid. In Landmark Communication v. Virginia the State was held disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct."
>
> In some of those cases, it is possible to believe, the press won more than perhaps it ought to have, though not many journalists are heard to express qualms. Surely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake. The New York Times which had delayed publication for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis. And one may doubt that press freedom requires permission to publish a rape victim's name or to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role." (University of Michigan 1977)

On freedom of religion:

> "One of those who spoke at Brookings in response to Bork said Bork essentially adopted Chief Justice William H. Rehnquist's dissent in an Alabama school prayer case in 1985. In that case, Rehnquist said the Founding Fathers intended only to ensure that one religious sect should not be favored over another, not that the government should be entirely neutral toward religion. Another member of the audience, the Rev. Kenneth Dean, pastor of the First Baptist Church of Rochester, N.Y., said he told Bork of his experience as a junior high school teacher in Florida where Bible reading began every school day. Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the classroom, he recalled. Dean said he felt he had treated the student badly by singling him out before his peers. Dean quoted Bork as responding, 'So what? I'm sure he got over it.' Bork, asked about Dean's account, said, 'I can't believe I would have said that.'" (Washington Post, July 28, 1987, referring to a dinner at the Brookings Institution for religious leaders in 1985)

On the Supreme Court's decisions in Brandenburg v. Ohio (1969) and Hess v. Indiana (1973), establishing the clear and present danger test before political speech can be prohibited:

> "There should, therefore, be no constitutional protection for any speech advocating the violation of law." (Indiana Law Journal 1971)
>
> "Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment." (University of Michigan 1977)

On the Holmes and Brandeis dissents in the Gitlow and Abrams cases, proposing the clear and present danger test:

"Actually, in those famous decisions, I thought the majority -- I think it was Sanford, Justice Sanford -- had a rather better logical argument than either Holmes or Brandeis. I don't think the clear and present danger test was an adequate test, no." (United States Information Agency, June 10, 1987)

On Congress and the antitrust law:

"Certain of the antitrust statutes, the Clayton Act and the Robinson-Patman Act, direct the courts' attention to specific suspect business practices. Though these practices are almost entirely beneficial, Congress has indicated its belief that they may -- not always, but under circumstances deliberately left undefined -- injure competition. Is a court that understands the economic theory free, in the face of such a legislative declaration, to reply that, for example, no vertical merger ever harms competition? The issue is not free from doubt, but I think the better answer is yes." (The Antitrust Paradox, p. 409-410, 1978)

"It was, perhaps, never to be expected that Congress would create the details of a rational antitrust policy. As a body, it is capable of deciding questions that require a yes or no, of adopting correct broad general principles, or of writing codes reflecting detailed compromises; but whatever the merits of individual members, Congress as a whole is institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of rational antitrust policy requires." (The Antitrust Paradox, p. 412, 1978)

"[I]f everything said by the proponents of multiple goals, of political goals, of the antitrust laws, if all of that were true, it would not matter . . . if Congressmen explicitly said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. (Bar Association of the City of New York 1986)

On horizontal mergers:

"[W]e are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not and, therefore, that mergers up to 60 or 70 percent of the market should be permitted. . . . Partly as a tactical concession to current oligopoly phobia and partly in recognition of Section 7's intended function of tightening the Sherman Act rule, I am willing to weaken that conclusion. Competition in the sense of consumer welfare would be adequately protected and the mandate of Section 7 satisfactorily served if the statute were interpreted as making presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies. In a fragmented market, this would indicate a maximum share attainable by merger of about 40 percent." (The Antitrust Paradox, pp. 221-222, 1978)

On vertical mergers:

"These observations indicate that [v]ertical mergers are merely one means of creating a valuable form of integration and that there is no reason for the law to oppose such mergers." (The Antitrust Paradox, p. 231, 1978)

On vertical price restraint (resale price maintenance):

> "Analysis shows that every vertical restraint should be completely lawful." (The Antitrust Paradox, p. 288, 1978)

> "There is never a price discrimination that injures competition . . . If the legislators tell a judge what to do, of course he has to do it, no matter what his personal views. But the Robinson-Patman Act does not do that. There is a theory that Congress did not mean what it said in the Robinson-Patman Act; that it said protect competition but really meant protect small business. That is the theory that Congress winked at when it enacted the statute. I do not think it is a judge's business to enforce a legislative wink." (Conference Board 1983)

On conglomerate mergers:

> "It seems quite clear that antitrust should never interfere with any conglomerate merger. Like the vertical merger, the conglomerate merger does not put together rivals, and so does not create or increase the ability to restrict output through an increase in market share. Whatever their other virtues or sins, conglomerates do not threaten competition, and they may contribute valuable efficiencies." (The Antitrust Paradox, p. 248, 1978)

On the standing of members of Congress to bring actions in federal courts to challenge unconstitutional acitons by the President:

> "We ought to renounce outright the whole notion of Congressional standing . . . [W]hen federal courts approach the brink of general supervision of the government, as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties." (Barnes v. Kline 1985)

On restrictions by Congress on the CIA:

> "A substantive charter that says what will be prohibited and what will be allowed . . . would seem to be a congressional attempt to control the President's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the president has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area." (American Enterprise Institute 1979)

> "[A charter is] not merely unworkable. I think such a code is indeed unconstitutional." (ABA Workshop 1979)

On the Foreign Intelligence Surveillance Act (1978), requiring court-ordered warrants for wiretapping and electronic surveillance of American citizens in the course of national security investigations:

> "I believe that the plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well . . . [T]he law is very probably a violation of both Articles II and III of the Constitution." (House Judiciary Committee 1978)

On the invasion of Cambodia:

> "President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces . . . The real question in this situation is whether Congress has the Constitutional

authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trepass upon powers the Constitution reposes exclusively in the President." (American Journal of International Law 1971)

On the War Powers Resolution:

"As expiation for Vietnam, we have the War Powers Resolution, an attempt by Congress to share in detailed decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable. But politically the resolution severely handicaps the President in responding to rapidly developing threats to our national interests abroad." (Wall Street Journal 1978)

On Watergate and the firing of Archibald Cox:

"There was a lawsuit about whether the charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked. I regard that as an argument about a 36-hour period. The reason the charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked."

"I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important."

"[T]here was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office."

"The next day after the discharge there was a meeting in my office on Sunday. I brought in Henry Peterson, who was then the head of the Criminal Division of the Department of Justice, and I brought in Mr. Cox's two deputies, Henry Ruth and Phillip Lacovara. At that meeting I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox." (Senate Judiciary Committee 1982)

On court-appointed special prosecutors:

"The question is whether congressional legislation appointing a Special Prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve." (House Judiciary Committee 1973)

On campaign financing reform:

"We have, as atonement for illegalities in fund raising in the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the First Amenment and probably should have held that all of it does." (Wall Street Journal 1978)

The **Chairman**. Would you like to say anything?

Judge **Bork**. No. I would just like to have a copy of the statements.

The **Chairman**. Without objection. It is 10 after 1:00. I think we should recess until 2:30.

Senator **Leahy**. What generally will be the program the rest of the day? I know we are going to have votes, too, on the floor.

The **Chairman**. In a moment we will recess until 2:30 and we will finish today with a second round of every Senator who wishes to have a second round, and we will make a judgment as we go. We will recess until 2:30.

[Whereupon, at 1:10 p.m., the committee recessed to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The **Chairman**. The hearing will come to order.

Judge, I apologize for these constant interruptions with the votes. I am sorry. It does not happen this way in the circuit court, does it? You guys, and women, can call it when you want it, but we cannot.

Our next questioner is Senator Simpson. Senator Simpson.

Senator **Simpson**. Well, Mr. Chairman, here I was here on time. No one was here.

The **Chairman**. I want you to know, Senator Simpson, I was here at 2:30 before you walked in, but you were smart enough to vote first, and then come.

Senator **Simpson**. Oh, I did not. [Laughter.]

The **Chairman**. Or did you miss that vote?

Senator **Simpson**. I sure as hell have not.

The **Chairman**. Oh, you have not voted?

Senator **Simpson**. I came from outside the building, walking, gathering my thoughts. You are going to have to carry on, Mr. Chairman, all by yourself.

The **Chairman**. Okay. Well, Judge——

[Laughter.]

The **Chairman**. Judge, I have a number of questions, but I do not think it is appropriate for me to start, again, since my colleagues are—we are going to do this in some order. But let's you and I talk for just a minute about the schedule here.

I would like very much to not keep you long today. I know you are willing to stay as long as we want, but I just think it is unfair to keep you on well into the evening tonight. But I would like very much to try to finish up tomorrow.

Judge **Bork**. I share your attitude, Mr. Chairman.

The **Chairman**. And I suspect that you might also. So what we will try to do today is—as we get Senator Simpson back here—is try to get three, maybe four more people. The problem I have is that Mr. Shevardnadze is here and is going to brief all Senators, and obviously that is an important matter.

I am not sure, until my colleagues get back, what their wish will be, whether to continue with a questioner while Shevardnadze is here. We will make that judgment when they get back.

But if we went with four more people today, that would leave four for a second round tomorrow, and you do not have to answer now, but I would like you to consider maybe starting a little earlier tomorrow morning, maybe start at 9:30, 9:00 o'clock even, I do not know.

Judge BORK. Mr. Chairman, if there is a chance of finishing tomorrow, I would be glad to start at 9:00 o'clock, 9:30.

The CHAIRMAN. It is my strong desire to finish tomorrow. As the witnesses, all witnesses have—we have had them changing their schedule, and it is my intention now to begin Monday morning with the first witness being the American Bar Association.

Again, it will depend on how long we go here. But as your staff can tell you, when I queried the Senators, those who are strongly for you, and those who are who are not, all of them said they wanted to ask more questions.

So I am not sure that might not dissipate after this second round is over, but I will try not to keep you beyond 5:30 today and it may be we break as early as 4:30. But is that agreeable with you?

Judge BORK. That is very agreeable, Senator.

The CHAIRMAN. What we will do is, rather than you and I, or me carrying on this travelogue here, we will recess until Senator Simpson gets back, and he is a Wyoming cowboy, he has long strides and he ought to be back here, shortly.

So we will recess to the call of the Chair, which I expect will be about 5 to 7 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Simpson.

Senator SIMPSON. Well, Mr. Chairman, I now know where everybody was, and although I did not hear the bell, at least I saw the light, later, after nearly too late, and so I thank you.

Well, I must say before I begin my remarks, that I at least think this is appropriate for me. I want to say, right now, that our Chairman has been ultimately fair, not only in these hearings, but in everything I have done with him in my 9 years in the U.S. Senate. He is very able, very candid, very accommodating, very helpful, and very courteous to me, as a member of the majority, or the minority.

I do not know where all this stuff will go with regard to your present situation. Hang on tight. You have at least had the guts to throw yourself in the public arena to run for the presidency, and that is better than a lot of faint-hearted detractors will ever do in this world, and they will be the ones who will be trying to sully you, and pull you down, and so, more power to you as you grapple with that one.

The CHAIRMAN. Thank you, Senator.

Senator SIMPSON. Now I was interested this morning by members of the panel discussing things with Judge Bork. I still am puzzled how we can rag around that one on the decision, the Court decision on Watergate, when it was vacated, and I do not know how much more you could really milk that one.

A vacated court decision is just that—null, void, repealed, out the window, gone. And that is what was proven to be so. And then I really do not know how, really, we can blame every social ill upon you that has befallen our country in these last years, and I think that that is easily perceived for what it is.

I personally want to tell you, I do not think you were responsible for the Vietnam War. I want to tell you that, and I feel that deeply.

Or every failure of the marketplace. Capitalism's little ups and downs, I am not going to lay at your feet.

So, I think we should kind of keep our eye on the rabbit here, that we are trying to confirm a Supreme Court Justice, and we are doing that, and very seriously so, and I say that on behalf of all of us.

It has been very interesting to me to hear some rather stirring discussions, very academic discussions from various members of the panel.

It is as much of a revelation as almost being back in law school, and hearing the debate of the sharpest kid in the class with the sharpest professor in the class, and I say that on behalf of my colleagues, because on both sides of the aisle, these are some superb lawyers.

So that has been interesting. Some of it has been rather arcane, I might add, I have thought. It is not really going to replace anyone's diet of viewing fare, in my mind, but the American people are hearing and listening, and judging, judging you on how you handle the questions, some very pungent, some very absurd, some very appropriate, some very inappropriate.

What has kind of been interesting to me is how we are judging things you did by how we feel in America now, and not how people felt about America then, and that is so easy to do.

These are different times than they were in 1964, at the time of the Civil Rights Act. Different times than when the debate went on in the Senate.

And the ultimate of different times has been mentioned here two or three times—the extraordinary situation of the removal of the Japanese-Americans to camps in the United States. That has been mentioned here several times.

Today, the House will pass that bill. I am a co-sponsor of that bill, and even though the intimacy of the camp has never been a part of my background, the intimacy of living next to it was, in Cody, Wyoming. One of the largest camps was Heart Mountain relocation center. I was a young man, a boy scout, and went out to visit the boy scout troop with the camp and behind wire were boy scouts, which was rather puzzling to me, who were American citizens, who wore the same scout uniform, had the same merit badges, told the same stories, rich tapestry of stories.

That is where I met Norm Mineta first. He was behind the wire there at Heart Mountain. That was a different time, and that was done by a man who spent a lifetime atoning for it. Earl Warren. He signed the order. He was attorney general of California. And then the Warren Court became the most progressive in the land.

I cannot help but think that that was a goad to him in his years on the bench. Anyway, it happened, and the Supreme Court of the United States embraced it, and I believe you referred to it as one of the most shocking—I cannot recall—anyway, you said that was an extraordinary decision, appalling decision. But nevertheless, it was a decision of the U.S. Supreme Court, and that I think is indicative of the fact that we were at war, and things were happening off our coast. We were told that there were submarines out there sending signals to people on shore who were going to do things to us in America.

You see, all of that escapes us in this process. The full scope of it is not there. And yet, as I say, I am a co-sponsor of that bill. We have things to do, and we will do them. But it is a sensitive issue. It was a sensitive issue in my hometown, because, you know, on the door it would say, "My son has been killed." And then other people would say "we want to open our hearts to these American citizens." It was a very confusing thing for this kid, at the age of thirteen.

But the civil rights legislation. You know, your writings on the civil rights legislation were not one whit different than some of Bill Fulbright's, Sam Ervin's, John Sparkman—vice presidential candidate of the United States of America on the Democratic ticket—saying the same things you were. The same about, you know, this is puzzling, you own a private establishment, are you not able to judge who you will allow in it? We are not talking about race. Everybody says "ah, you are, don't give us that."

So it was interesting, to me, to go back and look at the record of the voting, and especially an amendment from a man that all of us in the Senate refer to as Mr. Constitution. Sam Ervin. A marvelous man. It was my pleasure to know him during his lifetime, and to share a few rich stories with him. That was a delight.

He had an amendment to the civil rights legislation which provided that nothing in the title should be construed as requiring any person to render any personal service to another against his will. Pretty heavy stuff. Twenty-one people voted for that in the U.S. Senate. Some are here.

Sam Ervin had another one about covered establishments. He got 19 votes on that one. Sparkman had an amendment to exempt from coverage eating establishments located within the residence of the owner or proprietor. That was the vice presidential candidate of the United States, I am speaking of. Twenty-five voted for that one.

That is called reality, I think. And not one of these people who were involved, and who sit with us presently in our midst, are any lesser people for anything they did on this.

So what is the test on you, that makes this so impossible as an argument, when here we have men who voted on that issue? All you did was write on it, and a lot of people wrote on it. Democrats, Republicans, conservatives and liberals wrote on it in 1963. Nobody would be writing on it today, but we are not talking about today. That is just the way it is.

Then, of course, I went back and looked at what you have talked about the *Bakke* case, and you get flack of all kinds on that. I have heard that rattling off the walls here, about what you did on affirmative action, and it is an extraordinary attack on you that seems continual in its drum fire about civil rights. You handled that beautifully.

I do not know what more you can do. I mean, while they have been talking, you have been voting with your decisions.

I was interested in the quote from the Congressional Record in 1964 of the Senate debate. This quote.

> Contrary to the allegations of some opponents of this title, there is nothing in it that would give any power to the commission, or to any other court to require hiring, firing, or promotion of employees in order to meet a racial quota, or to achieve a certain racial balance.
>
> Title VII is designed to encourage hiring on the basis of ability, and qualifications, not race nor religion. That bugaboo has been brought up a dozen times. It is nonexistent.

That was Hubert Humphrey that said that. Hubert Humphrey said that about that bill. And then he said, too, is simply what the bill does—as was pointed out so earlier today—is simply to make it illegal, an illegal practice to use race as a factor of denying employment.

It provides that men and women shall be employed "on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens"—the use of that term offensive in itself these days—"but only as citizens of the United States."

Then—and I am quoting again from Hubert Humphrey—

> nothing in the bill or in the amendments requires racial quotas. The bill does not provide that people shall be hired on the basis of being Polish or Scandinavian, or German, or Negro—another phrase that is not used in the vernacular of our day—or members of a particular religious faith.
>
> It provides that employers shall seek and recruit employees on the basis of their talents, their merit, and their qualifications for the job. The employer, not the Government, will establish the standards.

Those are quotations of Hubert Humphrey in the 1964 debate of the Civil Rights law. So I think, you know, really, I do not think we really have to muck around in that much more.

I am sure you have thought a lot about the Indiana Law Journal article. It comes to you in the night, doesn't it? I do not think anybody has ever quoted from the first two paragraphs of it, and I think that is disturbing. Because what you said there, in this article, in the Indiana Law journal—it said:

> A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not only in the work of the courts but in the public.

And then you go on to say-–and I never heard anybody bring this up. "The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots"—you have had a few ranging shots back on the article, and I am sure that is probably why you wrote it, after getting to know you.

"They are more properly viewed as ranging shots, an attempt to establish the necessity for theory, and to take the argument of how constitutional doctrine should be evolved by courts a step or two further." That is what you said.

Nobody has brought that up. And then you said—and this is all on the first page. I have heard page 18 quoted, page 22 quoted, page 30, but I have never heard anything on the first and last page, which it seems to me that most people would get the flavor of a literary piece, or a law review article.

And you went on to say, quote:

> The style is informal since these remarks were originally lectures, and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced, and thorough presentation, for that would result in a book.

Unquote.

And then it goes on to say that the article was delivered in the spring of 1971 by Professor Bork as part of the Addison C. Harris lecture series at the University of Indiana School of Law.

At the end of the article you made another statement. One sentence. "These remarks are intended to be tentative and exploratory."

Now, I do not think we can work the rubric of the ages around that kind of thing. It is a good provocative piece. You found that out.

Did you ever stop to think—at least it came to me—that you know what could be really chilling in this country, especially for candidates for the judiciary, or young lawyers, or judges, or law review editors flapping their wings? You know what could really be chilling? If people dug our articles like this 20 or 30 years after you had done them, or ten, and said, "Look at this." That is what they are doing with it, nothing more.

I cannot imagine anything more chilling on the flow of free thought and theorizing, and ideas, than to pick up an article which is just that, and described as that, and hang it around your neck like a lavaliere for the rest of your life.

That is really bizarre, in my mind. So, as we talk about "chilling"—I love that phrase—it depends on where it hurts, and everything is chilling—chilling this and chilling that. Well, that is a pretty good chiller, right there, on some young man who is going to be asked to do a law review article and make it provocative.

That is what happened to Pat Wald. She was asked to do a provocative article on the rights of a child and the family relationship, a child of 12 or 13, and it was a remarkable piece. Well, I tell you: that remarkable lady took the slings and arrows of outrageous fortune on that one.

And so I just wanted to comment on some of those things. Those things means something to me because they are topical. You could talk about the right to privacy, and then for me to learn that it was a law professor's exercise on that contraception case in Connecticut; nothing had ever been brought about it, and then they finally nailed the doctor who was selling such devices, and it went to the Supreme Court. It did not look like that to me when I was practicing law in Cody, Wyoming. I thought it was pretty heavy stuff. But now I see it was kind of a pedantic exercise, kind of something to stretch the wings of professors, or something. And often, I have found in my life that professors sometimes blur the line between divinity and tenure. And that is one of the charges against you.

How do you feel about that one? You know, they think Judge Bork is arrogant. That has been said. How do you respond to that?

Judge BORK. Senator, I never have thought of a way to respond to that, except to say "I do not understand why you say that."

Senator SIMPSON. Why not? Obviously——

Judge BORK. No. I am not speaking to you, Senator. No. I do not know how to disprove a statement like that. People have argued with me, and when they were right—I think the most important thing is to follow your mind and your logic and the evidence where it goes. And sometimes, people argue with you, and you change your mind. I do not know if that is arrogance or not.

Senator **Simpson**. Well, certainly, anyone who has listened to you in these last 2 days has no fault with your mind or your articulate ability and your intelligence. That is extraordinary, and that is very obvious.

But again, those are interesting things as we get into all the stuff of cases and case law and who did this to what, and what the meaning was of the non-unanimous decision written in 1981 or 1982; it is just kind of unique. And then the right to privacy—and I do not know much more to develop on that. I think, hopefully, that has been developed.

As to that case and what you said, I was just interested—you talk about the right to privacy in topical terms—I was startled at a very small clipping, which I have never heard anybody comment on yet, and I throw it out and will move on to my questions.

It was in a kind of a gossip column of one of the local papers in July, during the time of the Oliver North hearing. It was written in a flippant style, and it said something about Oliver North, after long days before the Iran-Contra Committee, can apparently come home now to tapes of this performance. Get this, "No one knows for sure if he is taping all those hours for posterity, but he did buy a VCR last New Year's Eve, from Erol's, in Sterling Park, Virginia, and just 3 weeks ago had a repair technician in to see that the machine was in proper working order." "Interestingly"—I am quoting—"Erol's has no record in its computers that North or his wife is a member of the video rental club, or that he has ever rented a movie there. And to think of all those John Wayne movies he could be watching."

You know, that is funny—but that ain't funny at all.

We talk about the right to privacy. Well, I do not know how many in this room would like to have the newspaper go and check through Erol's or Freddy's Video, and find out what they are checking out down there when you go to get the tape, and you tell them you got one on bird-watching, and it is about a red-headed, double-breasted mattress-thrasher. [Laughter.]

So, if we really are talking about privacy in September of 1987, we ought to be paying a lot more attention to that little item in the newspaper than anything in the case of *Griswold*. That is my humble and earnestly-held opinion.

God, I have been waiting a long time to drop that one. But really, that is very perplexing. I do not know how it is for the rest of my fellow lawyers, but it is so for this lawyer. That is one of the most offensive things I can imagine, to know that a reporter can get to go down and go through your videotape rental records, wherever you are in the United States, and not pretend that is not a most offensive kind of conduct.

And I have often said if there had been four FBI agents hanging out in that house, watching Gary Hart, we would be reading about it yet. But they were not; they were members of the fourth estate.

So you know, there is an arrogance all around here, I think. And then, just to be terribly topical, this morning, I see that the gentleman who said that you were an agnostic—where is that lovely little thing—he said——

Judge **Bork**. He is a friend of mine, Senator.

Senator **Simpson**.——I know, I know; that is not the issue. I have got lots of friends who do me in; it is my enemies I have got to watch. [Laughter.]

You said that he used that word—nobody else had used that word—interesting, how interesting—and then he said, "I am comfortable with that." I do not know the gentleman, but I think that is a kind of arrogance.

We do it; I do it; you do it; they do it. So you know, it is the judging that always galls me, the judging of our colleagues by usually those who are not usually untainted.

Oh, the hell with it. That is enough. I have got some questions.

Let me ask you about the death penalty—and I have not heard that come up.

How much time do I have, Joe?

Senator **Grassley**. I asked him about the death penalty.

Senator **Simpson**. Yes. I just want to ask one other thing about that.

I do not know if you put it on a constitutional basis, legality of the death penalty and the constitutional basis. Where do you find that in the Constitution? And maybe you answered Chuck Grassley, but I did not hear it.

Judge **Bork**. Well, yes, we discussed it, I think.

Senator **Simpson**. Did you? Okay.

Judge **Bork**. I argued as Solicitor General—I argued, made an oral argument, and filed briefs as amicus for the United States, in the case that brought the death penalty back after *Furman* v. *Georgia.* And what you find in the Constitution is not only no prohibition of the death penalty, but you find repeated statements in the Constitution that the framers assumed the availability of the death penalty.

For example, the fifth amendment—"No person shall be held to answer for a capital crime, unless on presentment for indictment of a grand jury." Well, a capital crime is the death penalty.

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." If you are put in jeopardy of life, that is the death penalty.

"Nor shall any person be deprived of life, liberty, or property without due process of law." Well, being deprived of life is the death penalty. So the framers tell you that you have to have due process of law, but you can impose the death penalty.

The 14th amendment in 1868: "No State shall deprive any person of life, liberty, or property without due process of law." That is the death penalty again.

I think there is one more reference in the Constitution to the death penalty, Senator, but there are four, right there, that assume the availability of the death penalty so far as the Constitution is concerned.

Senator **Simpson**. Let me ask you another question. It was so interesting to me, especially in the advertising that swirls around America—and I have not found anybody yet who wants to take responsibility for it; I have talked to some groups who I thought were doing it, and they said, "Oh, we are not responsible for that"—so I have not found anybody yet, because it is offensive, and they have all figured that out. But it is interesting how they stick the word "poll tax" out there as if it were, quote, "racisim"—because that is all they have done. And "poll tax" to the layman out there is racist.

But I think it is important to know that that is not what that case had anything to do with at all; isn't that correct?

Judge BORK. That is correct. There was no allegation of racial discrimination of any kind in that case.

Senator SIMPSON. Not one. And if there had been, what would you have done?

Judge BORK. If there had been an allegation, and it was proved, the poll tax would be unconstitutional under the equal protection clause of the 14th amendment.

Senator SIMPSON. Let me ask you—I listened this morning as Senator Metzenbaum reviewed antitrust, and that was a law school seminar for me, because Senator Metzenbaum is our pro on antitrust on this panel, and I know that with your book, the book you wrote on the antitrust paradox, is really probably one of the most respected volumes in that field. And I would like to—in fact, my good friend from Ohio, as I say, who I always take to conference committees with me, at least when I was in the majority—I hope he will take me with him on a few now that I am in the minority—he said, "I am familiar with your views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject." And that is Howard Metzenbaum; he lets you know where he is coming from.

Then he said, "However, as I said at the time Justice O'Connor was up for confirmation"—this was on her—"the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the Judiciary." Others have made those statements, and I think that they are important, and they are known.

But I think that I want to enter into the record, Mr. Chairman, a letter from the law firm of Shearman & Sterling of New York——

Judge BORK. Senator, I know which letter, because I have a copy of it. It is not from the law firm of Shearman & Sterling. It is from a particular member of that firm, and it states the views of 17 past chairmen of the ABA committee on antitrust. But I do not want to get the law firm involved in this.

Senator SIMPSON. No; all right. I agree with that.

The CHAIRMAN. Without objection, the letter will be placed in the record.

[Letter of Mr. James T. Halverson follows:]

CITICORP CENTER
153 EAST 53 STREET
NEW YORK 10022
(212) 483-1000
CABLE: "SSNR"
TELEX: WU 126800
TELEX: WUI 668700

FOUR EMBARCADERO CENTER
SAN FRANCISCO 94111
(415) 991-5252
CABLE: "NUMLATUS, S. F."
TELEX: ITT 470884

5 SOUTH FIGUEROA STREET
37 FLOOR
LOS ANGELES 90017-5430
(213) 239-0300

SHEARMAN & STERLING
53 WALL STREET
NEW YORK 10005
(212) 483-1000
CABLE: "NUMLATUS" TELEX: ITT 421305 WUI 667290
WRITER'S DIRECT DIAL NUMBER
(212) 837-6670

21 AVENUE GEORGE V
75008 PARIS
011-33-14-723-55-40
"NUMLATUS PARIS"
TELEX: 042-630222

ST. HELEN'S, 1 UNDERSHAFT
LONDON EC3A 8HE
011-44-1-283-9100
"NUMLATUS LONDON EC3"
TELEX: 051-884274

39TH FLOOR CITICORP CENTRE
18 WHITFIELD ROAD
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HONG KONG
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CABLE: "NUMLA HK"
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ABU DHABI
UNITED ARAB EMIRATES
011-971-2 324477
CABLE: "NUMLATU"
TELEX: 949 22982EM

August 7, 1987

Mr. Benjamin C. Bradlee
Executive Editor
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Dear Sir:

I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.* We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that The Antitrust Paradox, which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication.

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* The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Cargill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

> (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
> (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.
> R. Bork, The Antitrust Paradox 51 (1978).

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,

James T Halverson

James T. Halverson
Shearman & Sterling
New York, New York
Immediate Past Chairman
Section of Antitrust Law
American Bar Association

On behalf of himself and:

Richard A. Whiting
Steptoe & Johnson
Washington, D.C.
Section Chairman, 1984-85

Richard W. Pogue
Jones, Day, Reavis & Pogue
Cleveland, Ohio
Section Chairman, 1983-84

Carla A. Hills
Weil, Gotshal & Manges
Washington, D.C.
Section Chairman, 1982-83

E. William Barnett
Baker & Botts
Houston, Texas
Section Chairman, 1981-82

Harvey M. Applebaum
Covington & Burling
Washington, D.C.
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Earl E. Pollack
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Chicago, Illinois
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Richard K. Decker
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Kirkland & Ellis
Washington, D.C.
Section Chairman, 1969-70

Miles W. Kirkpatrick
Morgan, Lewis & Bockius
Washington, D.C.
Section Chairman, 1968-69

Senator **Simpson**. So it is from the individual member of the firm, a Mr. James T. Halverson of the firm. He is a past chairman of the section of antitrust law, and he is commenting upon an article by Colman McCarthy, which was rather strident, on July 12th of 1987, stating that your views on antitrust law were, quote, "over the edge," unquote, and anti-consumer.

He writes on his behalf and on behalf of all of the previous chairmen of the section—and I think there were 15—who take issue with that and state that your book is among the most important works written in this field in the past 25 years; referred to by the U.S. Supreme Court and by the U.S. Court of Appeals in 75 decisions since its publication; six of the nine present Justices have cited Judge Bork's work, and that all of them have joined opinions citing it.

I think that is what we want to get into the record from people who are totally knowledgeable in the field, and they say that Mr. McCarthy is also quite wrong in his suggestion that your leaning, writings, are anti-consumer.

So I would like that entered into the record, and I think that is a very important thing for people to know—the full statement.

The **Chairman**. The full statement has been put in the record.

Senator **Simpson**. Yes, the entire letter, please, Mr. Chairman.

Well, I see I have 2 minutes, so Mr. Chairman, I might respectfully request—I do not know what your scheduling is—but that we might have another round. I think there are several of us who would like—and I went too long, admittedly so—it will not be me; I will be asking questions, I promise. But I think it would be good to maybe, hopefully, do that. We could limit the time, perhaps, but I am in my last minute now, and I do have some other question I would have liked to have asked with regard to the Vice President Agnew situation, where the judge made a determination with the Vice President which was different from the one he made with the President, and it has an explanation—a little bit more on that—and a little review of the list. I would like to kind of review the list, where this man has voted so many times to protect minorities and women—and I have the citations, and I do not want to just enter them into the record.

So with that, Mr. Chairman, I thank you for your courtesy.

The **Chairman**. I can assure the Senator that he will have every opportunity, as every Senator will here, to ask any questions he has. The fact is that we have had on both sides of the aisle here a deep interest in continuing to pursue these questions, and every Senator will have a chance to do that. Hopefully, those questions will expire by the end of tomorrow, but we will not cut people off.

Senator DeConcini.

Senator **DeConcini**. Mr. Chairman, thank you very much.

Judge Bork, I had to leave the Appropriations Committee and a few other things—I was chairing a subcommittee there—to go to a markup, and I was not here for all of your answers this morning, although I was here when you responded to Senator Thurmond regarding the equal protection discussion that we had yesterday as it relates to gender and as it relates to racial discrimination, and it was helpful. I must say that after yesterday I was very concerned. I still have a couple of points, if I could get to them, and you may want to clarify anything that you said yesterday.

First, let me just clarify this, Judge. You have stated that you now believe that the fourteenth amendment, the equal protection clause, applies to women. There is no question about that, is there, anymore?

Judge BORK. None; it applies to everybody.

Senator DECONCINI. It applies to everybody. Fine. Okay. So, now that we accept that basis, is it still correct that in the interview that you did just less than 3 months ago, you stated in that interview—and that is this one of July 10th, 1987—are you familiar with that—the United States Information Agency——

Judge BORK. I do not recall it particularly. Maybe there is a copy around here someplace.

Senator DECONCINI. Yes. Can someone give the Judge a copy of this? Okay.

Judge, what bothers me about that is down at the bottom of that page where the paperclip is—and I do not want to take this out of context at all. You stated there, "I do not think the equal protection clause probably should have been kept to things like race and ethnicity."

Judge BORK. Ethnicity, yes.

Senator DECONCINI. Yes. Is that your position?

Judge BORK. No. This goes back to the discussion we had, Senator, about if you are going to do it by groups, then I think the groups they were primarily talking about were racial groups and ethnic groups.

However, if you do not do it by groups, but do it by all persons on a reasonable basis test, which I think is closer to the language of the amendment, then everybody is included. And you see what I was leading up to, which is on the next page.

Senator DECONCINI. Yes. I saw that.

Judge BORK. In that speech I was referring to a case which I frankly thought was a little odd. That was a case about—I forget; it was Idaho, I think—but it had a law that in order to drink 3.2 beer, a man had to be 21, but a woman could be 18 years of age. And I said I thought that was to trivialize the Constitution in a way. They produced six opinions in that case about whether you could have a different drinking age for men and women for 3.2 beer. You would have thought it was the steel seizure case the way they went at it. And I thought, as a matter of fact, the differential drinking age probably is justified, because they have statistics on——

Senator DECONCINI. But you would not—in your rational or reasonable test there, that would not fall into this area, that particular law——

Judge BORK. No, no; you would examine it.

Senator DECONCINI. You would examine it.

Judge BORK. But they had evidence that there was a problem with young men drinking more than there was with young women drinking. Now, I do not know if the evidence was good. You would have to examine it. But they had that evidence.

That law was preferential to women, by the way, Senator.

Senator DECONCINI. Yes, I understand that. It does not make too much difference from the standpoint of what we are talking about.

Judge BORK. No, I know that, but from the standpoint of people saying that I disfavor women, this is a case in which I was——

Senator DECONCINI. I understand.

Judge BORK. They had a lot of evidence about differential drinking patterns and resultant troubles, automobile accidents and so forth, upon which they based that differential.

Senator DECONCINI. But based on that particular case. Let us just go back to that case for a moment. Based on that case, you do not believe that that rational standard or reasonable standard would apply or you do?

Judge BORK. Oh, no, the standard applies. The question is whether there is a reasonable basis for having a differential drinking age of 3 years. Now, maybe there is; maybe there isn't.

Senator DECONCINI. You don't have an opinion on that case?

Judge BORK. No. I would have to look at the evidence in the case. They got into some statistics. Statisticians tell me they didn't handle the statistics very well.

Senator DECONCINI. Let me go to a couple of other cases. Senator Thurmond questioned that your form of reasonable basis analysis would follow where the Supreme Court is now, but without having to group people into categories, if I understand it.

Now, you cited the unanimously decided REED case of 1971 as one of the Supreme Court decisions that you support, is that correct?

Judge BORK. Yes, that's correct.

Senator DECONCINI. Now, what about some of the post-Reed cases like the *Craig* v. *Boren* case where you stated, quote,

> when the Supreme Court decided that having different drinking ages for young men and young women violated the equal protection clause, I thought that was trivializing the Constitution and to spread it to areas it did not address.

Now, taking that case, I have a problem, Judge. Where are you? Justice Powell, Stewart and Stevens, who you've cited here quite a bit, stated and Justice Powell stated in his concurring opinion,

> This gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Now, I am trying to find out where you draw the line in your reasonable test, and I have not found that out, and if you could help me in a few words, it would be helpful. Let me go ahead and give you two more cases and then you can answer all three of them and maybe I can understand it.

Let me give you a couple of cases using what I consider the strict or the higher level of scrutiny struck down. The statutes in question which I am going to give you here are which, under the basis of violating equal protection clause. Yet the dissent in these cases said the rational basis test should have been used and the statute should have been upheld. One is the *Frontiero* v. *Richardson* case, if you are familiar with that case, a 1973 case. Under the statute a serviceman could claim his wife as a dependent for the purpose of obtaining increased living allowance, medical and dental benefits without regard to whether she was, in fact, dependent upon him or any part of her support was dependent upon him. But a service woman may not claim a husband as a dependent for such purposes unless he could prove that half of his support was dependent on her. Now, that case was decided 8 to 1 with Rehnquist writing the dissent.

Now, another case very near to that is *Kaban* v. *Muhammed* 1979. Under that statute, a mother but not the father of an illegimate child could block the adoption of a child by withholding the consent. Now, that was a 4 to 5 decision with Justice Powell writing that.

Now, comparing these two cases and comparing that rational test that was applied to both of these cases, I understand these cases that the dissent used that rational, quote, "reasonable" test which you said is that you used, as I understand it correctly and is your view of the rational basis test different from the dissenters in these two cases or is that what it is, and if it is, I understand it. It doesn't throw you out of the Supreme Court as far as I'm concerned.

What I want to know is where you are.

Judge BORK. I think, Senator, didn't my office and I defend the distinction in *Frontiero*? I think we had to because I think it was a congressional statute we were defending.

Senator DECONCINI. Did your office defend it? You mean, when you were Solicitor?

Judge BORK. Yes.

Senator DECONCINI. I don't know, sir.

Judge BORK. Well, I think maybe we did. But anyway, no——

Senator DECONCINI. I mean, is that relevant?

Judge BORK. No.

Senator DECONCINI. Okay.

Judge BORK. I am just curious.

Senator DECONCINI. Fine. I would be glad to find out.

Judge BORK. No. I can find out. There is a casebook around here.

Senator DECONCINI. I can, too, and I will be glad to find out and let you know.

Judge BORK. It is not really relevant. Well, I can't tell from that whether I did or not. It just gives a date.

Senator DECONCINI. Yes. Well, I am sorry I don't know the answer to that.

Judge BORK. No, it doesn't matter. I shouldn't have raised it.

But, no, you can use heightened scrutiny, intermediate scrutiny and lower scrutiny, or you can use the reasonable basis test.

Senator DECONCINI. Now, let me ask you there, the reasonable basis test doesn't fall in any of those three in your judgement?

Judge BORK. No. It is a different methodology.

Senator DECONCINI. Okay.

Judge BORK. And people who use heightened scrutiny on a particular case may come out different ways. People who use intermediate scrutiny may come out different ways. It is a matter of judgement.

Similarly, people who use the reasonable basis test may come out different ways. You know, it is like original intent. That doesn't give you a mechanical answer. What it does is get you into where you are starting from. That is all.

So the people who use, if they use rational basis or whatever they called it in *Frontiero* and——

Senator DECONCINI. Rational basis is what they used?

Judge BORK. Yes.

Senator DECONCINI. The dissent used the rational basis?

Judge BORK.——*Kaban* or whatever it is, that is probably—you know, you could use the same thing and disagree with them. Now, I think in *Frontiero,* or at least as you described *Kaban*—I don't know the case—the mother but not the father could block the adoption, that doesn't sound on the face of it very reasonable.

But, you know, I shouldn't be saying that because I haven't examined all the facts.

Senator DECONCINI. So I did misunderstand you yesterday. I gathered yesterday that your reasonable standard on cases involving sex discrimination, gender discrimination was similar to the rational basis. That is not the case?

Judge BORK. No. No, it is not the lowest level of scrutiny.

Senator DECONCINI. Okay. Now, is the reasonable standard test a fourth test?

Judge BORK. It is an entirely different methodology.

Senator DECONCINI. We are talking about heightened, intermediate, rational, and now reasonable?

Judge BORK. No, it is an entirely different methodology. Instead of saying what degree of scrutiny is this group entitled to when a statute disadvantages them, it asks, is the differentiation made, the disadvantage made reasonable in light of a valid governmental purpose?

Now, for example, I would think as far as gender is concerned you could get, using a reasonable basis test, results at least as favorable to women as you would using intermediate scrutiny. Because in our society, that is, as it has evolved—and I made a point in one of my decisions, the *Ollman* case, of saying that as society evolves constitutional doctrine will change, but it changes in certain ways.

The kinds of distinctions between men and women that are now allowable because reasonable are almost entirely based upon biological differences and whether the particular——

Senator DECONCINI. Isn't that the same as rational?

Judge BORK. You know, I don't know if it is the same as rational or not, but I am telling you the level at which I apply it.

Are almost entirely based upon biological differences, and there are only a few things in life as to which a biological difference makes a difference.

Senator DECONCINI. Otherwise, you would apply the intermediate or the strict interpretation, or test standard?

Judge BORK. I was trying to get away from the—as Justice Stevens did, and I think I like his position better—I was trying to get away from a methodology under which each group has its own level of scrutiny. Because I remember teaching this stuff in law school, and at one point we had 2½ levels or 3½ levels of scrutiny, and I think it becomes highly artificial.

I think it is better to look at it and say this law makes a distinction, does it make any sense? There was a time in this country when the distinction made in *Frontiero,* that is, we will assume that a woman is a dependent and a man is not, might have made some sense. That was a time when women were not in the marketplace. So that they would have to prove that they were in the marketplace.

That distinction now makes no sense because women are heavily into the marketplace, into careers, and so forth. Hence, the result in *Frontiero* follows.

Senator DECONCINI. But, in *Frontiero*, the facts are that Rehnquist used the rational basis test.

Judge BORK. I think he is probably—as I recall his cases and his testimony here before this committee, I think he is using this multi-tiers of analysis, strict scrutiny—he is using rational basis as the third and lowest level of scrutiny in these tiers. I am not even in that game, and neither is Justice Stevens.

Senator DECONCINI. So, you are not going to take to the Court, if you are confirmed, this three tiers?

Judge BORK. No.

Senator DECONCINI. You are going to take one tier? Both as to gender discrimination cases and race discrimination cases?

Judge BORK. True.

Senator DECONCINI. Is that correct?

Judge BORK. That is correct.

Senator DECONCINI. So you won't apply the strict interpretation to the race discrimination test?

Judge BORK. Well, in race——

Senator DECONCINI. You are going to use reasonableness on everything is what you are saying?

Judge BORK. Yes. But in race, almost no distinction I can think of is reasonable.

Senator DECONCINI. Well, I agree with you vis-a-vis you would use the strict interpretation, or the strict standard.

Judge BORK. Yes.

Senator DECONCINI. But maybe it is semantics.

Okay, let me go to something else, Judge. And that is helpful. Let me say, also, I appreciate the time you have spent with this committee and the forthrightness that you have displayed over the last few days. As we talked before you came here for the actual confirmation hearing, you have been forthcoming and it has made a great deal of difference to me because of the circumstances surrounding your nomination. Not you personally, just because of the circumstances of why we are here.

I am very concerned, Judge Bork, about the activism, charges of and my belief of overactivism on the Court today, and then I scrutinize a number of judges who have sat on the Court who are in the conservative column, and they seem to have some activism, too.

And you certainly have been very critical of the Supreme Court, and some of the opinions you have written and gone into, I want to review one because I want you to explain what activism is to you and does it apply to you when you expound on a case.

I want to turn your attention to *Finzer* v. *Barry*. I want to acknowledge that the Supreme Court has granted certiorari in the case, and that it would be improper for you to comment on any aspect of the issues presented by that case, so I am not going to try to do that.

The question that I do have is how do you go about in determining the framers' intent, and is that activism as you explain that? And let me read you some of the opinion.

In that opinion you state:

> The framers understood that the protection to foreign embassies from insult was one of the central obligations of the law of nations. It is also clear that the Founders who explicitly gave Congress the power to enforce adherence to the standards of the law of nations, which they understood well, saw no incompatibility between the national interest and any guaranteed individual freedom.

I find this to be an interesting quote. It almost is—well, let me say this. When a decision, in your opinion, calls for an analysis of the framers' intent, I want to know how you come to that in lieu of this case.

In this particular decision you did a thorough and long overview of threats to embassies and how governments attempted to protect them. You cited "Blackstone's Commentaries," a letter written by Millard Fillmore in 1851, an article written on the law of the nations in 1863, an incident in Philadelphia in 1902 in which a foreign flag was burned and no one was prosecuted, a U.S. Attorney General's opinion in 1794 that says the law of libel is strengthened in the case of foreign ministers because the law of nations secures a minister from insult, and a 1779 resolution by the Continental Congress urging that the right of ambassadors be protected.

This process seems to me a very laborious process that you went through, and I enjoyed reading it, I must say, for the history involved in it—for you to go through to arrive at your decision that "it is also clear that the founders who explicitly gave Congress the power to enforce adherence to the standards of the law of nations, which they understood well, saw no incompatibility between this national interest and any guaranteed individual freedom."

How would you respond to the statement, when you are a nonactivist and a strict interpretationist, if you want to call it that, or believe in the original intent that we have discussed here for 2 or 3 days—how do you rationalize this long historical basis for your decisions that seem to go far away from the original intent?

Judge BORK. May I have the page number there, Senator?

Senator DECONCINI. The page of the case?

Judge BORK. Yes.

Senator DECONCINI. Just a minute, and I will get it for you. I will get you the case, I think.

Judge BORK. I am trying to understand why you think I departed from the original intent, because I thought that is what I was talking about, for the most part.

Senator DECONCINI. It is on page 1457.

Judge BORK. Let me say one other thing, Senator, about activism and result orientation. As you and I know, but not all our listeners may, "result orientation" is a term of art that we judges use describing some judges methods for judging a case, in which a judge would pay more attention to results than legitimate reasoning.

The people in this case who brought the lawsuit and whom I ruled against were conservatives who wanted to go out and speak and pray, and congregate in front of the Soviet and the Nicaraguan embassies. So when I ruled against them, it was not exactly an action of a conservative activist. And what I did—by the way——

Senator DECONCINI. But on the other hand, it supported the Government's position, that the Government wanted——

Judge BORK. This Congress' position. This Congress passed the statute——

Senator DECONCINI. And who signed the statute? I assume it is the law of the land, right?

Judge BORK. Pardon me?

Senator DECONCINI. It is the law of the land.

Judge BORK. That is right.

Senator DECONCINI. I mean, it is not just the Congress.

Judge BORK. That is right. The President signed the statute. But I mean, this statute was framed——

Senator DECONCINI. All right. Go ahead.

Judge BORK. ——by Congress, and enacted, and the only question was is it constitutional. It prevents people from carrying placards, as I recall, offensive to a foreign embassy within 500 feet, or congregating there. And it has therefore both aspects. One is the aspect of protecting the security of the embassy, and we had affidavits about the difficulty—if we allow people right up close to the embassy, it becomes almost impossible for the police to protect the security of the embassy—and the aspect of insult to the ambassador and his staff. And that is what Congress had in mind.

Those are deeply-rooted in our constitutional tradition. The framers were worried about insult to ambassadors. The Continental Congress, as you pointed out, was worried about it. In fact, one reason—not a major reason, but one reason—I think, for a Constitutional Convention was that before the Constitution they had to rely upon the States to protect ambassadors, and not all the States would do so, and our foreign relations were in kind of a tangle and a mess.

And therefore in article I, section 8, clause 10, Congress is explicitly given the power to define and punish offenses against the law of nations. And offenses to ambassadors or dangers to the security of ambassadors is, of course——

Senator DECONCINI. Well, my concern, Judge Bork, is that in your original intent as I understand it, you look to the circumstances when the amendment was passed, the intent of the framers, and here, I am concerned that here you looked at a letter written by Millard Fillmore in 1851, which is certainly not the time of the amendment——

Judge BORK. Oh, I see, I see.

Senator DECONCINI. ——the time of the amendment; an article written on the law of the nations in 1863; an incident in Philadelphia in 1902. What troubles me here is that if you are truly what you say you are and what I believe you are, more an original intentor than an expansionist, how do you rationalize using this sort of thing to come to original intent? I just do not follow it, that is all. And maybe there is a logical thing, because a couple of them, you do—you go back here to the Continental Congress. That certainly was in the time when this was coming about, 1779. But these others really, I just could not figure it out.

Judge BORK. Well, as you point out, Senator, I went down through all this history about the Continental Congress, about the old writers, like Batelle, on the law of nations, and a complaint by the British government in 1794 because of a riotous assembly before the house of a foreign council, and the opinion of the Attorney General in 1794, and so forth. And I first established that Edmund Randolph and John Jay and so forth, all these people, had these views; and that one of the first things the new Nation did—John Jay subsequently said, "It is of high importance to the peace of America that she observe the law of nations," and the safety and dignity of ambassadors is central to that.

I established that as a matter of original intent. Then, I thought it important to point out that this has been a continuing intellectual tradition in the law, right down to the present day, and that is why I went——

Senator DECONCINI. So you used current history, or more current history, to attempt not to go to the original intent, but to substantiate that that original intent has been followed; is that what you are saying?

Judge BORK. Yes, yes.

Senator DECONCINI. Okay, okay. I understand it now, because to me, that was quite unclear when I read your articles on original intent, which I did not disagree with in total at all, but then I read this opinion and I said, wait a minute, where does he come out.

Judge BORK. Well, I just want to point out, Senator, that Chief Justice John Marshall, in *M'Culloch* v. *Maryland,* not only cited the original meaning of the Constitution, but he brought the practice under the Constitution down to his day to show that that supported his understanding of the original intention.

Senator DECONCINI. We only have a few more minutes here, and then we are going to take a short recess, Judge, and then Senator Grassley, I think, will be up.

Let me go into one more quick area, judicial restraint. It has been stated by some of your supporters that your personal views do not enter into your judicial analysis of the case. In describing the unwelcome heterosexual harassment of a subordinate by a supervisor in *Vinson* v. *Taylor,* you use casual, sometimes what I would term flippant, words. However, in describing the consequences of a consentual homosexual relationship in the *Dronenberg* case, you stated—and I want to read it real quickly—

> Episodes of this sort are certain to deleterious to morale and discipline, to call into question the even-handedness of superiors dealing with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and it must be said, given the powers of military supervisors over their inferiors, to enhance the possibility of homosexual seduction.

Then you go on in that opinion—which I am sure you are familiar with; you did not write it that long ago, and I read it with some interest—you go on at great length, I think it is about nine pages, explaining this.

In this kind of a case, what brought you to expand and put in what appears to be your philosophy? Is that judicial activism? What do you call it?

Judge BORK. No, Senator. Do you mean the discussion of the privacy cases?

Senator DECONCINI. That is right; yes, sir.

Judge BORK. No, Senator, I do not think so. That case was argued almost entirely by the attorneys from the privacy cases. They said that the privacy cases require this result, and they went through all of the cases I discussed, and pressed it. And that is why I felt in fairness, I ought to——

Senator DECONCINI. That is why you answered every one of those cases?

Judge BORK. Yes, I did.

Senator DECONCINI. And the *Vinson* case versus the *Dronenberg* case, do you recall the difference in there that you did not answer? Is that the same reason—they did not cite any privacy in the *Vinson* case?

Judge BORK. The *Vinson* case is not a case in that sense. I mean, I was not on the panel. And this was merely a dissent from a denial of a petition for rehearing en banc. That is, I never had an attorney before me or a brief before me.

Senator DECONCINI. You did not hear any arguments on the *Vinson* case——

Judge BORK. No, no. What I was saying was that the panel opinion was wrong. And as a matter of fact, although people, I think, have mischaracterized what happened in the Supreme Court, the Supreme Court agreed with me on the two important issues in the case.

Senator DECONCINI. So it is fair to say, going back to the *Dronenberg* case, that if in the arguments, the briefs before you, if you were on the Supreme Court, if they did not cite all these privacy cases because of your judicial restraint that you impose on yourself, you would not yourself embark on such discussions?

Judge BORK. Oh, that is entirely true; that is entirely accurate, Senator. I do not view a court's opinion as a place for a law review article.

Senator DECONCINI. You only do that when the cases are specified in the material brought before you; is that what you are saying?

Judge BORK. Yes, except—I should make this qualification. If I answer the cases, and that sort of brings to mind another argument along that line that might have been made, I may say, "But that would not help, either." But I would not do it unless it were germane to the issue at hand, because I do not believe judicial opinions are the place for writing law review articles. If I want to do that, I will write a law review article.

Senator DECONCINI. Well, when I read the *Dronenberg* case, I thought it was a pretty good law review article, quite frankly, on the privacy, and I mean that as a compliment——

Judge BORK. Well, it may be.

Senator DECONCINI. I read it, but I could not understand why it was there.

Judge BORK. Oh, that was entirely what the argument was about.

Senator DECONCINI. Thank you, Mr. Chairman. My time is about up, and I am going to go vote.

The CHAIRMAN. Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge BORK, once again, this starts my second round of questioning, and I think I ought to begin—can you hear me——

Judge **Bork**. Oh, yes.

Senator **Grassley**. I want to once again welcome you back before the committee. I know it is a lot of hard work.

Before I start some questioning, I want to say something that I think needs to be said. This has been touched on before, but I think it bears repeating. For about 12 hours now, you have responded to some of the most intense questioning. You have been under a great deal of scrutiny, and I think that you have done very well indeed.

But the point I want to make is that I do not think in the history of the Senate has a nominee been subject to this kind of questioning; and, never has a judicial nominee like you been so forthcoming in his views. And I hope that I am right when I say that it is my recollection of history that it was not until 1955 that this committee even made it a practice of questioning Supreme Court nominees on their views.

So by my count, that would mean that we probably, in the history of our country up to that point, had 90 Supreme Court Justices serve without such questioning, and many of those 90 served with distinction. They were approved and then took their place on the Court without going through any of the formal questioning process that you are going through.

So I think some perspective is in order. It is to your credit; your full knowledge of the law; what people watching on television ought to see as a powerful intellect. And I do not know how anybody can recall such long ago happenings and writings and events as you do. You have been able to recall quite a bit. I think you need to be complimented for that.

I believe that you have responded, it seems to me, with candor and more patience than any Senator would ever have, and obviously more grace than any Senator would have. So thank you very much.

These inquiries that we have been questioning you about now for these last 12 hours have covered the full scope of your lifetime in the law. This involves more than 100 legal opinions that you have written while you have been on the D.C. Circuit, dozens of law school review articles that you have written, countless speeches that you have made, and your Solicitor General briefs. I could go on and on about what you have drawn on to answer these questions.

Today, we have branched out into some quotes from a 462-page book on antitrust law that you wrote, I believe, back in 1978. And make no mistake about it, most of these questions have been tough; many have been fair. I do not know whether you have former students of yours watching, who would have taken some first-year law school classes from you; however, they may take some personal pleasure in seeing a former professor on the receiving end of the Socratic method.

Two days ago, some people announced that you are a rigid ideologue, with a closed mind on a whole host of legal issues. Just yesterday, some of these same people said that you change your mind too much or that, even worse, you have styled your responses to advance your legal career.

Of course, I guess maybe lawyers—and I am not a lawyer, as you recall—may call this "arguing the alternative." In politics, we call it "having it both ways".

What really needs to be said is almost self-evident—that there is no one in this room, particularly those of us in this body, who could withstand the kind of scrutiny that you have, and I just want to take a few minutes out of my half-hour to commend you for that.

Judge Bork, I do not expect you to recall where I left off yesterday, but that is where I want to take up. You and I were in the process of discussing how it is that the Bill of Rights can evolve. As a follow-up of the evolution of rights, does the fact that the application of the fourth amendment in the 20th century, covering illegal electronic surveillance, or that the first amendment covers the electronic media, tell us that your philosophy allows the Bill of Rights to evolve?

Judge BORK. Yes, it does, Senator. I point out that I wrote extensively about that in the *Ollman* case, and I did so because I was challenged by the dissent, about how can these rules ever change. And I wrote extensively in that case about how rules can evolve in order to protect the original value that the framers wanted to protect, as circumstances and technologies change around us.

Senator GRASSLEY. Could you give me again, then, your general approach to the problem of applying the words of the Constitution to problems that the founders could not have foreseen?

Judge BORK. I think, Senator, one way of putting that is that you look at the founders and the ratifiers, and you look at the text of the Constitution, their words, what it was that was troubling them at the time, why they did this, and you look at the Federalist Papers and the Anti-Federalist Papers and so forth and so on and so on, to get what the public understanding of the time was of what the evil was they wished to avert, what the freedom was they wished to protect. And once you have that, that is your major premise; and then the judge has to supply the minor premise to make sure to ask whether that value, that freedom, is being threatened by some new development in the law or in society or in technology today. And then he makes the old freedom effective today in these new circumstances.

That is going to mean changing legal doctrine, evolving legal doctrine, in order to protect the original value or freedom that the framers and ratifiers of the Constitution wanted to protect.

Senator GRASSLEY. But you have to contrast, then—am I right—the evolution of rights in the Constitution with what you might call the wholesale creation of totally new rights?

Judge BORK. Oh, that is right. The freedom, the value, to be protected by the judge is always the lawmakers, in this case, the ratifiers, of the Constitution, and not the judges' values.

Senator GRASSLEY. Judge Bork, yesterday and again today, I think that you did a very good job of explaining to this committee the very important distinction between the result in a case and the reasoning behind that result. In other words, you may agree with the result as a policy matter, but still quarrel with the reasons supporting that result.

I think this is, at least what I sense as the essence of your judicial conduct. But I think it is important for us to go over that again and again and again.

Can you explain again to the committee why the reasoning of a court is often more important than the mere result?

Judge **Bork**. A judge has power over people, and it is important, since he is unelected and probably unrepresentative of the American people, it is important that he demonstrate by his reasoning that there is law that he is applying and that he is not applying his personal values or principles. And that is why the reasoning in an opinion is crucial. That is the judge's showing of his warrant to do what he does. That is the only thing a judge has to prove to the public that what he does in this case, and why this person loses, and why the rule is as it is, is a legitimate rule and a legitimate result, because he must show his warrant by reasoning from the Constitution or from the statute.

Senator **Grassley**. Is the public following the Court's opinions the rationale behind this?

Judge **Bork**. Yes. I think opinions serve a lot of functions. One, the losing party at least is given a good reason why he or she lost, and that is important, that people to understand that they were heard, and that a reason has been given. It also is a statement to the public that the judge is exercising his or her power legitimately. It is also an essay, in a sense, to other people who may be affected in the future by this area of the law so that they can predict likely developments in the law.

Opinions serve a lot of functions.

Senator **Grassley**. Well, what you say about results on the one hand versus reasoning on the other, to put you in proper perspective, is nothing out of the ordinary, is it?

Judge **Bork**. No. I think judges have been saying that since the beginning of the Republic. And Joseph Story, a great Justice and a professor at Harvard Law School at the time, a man who sat on the Supreme Court with Chief Justice John Marshall, wrote a book on the Constitution, and he very clearly states that this is the way you interpret the Constitution. And I am in utter agreement with Justice Story. That is an old and hallowed tradition in the law.

Senator **Grassley**. In fact, isn't that about the first thing that a new law student learns in law school: the legal reasoning is more important than the mere result?

Judge **Bork**. Well, I think that is true.

Senator **Grassley**. Over the past few weeks, I have seen some so-called analyses of your opinions during the period of time that you have been on the D.C. Circuit. These analyses took a look at what would be a fraction of the cases that you participated in, and concluded that your vote could be predicted based on the status of the parties in the case. In other words, they said the result in your cases is predictable by identifying the plaintiff and the defendant in the case. Public interest groups, they say, always lose; the Government always wins, and on and on and on.

Are you familiar with these studies, done by Ralph Nader's groups and others?

Judge **Bork**. I have to say—and I hope I do not hurt anybody's feelings, Senator, that I did not read those studies. But I am familiar with what they say, and I think that——

Senator **Grassley**. Well, I do not think that matters. I think you can answer my question.

Judge **Bork**. Oh, sure, sure.

Senator **Grassley**. Let me ask you to return a minute, if I could, to your days as a law professor—and you were in one of the best law schools in the United States, Yale University. Let me ask you what you think of the legal scholarship of those analyses, even though you did not read them—you read the newspapers and have some idea of what they are talking about.

Judge **Bork**. Yes, oh, yes, I did. Well, some of them were very strange. I remember one I read about, told about, that classified all my pro-business decisions, and among my pro-business decisions was a decision holding for the labor union against the federal labor relations authority. And they said, well, a labor union is really a business, or something like that, and the categorization really got fairly comical.

And I think the other day—I cannot remember now how it came up—a Senator was pointing out—maybe it was Senator Humphrey, but I am not sure—was pointing out a number of decisions in which I voted for the individual against the corporation or the individual against the Government. There are lots of cases like that.

I should say, Senator, and I intend to put into the record here, sooner or later—I just keep forgetting to do it—if you look at my decisions on race, on women, on labor unions, on individuals versus the Government, you will find no consistency along those lines. You will find no political axis, no political line along which those decisions line up. They go both ways. They line up only according to legal reasoning.

Senator **Grassley**. Now, in my questioning, I am not particularly asking you to defend yourself in the sense of how these analyses have rated you, but I am asking you to look at it as a law school professor from the standpoint of these analyses of you. It seems to me that they probably read the first page, to see who was involved in the case, and then read the last page, to see who won, but conveniently skip over all the reasoning in-between.

Judge **Bork**. Well, they conveniently skip over even who the parties were, because they say, well, he voted for—I remember there was one criticism about a case. He voted for railroads, against the ICC. That shows he is pro-business. What they did not mention was that with the ICC was Alcoa, fighting with the railroads.

Now, Alcoa, I suppose, thinks of itself as a business. I think of it as a business. So, how that gets to be a pro-business decision, I do not know. There was business on both sides of that case.

Senator **Grassley**. Well, let me ask you, if one of your students when you were teaching in law school had handed in a paper like that, what kind of a grade would you have given that kind of legal analysis?

Judge **Bork**. Well, it would not be a passing grade, Senator; it would not be.

Senator **Grassley**. I take it that you are willing to let your spotless record on appeal to speak for the power of the reasoning in the cases that you have participated in?

Judge **Bork**. Yes. I have said what I have said about the judges' function and the importance of the reasoning, and I have a record, a lot of cases with a lot of reasoning, and I would like to be judged on that record.

Senator **Grassley**. Judge Bork, yesterday I thought you clearly distinguished your view of the Supreme Court's rationale in some 14th amendment cases, and you demonstrated again that you fundamentally differ with result-oriented judges, and as I hear it, you are more concerned with legal rationale or thoughtful approach.

But then, I read in this morning's local newspaper, the Washington Post, to find it suggested by your opponents that you are itching to overrule *Bolling* v. *Sharpe* and bring back segregated schools to the District of Columbia.

Judge **Bork**. Oh, that is absolutely preposterous. Nobody is going to pass, in the first place—this Congress is not going to pass a statute segregating the schools in the District of Columbia. If this Congress, in a fit of forgetfulness did, *Bolling* v. *Sharpe* is precedent there is absolutely no reason to overrule; none.

You know, all kinds of expectations and institutions have grown up around it. And this morning, I also mentioned that one might have supported *Bolling* v. *Sharpe* on a first amendment rationale, and perhaps I did not explain that too clearly.

The first amendment protections include associational rights as well as other rights. And a law forbidding associations on grounds of race might—I do not say would; I am not adopting a legal theory; I am just saying we are into an area of arguability here—might be attached on associational right grounds under the first amendment.

But to say that the reasoning of any case seems not adequate is not to say you want to overrule it, and it is certainly not to say you want to bring back the underlying statute. Neither of those is true in my case.

Senator **Grassley**. Well, I hear you. I just wonder if you are as frustrated as I am, though, that people are not taking the trouble to listen to what you are saying.

Judge **Bork**. Well, you know, it is funny; I did see one brief comment in the paper this morning. It said that I denied that I was a racist, though nobody had accused me.

No, nobody had accused me, but Senator Humphrey asked me directly whether I was, and I said no. All of a sudden, I am denying things nobody has brought up. That is ridiculous.

Senator **Grassley**. If I could move on, Judge Bork, I would like to talk about something we have heard a lot about.

The **Chairman**. Excuse me. Judge, where did that appear?

Judge **Bork**. I do not know. Unfortunately, Senator, I get three papers in the morning. But I saw something in the middle of a story. I think that it said—

The **Chairman**. You have a right to be upset if that is true, because I recall specifically your being asked that.

Judge **Bork**. Being asked; I was asked that, yes. As I recall, the story said that I denied it, though I was not accused—which sounds like, "The guilty flee where no man pursueth." But I was asked the question.

The CHAIRMAN. You were, in fact, asked the question.

Senator GRASSLEY. Judge Bork, we have heard a lot about the issue of standing; that is, standing to sue in the federal courts. Again, remembering the fact that I am not a lawyer, I would like to bring up a technical area that I want to explore with you in the doctrine of standing.

I would like to just have you explain your views of this doctrine.

Judge BORK. My views of this doctrine are almost identical with those of the Supreme Court. It is a separation of powers doctrine, and it is a doctrine that is essential to keep the courts from dominating the society. As Lewis Powell has said, standing is about the proper and properly limited role of courts in a democratic society. And that is this reason. And this, oddly enough, I got from a speech—it is in a footnote somewhere, if I cannot find it now—I got from a speech given by Chief Justice John Marshall in Congress. He said courts are there to decide controversies when an individual or an organization has been hurt. And it has to be the individual who has standing and not the issue involved which gives standing. Otherwise, courts could just take on any issue they wanted to and practically run the government.

Standing is a way of making sure that people are really hurt, suffered some injury, before they come in to litigate some large constitutional question or statutory question that they would just like to litigate out of interest.

Now, there are two aspects of standing. One is the article III core of standing. That is, the Court has said that part of standing being a separation of powers question is demanded by the Constitution. But there is an additional aspect of standing which is not demanded by the Constitution, but the courts have required as a prudential matter. Congress is free to give standing in the area where courts would deny it on prudential grounds, but not free to give standing where the court thinks that article III denies standing.

Now, I should say that my opinions on standing, as I have an analysis of them here by a professor you might all know—he points out that my views on standing are almost identical to Lewis Powell's. And indeed, I was following some Lewis Powell opinions. And when I wrote a standing opinion, Justice O'Connor quoted my opinion in her next opinion, so that——

Senator GRASSLEY. What about commenting, on Justice Powell's opinion in *Wirth* v. *Seldin*. I think he wrote the majority opinion there, and that is a famous case in this area that maybe would tell some of the members of the committee that have judged you based on whether or not you ought to take Justice Powell's seat. If you would speak to that, maybe you would show that your reasoning is not much different than his.

Judge BORK. Well, it is entirely the same. In this——

Senator GRASSLEY. Entirely the same?

Judge BORK. Well, as far as I can tell. I mean——

Senator GRASSLEY. Well, yes. I just want to emphasize it; I am not disagreeing with you.

Judge BORK. Well, I cannot say that we would never disagree on a standing case, but the analysis is entirely the same.

Let me say in this opinion I wrote, *Barnes* v. *Kline,* I said I reasoned from Justice Powell's opinion in *Wirth* v. *Seldin,* and I quoted him. He said,

> In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. In both dimensions, standing is founded in concern about the proper and properly limited role of the courts in a democratic society.

Then I wrote, right below that,

> This should make it clear that the jurisdictional requirement of standing keeps courts out of areas that are not properly theirs. It is thus an aspect of democratic theory.

And that is what it does. It is one way of confining courts to the proper area of their authority.

Senator GRASSLEY. I have just one follow-up question on standing, and as you related it to Justice Powell, and then Senator Hatch wanted just a little bit of my time.

We would not, then, based upon what you have just said and what you believe, anticipate any major shifts in the Court's views on this issue if you were to replace Justice Powell?

Judge BORK. No. I agree with the Court's line of rulings in recent years.

Senator GRASSLEY. Okay. Senator Hatch?

Senator HATCH. Well, thank you, Senator, for yielding to me.

Mr. Chairman, I would like to put into the record at this time—and would ask that a committee clerk be asked to hand these out to the members of the media—100 selected law professors favoring the confirmation of Robert H. Bork as Associate Justice of the U.S. Supreme Court. And let me just draw attention to a few of them: Dean Robert Mundheim, of the University of Pennsylvania Law School, General Counsel at the Treasury Department under President Carter; Mary Ann Glendon, Harvard Law Professor, Chief Editor of the International Law Encyclopedia; Bruce Hafen, the Dean of the Brigham Young University School of Law; Albert Blaustein, of Rutgers, President of the Human Rights Advocates International; Henry Manne, Dean, George Mason Law School; Paul Marcus, Dean of the University of Arizona Law School; Steven Frankino, Dean of the Villanova Law School—just to mention a few.

I think that these are eminent professors, eminent names, who support your nomination and want to see you on the Supreme Court, even though some of them may differ with you on individual issues, as would be expected.

So if I could have this distributed, I would appreciate it.

The CHAIRMAN. Without objection.

[Document entitled "100 Selected Law Professors Favoring the Confirmation of Robert H. Bork as an Associate Justice of the Supreme Court" follows:]

100 Selected Law Professors Favoring the Confirmation of Robert H. Bork as an Associate Justice of the United States Supreme Court

Robert Anthony - Professor, George Mason Law School. Director, U.S. Office of Foreign Direct Investments (1972-1973). Chairman, Administrative Conference of the United States (1974-1979). Chair, Public Advisory Board, International Law Institute (since 1984).

Douglas Baird - Professor and Associate Dean, University of Chicago Law School. Former Law Clerk to Judge Shirley Hufstedler, Ninth Circuit Court of Appeals.

Gordon Baldwin - Professor and Chairman, Placement Opportunities Committee, University of Wisconsin Law School. Counselor on International Law, U.S. Department of State (1975-1976). Chairman, Advisory Screening Committee on Law, Fulbright Program (1974-1975).

John Baker - Professor, Indiana University Law School. Former law clerk to Judge Harold Tyler.

Paul Bator - John P. Wilson Professor, University of Chicago Law School. Former law clerk, Justice John Harlan. Associate Dean, Harvard Law School (1971-1975); Deputy Solicitor General and Counsellor, United States Department of Justice (1983-1984).

William Baxter - William B. Scott and Luna Scott Professor, Stanford Law School. Assistant Attorney General for Antitrust, United States Department of Justice (1981-1983). Books include The Political Economy of Antitrust.

Lillian Bevier - Henry L. & Grace Doherty Charitable Foundation Professor, University of Virginia Law School. Editor and Program Consultant, Local Government Attorneys Association of Virginia (1980-1984).

Rhoda Billings - Professor, Wake Forrest Law School. Associate Justice, Supreme Court of North Carolina (1985-1987).

Albert Blaustein - Professor, Rutgers Law School. President, Human Rights Advocates International. International Association of Jewish Lawyers and Jurists (UN Rep.). Attorney, U.S. Commission on Civil Rights (1961-1963). Desegregation Consultant, Philadelphia School District (1963-1964). Books include Constitutions of the Countries of the World.

James Blumstein - Professor, Vanderbilt Law School. Consultant, President's Commission for the Study of Ethical Problems in Medical and Biomedical and Behaviorial Research (1981).

James Bond - Dean and Professor, Puget Sound Law School. President, NC Fund for the Protection of Individual Rights.

Dent Bostic - Professor, Vanderbilt Law School. Dean, Vanderbilt Law School (1980-1985).

Robert Byrn - Professor and Associate Dean, Fordham Law School.

Thomas Campbell - Associate Professor, Stanford Law School. Former law clerk to Justice Byron White. Director, Bureau of Competition, Federal Trade Commission (1981-1983).

William Carney - Charles Howard Candler Professor, Emory Law School.

Gerhard Casper - William B. Graham Professor, University of Chicago Law School. Dean, University of Chicago Law School (1979-1987). Co-Editor, The Supreme Court Review. Books include The Workload of the Supreme Court.

Don Castleman - Professor, Wake Forest Law School. Member, North Carolina General Statutes Commission.

Robert Clark - Professor, Harvard Law School. Books include Corporate Law.

Roger Cramton - Robert S. Stevens Professor, Cornell Law School. Former law clerk to Justice Harold Burton. Chairman of the Administrative Conference of the United States (1970-1972). Assistant Attorney General, Office of Legal Counsel (1972-1973). Dean, Cornell Law School (1973-1980).

David Currie - Harry N. Wyatt Professor, University of Chicago Law School. Former law clerk to Justice John Harlan. Chairman, Illinois Pollution Control Board (1970-1972). Books include The Constitution on the Supreme Court: The First Hundred Years.

Richard Day - Professor, University of South Carolina Law School. Dean of the University of South Carolina Law School (1977-1980).

Rodolphe de Seife - Professor, Northern Illinois Law School. Director, West Virginia Legal Resource Center (1973-1975). Translator of China Comes of Age.

Robert Destro - Assistant Professor, Catholic University Law School. General Counsel, Catholic League for Religious and Civil Rights (1977-1982). Member, U.S. Commission on Civil Rights.

Richard Duncan - Professor, Nebraska Law School. Chair, NE Advisory Committee, U.S. Commission on Civil Rights.

Gerald Dunne - Professor, St. Louis University Law School. Vice President, Federal Reserve Bank of St. Louis (1967-1973). Books include Justice Joseph Story and the Rise of the Supreme Court; Hugo Black and the Judicial Revolution. Recipient, Scribes Most Meritorius Book Award.

John Dunsford - McDonnell Professor of Justice in American Society, St. Louis University Law School. Books include Constitutional Freedom and the Law (with Dorsey). President, National Academy of Arbitrators (1984-1985).

Robert Ellickson - Robert E. Paradise Professor of Natural Resources Law, Stanford Law School.

James Ely - Professor, Vanderbilt Law School. Senior Resident Associate, Vanderbilt Institute for Public Policy Studies.

Richard Epstein - James Parker Hall Professor and Editor, Journal of Legal Studies, University of Chicago Law School. Author of Takings.

Steven Frankino - Dean, Villanova Law School. Former Dean at Catholic University Law School and at Creighton Law School.

Gerard Gilbride - Professor, Brooklyn Law School. Assistant Dean, Brooklyn Law School (1955-1978).

Mary Ann Glendon - Professor, Harvard Law School. Chief Editor, International Encyclopedia of Comparative Law. Vice President, International Society on Family Law. Books include State, Law, and Family.

Joseph Grano - Distinguished Professor, Wayne State Law School. Reporter, Committee on Michigan Rules of Criminal Procedure.

Bruce Hafen - Dean and Professor, Brigham Young University Law School. President, Ricks College (1978-1985).

Paul Haskell - Graham Kenan Professor, University of North Carolina.

Clark Havighurst - William Neal Reynolds Professor, Duke Law School. Adjunct Scholar in Law and Health Policy, American Enterprise Institute.

Robert Hillman - Professor, University of California at Davis. General Counsel, Star-Kist Foods (1979-1981).

Maurice Holland - Dean and Professor, Oregon Law School.

Henry Mark Holzer - Professor, Brooklyn Law School. Associate Dean, Brooklyn Law School (1984-1986).

Donald Horowitz - Professor, Duke Law School. Fellow, Woodrow Wilson International Center for Scholars (1971-1972); Resident Associate, Brookings Institute (1972-1975); Senior Fellow, Smithsonian Institute (1975-1981). Books include The Courts and Social Policy.

Robert Hudec - Professor, University of Minnesota Law School. Former law clerk to Justice Potter Stewart. Assistant General Counsel in the Office of the U.S. Trade Representative during the Johnson Administration (1963-1965).

James Huffman - Professor, and Director of the Natural Resources Law Institute, Lewis and Clark Law School. Chair, Oregon Advisory Committee, U.S. Commission on Human Rights.

Jerold H. Israel - Alene and Allan F. Smith Professor at the University of Michigan Law School. Former law clerk to Justice Potter Stewart. Governor's Commission on Criminal Investigation (1969); Reporter, Commission to Revise Uniform Rules of Criminal Procedure (1971-1974).

James Jacobs - Professor and Director, Center for Research in Crime and Justice, New York University Law School. Books include New Perspectives on Prisons and Imprisonment.

John Jeffries - Professor, University of Virginia Law School. Former law clerk to Justice Lewis Powell. Author of The Trial of John W. Hinckley, Jr.

Stanley Johanson - Bryant Smith Professor of Law, University of Texas Law School. Board of Trustees, Law School Admission Council.

Douglas Kahn - Paul G. Kauper Professor, University of Michigan Law School. Books include Basic Corporate Taxation.

Thomas Kauper - Henry M. Butzel Professor, University of Michigan Law School. Former law clerk to Justice Potter Stewart. Assistant Attorney General for Antitrust, United States Department of Justice (1972-1976). Executive Director, National Institute for Consumer Justice (1971-1972).

Edmund Kitch - Joseph M. Hartfield Professor, University of Virginia Law School. Special Assistant to the Solicitor General (1973-1974).

Douglas Kmiec - Professor and Director, Thomas J. White Center on Law and Government, Notre Dame Law School. Deputy Assistant Attorney General, Office of Legal Counsel (1986-1987). Founder and Editor, Journal of Law, Ethics and Public Policy.

Donald Large - Professor, Lewis & Clark Law School. Books include Special Problems of the Deaf.

Saul Levmore - Professor, University of Virginia Law School. Former Dean, Jonathan Edwards College, Yale University.

Lee Liberman - Assistant Professor, George Mason University School of Law. Former law clerk to Justice Antonia Scalia; former Associate Deputy Attorney General, United States Department of Justice.

Edward Levi - Glen A. Lloyd Distinguished Service Professor Emeritus, University of Chicago Law School. Attorney General of the United States (1975-1977).

A. Leo Levin - Professor, University of Pennsylvania Law School. Director of the Federal Judicial Center (1977-1987). Executive Director, Commission on Revision of the Federal Court Appellate System (1973-1975).

Wesley Liebeler - Professor, UCLA Law School. Director, Office of Policy Planning, Federal Trade Commission (1974-1975). Assistant Counsel, President's Commission on the Assassination of President Kennedy (1974).

Jonathan Macey - Associate Professor, Emory Law School. Former law clerk to Judge Henry Friendly.

Henry Manne - Dean, George Mason Law School. Board of Governors, Israel Center for Social and Economic Progress. Member, American Hospital Association Medical Malpractice Task Force. Books include The Modern Corporation and Social Responsibility.

Paul Marcus - Dean, University of Arizona Law School. Books include The Prosecution and Defense of Conspiracy Cases.

James McCall - Professor, Hastings Law School. Deputy Attorney General, State of California (1969-1971). Member, California Attorney General's Consumer Protection Task Force (1972-1978).

Fred McChesney - Associate Professor, Emory Law School. Associate Director, Federal Trade Commission (1981-1983).

Michael McConnell - Assistant Professor, University of Chicago Law School. Former law clerk to Justice William Brennan. Assistant to the Solicitor General, United States Department of Justice (1983-1985).

John Meehan - Professor and Chairman of the Admissions Committee, Brooklyn Law School.

Bernard Meltzer - Distinguished Service Professor Emeritus, University of Chicago Law School. Trial Counsel, Nuremberg War Trials (1945-1946). Books include Labor Law: Cases, Materials, and Problems.

Wallace Mendelson - Professor of Public Law, University of Texas. Former law clerk to Justice Felix Frankfurter. Editor-in-Chief, Report of the U.S. Commission on Civil Rights (1961). Editor, Felix Frankfurter, a Tribute.

Henry P. Monaghan - Thomas M. Macioce Professor, Columbia Law School.

Thomas Morgan - Distinguished Professor, Emory Law School. Dean, Emory Law School (1980-1985). Consultant, Administrative Conference of the United States (1975-1980).

Robert Mundheim - Dean and University Professor, University of Pennsylvania Law School. General Counsel of the Treasury Department under President Carter. Director, Securities Investors Protection Program (1977-1980).

Robert Nagel - Professor, Colorado Law School. Deputy Attorney General, Pennsylvania Department of Justice (1972-1975).

Phil Neal - Harry A. Bigelow Professor Emeritus, University of Chicago Law School. Dean, University of Chicago Law School (1963-1975). Partner, Friedman and Konen, Chicago.

Daniel Polsby - Professor and Chairman of the Admissions Committee, Northwestern Law School.

William Powers - Judge Benjamin Harrison Powell Professor and Associate Dean, University of Texas Law School.

George Priest - John M. Olin Professor, Yale Law School.

William Reppy - Professor, Duke Law School. Former law clerk to Justice William O. Douglas. Books include Community Property in the United States.

Robert Riggs - Professor, Brigham Young University Law School. Board of Trustees, Utah Legal Services Corporation (1978-1982). Books include US/UN: Foreign Policy and International Organization.

Charles Rogovin - Professor, Temple Law School. Administrator, Law Enforcement Assistance Administration (1969-1970). President, Polce Foundation (1970-1972). Consultant, Senate Watergate Committee (1973-1974). Commissioner, President's Commission on Organized Crime (1983-1987).

Eugene Rostow - Sterling Professor of Law and Public Affairs Emeritus, Yale Law School. Former Dean, Yale Law School (1955-1965). Undersecretary of State for Political Affairs under President Lyndon Johnson. Director, U.S. Arms Control and Disarmament Agency (1981-1983).

Ronald Rotunda - Professor, University of Illinois Law School. Assistant Majority Counsel to the Senate Watergate Committee. (1973-1974). Co-author of the Treatise on Constitutional Law.

Terrance Sandalow - Dean, University of Michigan Law School (1978-1987). Former law clerk to Justice Harold Burton and to Justice Potter Stewart.

David Schoenbrod - Professor, New York Law School. Marshall Scholar. Attorney, Natural Resources Defense Council (1972-1979). Co-author, Electric Power and the Environment. Board of Advisors, Center for Governmental Responsibility (1976-1981).

Hal Scott - Professor, Harvard Law School. Former law clerk to Justice Byron White. President, International Academy of Consumer & Commercial Law.

Robert Scott - Lewis Powell Professor, University of Virginia Law School. Attorney General's Task Force on Welfare Reform (1973-1974).

Michael Sharlot - Wright C. Morrow Professor of Criminal Law, and Associate Dean, University of Texas Law School. General Counsel of the Peace Corps under President Johnson.

John Slain - Professor, New York University Law School. Board of Directors, Indianapolis Legal Services Organization (1966-1971). Board of Directors, Ohio Catholic Charities (1975-1977).

Michael Smith - Professor, University of California at Berkeley Law School. Former law clerk to Chief Justice Earl Warren.

Bertel Sparks - Professor, Duke Law School. Consultant to the Senate Subcommittee on Constitutional Rights (1966). National Conference of Bar Examiners (since 1970).

Paul Stephan - Professor, University of Virginia Law School. Former law clerk to Justice Lewis Powell. Director, Forum for U.S.-Soviet Dialogue.

Stewart Sterk - Professor, Cardozo Law School. Former law clerk to Judge Charles Breitel.

Richard Stewart - Byrne Professor, Harvard Law School. Former law clerk to Justice Potter Stewart. Special Counsel, Senate Select Committee on Presidential Campaign Activities (1973). Board of Trustees, Environmental Defense Fund.

Frank Strong - Cary C. Boshamer Distinguished Professor of Law, Emeritus, University of North Carolina Law School. Former Dean, Ohio State Law School. President, Association of American Law Schools (1960).

Jan Ting - Professor, Temple Law School. Author, An American In China. Board of Governors, East-West Center.

David Trager - Dean and Professor, Brooklyn Law School. U.S. Attorney for the Eastern District of New York (1974-1978). Chairman, Mayor's Committee on the Judiciary (since 1982).

Basile Uddo - Professor, Loyola Law School. Board of Directors, Legal Services Corporation.

William Valente - Professor, Villanova Law School. Books include Law in the Schools.

Lynn Wardle - Professor, Brigham Young University Law School. Former law clerk to Judge John J. Sirica. Books include The Abortion Privacy Doctrine.

Olin Wellborn - William Liedthe Professor, University of Texas Law School.

James J. White - Robert A. Sullivan Professor, University of Michigan Law School.

Scott Whitney - Professor, George Mason Law School. Vice President, American Airlines (1959-1964). Advisor to the U.S. Office of Technology Assessment (1972-1977) and to the World Wilderness Congress (1972-1977).

Nicholas Wolfson - Professor, University of Connecticut School of Law. Chairman, ABA Legal Education Committee. Books include The Modern Corporation.

Winton Woods - Professor, University of Arizona Law School. National Endowment for the Humanities (Fellow, 1973). Author of Introduction to Legal Process and Resolution of Dispute.

The **Chairman**. The Senator has about 8 or 10 minutes left.

Senator **Grassley**. Thank you. You are right, Senator.

Judge Bork, this morning Senator DeConcini was questioning you about the *Finzer* v. *Barry* case, and I would like to follow up on that. My reason for following up on that is because I sponsored legislation on that subject last year, along with Senator DeConcini, to repeal the 1938 District of Columbia ordinance barring political protests within 500 feet of a foreign embassy. I opposed this law because I think it is overly broad, and it infringes upon some of our basic civil rights, the first amendment freedoms of speech and assembly. And even worse, Judge, I think it has been a law that has been selectively enforced.

Judge **Bork**. May I say, Senator—because that is a good point—there was no allegation of selective enforcement in *Finzer* v. *Barry*.

Senator **Grassley**. There was not?

Judge **Bork**. No. Nobody attacked the law on grounds of selective enforcement. That would have produced a different case.

Senator **Grassley**. Okay. Well, at this point, because of congressional action last year, we have been promised by the District of Columbia Government that it will consider changing the 500-foot rule. I hope they will come around to favoring the free speech point of view.

Now, last year, you authored this opinion which upheld the constitutionality of the ordinance as challenged by a group of protestors who were arrested in front of the Soviet and Nicaraguan Embassies.

I am not going to ask you to go into the rationale of upholding it, because I think that would be repetitive. But I think I need to say to you that I disagree with you in this case. I think the statute is over-broad. For example—and this is what I really resent as far as the District law is concerned—in 1972, Congress passed a statute that prohibits demonstrations within 100 feet of an embassy. This statute also covers consulates in cities in the United States, and even the United Nations' complex. The 100-foot rule, then, works without any danger—or, let me put it this way—I feel it protects foreign officials adequately.

I am prepared to wait for a decision of the D.C. City Council as they revisit this issue. However, but I would like to assume, if I could, that you would have no problem upholding a local statute that was more in line with the Federal law in this area.

Judge **Bork**. Oh, no. Nothing in this opinion suggests that the protection has to be as much as it is or as little as it is. This opinion merely says that for the reasons given, I think this law is constitutional. But that does not mean you have to have that law. It is for Congress, or in the first instance, the City Council, to decide what law satisfies the requirements of the law of nations. And I do not know that a court has any power to say you have to have a more severe law—not at all. That is a power given to Congress by article I.

Senator **Grassley**. Judge Bork, this morning you cited the Supreme Court's *Chadha* case, which struck down a version of the legislative veto. My interest in the legislative veto has been long-term in the 12 years I have been in Congress—making greater use of it, preserving it. I do not like the *Chadha* case. I have to live with it. Senator Levin and others and I have ways we feel that we can make the legislative veto constitutional.

We feel that the legislative veto is vital to Congress' ability to put the brakes on a runaway and faceless bureaucracy. And sometimes, as you deal with in the courts, you know that bureaucracy can run over the rights of people.

I am not looking for an advisory opinion now, Judge. But what if Congress would enact a legislative veto that provides (1) bicameral passage and (2) presentment to the President? Isn't that about all that *Chadha* would require for a legislative veto to be constitutional?

Judge **Bork**. Offhand, I really should not talk about that, Senator, because I might get a case like that on either court I am on. But certainly, those are two elements that *Chadha* discusses—lack of presentment and the lack of bicameral legislation. I forget whether there are additional ones, and I do not want to pass on the constitutionality of what you propose here.

Senator **Grassley**. Okay. Well, let us just say from your perspective, serving on the D.C. Circuit, you have occasion to review many decisions by regulatory agencies. So I am wondering if that perspective—seeing what agencies do, how they do it, how some of what they do is contrary to the intent of Congress—because I think the courts give great deference to that—does that give you any philosophical position on the concept of legislative veto, if you could speak generally to that point?

Judge **Bork**. Well, I think all I can say is that the subjects of the delegation of discretion or power to agencies and the subject of the legislative veto are closely connected philosophically or politically or however you want to put it, so that I understand the motivation for the legislative veto, but I would also think that narrower or more structured delegations to bureaucracies, to agencies, might also address the problem you are concerned about.

Senator **Grassley**. Well, what about considering the 20th century problem of legislating in a lot of very technical areas in which, maybe the Congress does not have enough expertise. It just seems to me that the courts ought to take into consideration that the times demand some delegation—by the Congress to agencies—of the details of statues, while still allowing for the retention, by Congress, of some control over this process?

Judge **Bork**. Yes. Of course, the more Congress lays down in the delegation the criteria to be followed by the agency, the easier it is for a court to review the agency and keep the agency within bounds. But if the delegation is unstructured and sort of open, a court has a very difficult time reviewing it, and only Congress can provide a cure.

Senator **Grassley**. Well, my time is up. I guess I would just say in closing on that point, that I think you have asked us to consider that times have changed during the period that you have been writing and expressing your views—regarding your overall philosophy of giving deference to the legislative process—because the place where democracy is best exercised is in the parliamentary bodies. I would, in turn, ask you to consider our changing circumstances and the limits of what the modern Congress can do through statute; that Congress cannot write laws as technically correct as you have described during this discussion today.

Judge **Bork**. I agree there is a problem, Senator.

The **Chairman**. Thank you, we will now take a 5-minute recess. [Brief recess]

The **Chairman**. There will be order in the chamber, please.

Judge, in terms of the rest of the day, Senator Leahy is next. Senator Specter is back, and I am trying to accommodate one of our colleagues who cannot be here. I hope we only have to go two more; at the most, we will go three more.

Judge **Bork**. All right.

The **Chairman**. Senator Leahy.

Senator **Leahy**. Thank you, Mr. Chairman. Judge Bork, I had said yesterday I wanted to follow up with some of the questions I had asked you on free speech. Before I do, I want to make sure I understand a couple of points that have been covered here.

You have talked about the *Finzer* case with Senator Grassley and Senator DeConcini, and a number of your supporters have stated that in 400 cases you have not been reversed, and have left the implication you have had 400 cases go up on appeal. You have not done that, sir, but a number of your supporters have. Just so we can note for the record, the *Finzer* case is the only majority opinion that you have written that has gone up on appeal to the Supreme Court, is that correct?

Judge **Bork**. I don't know, Senator, I hadn't kept count that way. It could well be correct.

Senator **Leahy**. I believe it is. At this point cert. has been granted, but the case has not been decided by the Supreme Court.

Judge **Bork**. That's correct, Senator. It has not been argued yet.

Senator **Leahy**. And if you were to serve on the Supreme Court, you would not be able to sit on that case anyway.

Judge **Bork**. Oh, no, of course not. Any matter I touched in any way on the Court of Appeals I would recuse myself on the Supreme Court.

Senator **Leahy**. And I mention that just to clarify that you can take a little bit more liberty in talking about it. As I understand the *Finzer* case, that involved a statute, as you said, passed by Congress, which says basically that if you are going to have somebody demonstrating within 500 feet of an embassy, they can do that only if their demonstration is favorable to the policies of that government. Is that, in laymen's language, basically what it says?

Judge **Bork**. Well, in laymen's language, that's right; it says you may not—let me see if I can find it. The congregation aspect—you may not congregate within 500 feet for any purpose; and the first part of the statute, it's unlawful to display any placard designed to bring into public odium any foreign government or to bring into public disrepute political, social, economic acts of any foreign government, that's right.

Senator **Leahy**. You could, however, display a placard which was supportive of that government.

Judge **Bork**. That's correct.

Senator **Leahy**. It's interesting, because really what you do with such a statute is an unusual twist. Let's just use—and I am not asking you for some kind of a declaratory judgment on this—but let's take a hypothetical: we have the embassy of Iraq, and after the Iraq air force had nearly destroyed the U.S.S. STARK, killing more than 30 Americans, according to that statute you could have somebody down there with a placard saying to the Iraqi Government we agree with everything you did, right on. But if the mother or father of one of those sailors killed wanted to stand down there with a placard and say we think this was a heinous, murderous act, they couldn't do it.

Judge **Bork**. Under the statute, that is correct.

Senator **Leahy**. In some ways—and I realize this matter is up before the Supreme Court, and they will have to decide it—in some ways I would find that virtually unconstitutional on its face in allowing one type of speech but not the other. It would be one thing to say for security you don't allow people to congregate within a certain distance of an embassy—and I can understand that.

Judge **Bork**. That's right. I dealt with that point in the opinion—I guess I better not argue it further. But, of course, Congress is free, I suppose—I'm not passing on the constitutionality again of a hypothetical statute—but Congress would certainly be free now or any other time to say no expression of opinion about a foreign government may be had within 200 feet, 300 feet, whatever.

Senator **Leahy**. Wouldn't that be more acceptable than to say you can have one kind but not the other, and tell Americans that they can say one sort of thing about a foreign government but not something else on our soil?

Judge **Bork**. Americans can say anything they want to about Iraq, anything hostile they want to say about Iraq or any other foreign government, or this government, the U.S. Government—just not within 500 feet of the embassy of that government. But the rest of the country——.

Senator **Leahy**. The point I make concerns me very much. In a court upholding a statute which says to Americans you can certain things but not other things. It's one thing to say you can't say anything within a certain distance; but to say you can say some things but not other things—that I find of great concern.

Judge **Bork**. It is a matter of concern, I agree with you about that—and I tried to deal with that concern. In a way, saying you may not say anything is a more restrictive statute than saying you may not insult a foreign government.

Senator **Leahy**. I find more chilling to say that we will select what can be said. But leave that be, we'll go up on appeal, and we'll see how the eight members decide it.

Let me talk about another area, though. We are both lawyers, and I consider that an honorable profession. I know you do. The proud tradition of pro bono work—certainly that was the thing stressed to me in the first law firm I went to after I left Georgetown and went back home. That tradition wasn't always observed, but it should be, because it's more than a tradition—it's an obligation. The Judiciary Committee asks every single nominee for any federal court position, from the U.S. Claims Court to the Supreme Court, how they have fulfilled that obligation.

Let me read the question we asked you, and your answer. The question says: "An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged. Describe what you, Judge Bork, have done to fulfill these responsibilities, listing specific instances, the amount of time devoted to each."

And you responded: "During my time in practice, 1954-1962 . . ."—in other words, 8 years—"the firms I worked for did not engage in pro bono activities. While I was a professor at Yale I was not a member of the Connecticut Bar and cases of this sort were handled by teachers and students in the clinical legal education program."

What we asked you was what you have done to make legal services available to the disadvantaged. I read that answer as saying that you found ways why you didn't fulfill the obligation. Now, in 1955-1962, you were an associate, then a partner at Kirkland and Ellis—that's one of the finest law firms in this country. You say the firm did not engage in pro bono activities.

I find that hard to believe. I can't believe in that whole firm people didn't engage in pro bono activities.

Judge BORK. There may have been—I didn't know of any.

Senator LEAHY. But you didn't.

Judge BORK. I didn't, and the firm had no program for pro bono activities, and, to tell you the truth, the younger people in the firm were worked very hard, and I remember I gave a speech and a senior partner complained about the billing hours I didn't get because I was giving a speech. I don't think the attitude towards these things was then what it is now. I think a lot of firms have pro bono programs now who didn't then.

Senator LEAHY. I became a lawyer in 1964, and I know the firm I went to, a small firm, had followed the tradition of most of the firms in my own State for years and years before that of pro bono work. Every law firm that sought to hire me in Washington at that same time told me of their tradition for years before of pro bono work. There was nothing to stop you from doing pro bono work, was there?

Judge BORK. No, I suppose I could have asked for time to do it.

Senator LEAHY. Are you proud of the fact that you didn't do any pro bono work?

Judge BORK. No, I didn't, I'm not proud of it. The things I specialized in would not have been very useful in pro bono work—I would have had to learn a new area of law. But that's not an excuse for not doing it.

Senator LEAHY. Let me ask you about that. You are an expert in constitutional law.

Judge BORK. When I was in the firm, I didn't do any constitutional law; I was doing major litigation, which means two-thirds of it was antitrust law, and other forms of litigation that were protracted and expensive. I had no contact with constitutional law until I began to teach it.

Senator LEAHY. Judge Bork, you are acknowledged by every one of us here as a brilliant lawyer. You don't think that those talents could have been brought to bear somewhere in pro bono work?

Judge **Bork**. Oh, yes, they could have been. I didn't mean to say that. I just said that the fields I was working in did not lend themselves to it, and I didn't think about it—and I should have.

Senator **Leahy**. The reason I ask these questions—I look back over what you have done and I have to think about what Senator Simpson said at the beginning of this about how the average lawyer deals with real people, he sees somebody where they are going through a divorce or a criminal matter, the anguish and all of an individual. These people also get to the Supreme Court. Why should we not be concerned that your whole legal career has been isolated from that kind of reality?

Judge **Bork**. Oh, I have dealt with that kind of reality in various cases; I just didn't do pro bono work. I see this kind of a case on the bench; I saw that kind of a case when I was Solicitor General. I didn't do pro bono work when I was at the firm.

Senator **Leahy**. Your most significant clients are, what, General Motors, General Atomic, Shell Oil? These are huge corporations.

Judge **Bork**. Oh, I had clients like the local distributor—a local distributor of electronic products in New Haven who was having trouble with a major corporation. I gave them an antitrust complaint on his behalf, and they came back and settled.

Senator **Leahy**. Let me ask you about the time you were at Yale.

Judge **Bork**. That was while I was at Yale.

Senator **Leahy**. Let me go on that. How much pro bono work did you do when you were at Yale?

Judge **Bork**. I didn't do any pro bono work at Yale, Senator.

Senator **Leahy**. Again, why not?

Judge **Bork**. I just didn't think about. We had this whole clinical legal studies program which did all of that, and very few professors had anything to do with that program except to establish it and to have a member of the faculty run it.

Senator **Leahy**. Prior to going to Yale, you had not had involvement with constitutional law, but at Yale you did.

Judge **Bork**. That's right.

Senator **Leahy**. You were an expert, you taught constitutional law.

Judge **Bork**. Correct.

Senator **Leahy**. Over and over again, in the kind of pro bono matters, especially involving indigent defendants, others, we see constitutional issues. Were you ever asked when you were at Yale to help out in any of these?

Judge **Bork**. No, I was never approach for pro bono work.

Senator **Leahy**. You never volunteered your own expertise as a constitutional authority for pro bono work?

Judge **Bork**. No.

The **Chairman**. Senator, I think he's answered that question.

Senator **Leahy**. Let me ask you this question. Was it because you did not have time, the inclination, or were not asked?

Judge **Bork**. To tell you the truth, Senator, I was not asked, and I was busy working on other things and I didn't think about it. I should have thought about it. I didn't. I assume that our clinical legal program, if they thought I had something of use to them, would have asked me.

Senator **Leahy**. It's not a matter of time.

Judge **Bork**. No, you can always stop doing one thing and do another thing.

Senator **Leahy**. Let me go back to your testimony yesterday. I said I'd follow up on this. You discussed your past writings and your current views on issues of free speech, and you were sharply critical—as a number of us have pointed out, and you have—of a wide range of doctrines which the Supreme Court has employed to protect the rights of Americans to say what they want to say. Now, yesterday, though, in answer to my questions, you described your current views as much closer to the idea of free speech that the Supreme Court has applied over the past 30 or 40 years.

Judge **Bork**. Well, let me—I'm sorry, you weren't finished with the question?

Senator **Leahy**. That's all right.

Judge **Bork**. What I said yesterday, I hope, and what I said this morning was that in a variety of areas, had the legal theories I espoused, had the law developed along those lines—I'm not talking about the political speech doctrine or idea now—I could have accepted it. For example, I talked about *Brandenburg* v. *Ohio,* and what I said—and we are talking there about the advocacy of law violation. Now, I want to take out of this discussion the Martin Luther King kind of problem where often Mr. King was advocating violating a law in order to test its constitutionality—I have no problem with that. I am talking about the advocacy of law violation which is not aimed at framing a constitutional test. The difference between what I said and what *Brandenburg* said is this: *Brandenburg* requires a closer nexus, a closer connection, between the advocacy and the lawless action than I did. For example, I thought, for a variety of reasons, that one might constitutionally punish advocacy of law violation, even if the violation wasn't imminent. *Brandenburg* added to that only the qualification that the law violation must be imminent when the speaker speaks.

Now, I could have accepted the law if it had developed in the way I suggested, but I can also *Brandenburg* in the way the law did develop.

Senator **Leahy**. And yesterday, in answer to my question, you did accept *Brandenburg*, but prior to that, in all your published statements anyway, you had not.

Judge **Bork**. That's right. And this isn't a great change of mine. As I say, I could have accepted the law as I suggested, but I accept the fact that the Supreme Court has added an additional safeguard for free speech advocating lawlessness, and, as an academic, I didn't think that theoretically justified; as a judge, I accept it. And that's all there really is to that.

Senator **Leahy**. *Brandenburg*, of course, was decided in 1969. Your *Indiana Law Review* article, which pretty well rejects it, was in 1971.

Judge **Bork**. Yes.

Senator **Leahy**. And I want to go back again to some of your statements, because I want to find out just where the changes take place and what it is that jogged those kinds of changes. I had asked you how far you had gone from the bright-line distinction between political and non-political speech by 1973, when you testified on the subject before the committee in your confirmation hearings for Solicitor General, and that is when you said you were about where the Supreme Court currently is. But let me go over some of your writings and statements after 1973.

In 1979, in your speech on the first amendment at the University of Michigan, you said that

> The transmission of news and information relevant to the political process should be protected by the first amendment.

And all of us can be happy about that, and the news media here I am sure are. But you went on to say

> There is no occasion on this rationale to throw a constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art are capable of influencing political attitudes. But in these indirect and relatively remote relationships of the political process, verbal or visual expression does not differ at all from other human activities such as sports or business, which are also capable of influencing political attitudes, but which are not on that account immune from regulation.

Now, do you still believe that only those forms of expression that directly feed the democratic process should receive first amendment protection?

Judge Bork. May I have the page, please, Senator? I just got the speech in front of me.

Senator Leahy. It's on pages 8 to 9.

Judge Bork. Well, the transmission of news and information relevant to the political process includes a great deal of speech that is not political obviously—and I have discussed this. It includes moral discourse, social discourse, scientific discourse, and, as I said in one of these speeches, fiction. And I said there is no occasion on this rationale to throw constitutional protection around forms of expression that do not directly feed the democratic process.

That's right; on that rationale they don't. And I think I could still—if I were starting back, before any decisions of the Supreme Court, and trying to work out a theory of the first amendment, I suppose I would have worked out a theory about those kinds of things that affect political ideas. Now, as a friend of mine reminded me a couple of weeks ago, if you read "The Tropic of Capricorn" by Henry Miller, you find a lot of stuff in there that is really political—criticism of the establishment and so forth. So that those things would be protected.

Now, I don't know where I would come out if I sat down now in the absence of Supreme Court precedent and worked out a theory of the first amendment—I don't know where the line would be drawn.

But what I did say is that the Supreme Court has decided a lot of things which I can accept and do accept as law, and have no desire to change.

Senator Leahy. Are you saying that today it does not have to directly feed the democratic process to be immune from regulation?

Judge Bork. That is what the law is, and I accept that law.

Under current Supreme Court law, if the Government tries to suppress a book, and that action is challenged, does the Court have to examine the book to determine its relationship to the political process in order to decide whether the book receives first amendment protection?

I don't think so, Senator. I think under current law the Court has to examine the book to see whether it is obscene in the way that the Supreme Court has defined it.

Senator **Leahy**. Let's assume that the allegation of obscenity is not made. Then is the relationship to the political process irrelevant to the question of whether government could ban the publication?

Judge **Bork**. Under current law it is and it is law I accept.

Senator **Leahy**. What about a motion picture? If the government tries to ban it and it is not obscene, does it make any difference whether its content relates to the political process?

Judge **Bork**. No. Under current law, it does not. I think any form of expression now—if it's not obscene—I think the Supreme Court protects.

Senator **Leahy**. What about a painting or a photograph?

Judge **Bork**. I think so.

Senator **Leahy**. What about an article in a scientific journal?

Judge **Bork**. Oh, clearly.

Senator **Leahy**. In other words, if a government tried to prevent its publication but it is not obscene, it doesn't make any difference whether the content relates to the political process.

Judge **Bork**. That is the law and it is law I accept.

Senator **Leahy**. Do you think it should make any difference?

Judge **Bork**. No, I don't think it does because if you start from the political process core of the first amendment, and I should say, although I have now lost it, everybody accepts the fact that the first amendment starts from a political process core, and I've mentioned Harry Kalven and Meiklejohn.

In *Garrison* v. *Louisiana*, Justice Brennan talks about this core. For speech concerning public affairs is more than self-expression. It is the essence of self-government, and that is where everybody starts from, but that has moved out now to all forms of self-expression that are not obscene.

Now, I suppose if I went back and rethought the doctrine, which I really haven't rethought since 1971 except to give up on the 1971 bright line, if I went back and rethought it, I would suppose that among other things, it would place too great a burden upon courts to sit down and ask whether this thing feeds the democratic process.

Senator **Leahy**. Should that kind of a question of burden—if we're really dealing with a constitutional issue—should that be that overriding?

Judge **Bork**. It certainly is important, Senator. You will find that, for example, in the political question doctrine, courts will not sometimes get into what looks like a constitutional issue if they think there are not standards for them to apply that are suitable for judicial application. And I think that is right. Particularly, in this case, applying the political process core and moving out, it would seem to me better, just in terms of freedom and in terms of making the tasks of the courts doable, to place obscenity off limits and protest the rest.

That does not mean that philosophically a different line might not be drawn if you ignore other considerations. But I have no desire to impose a philosophical view which I do not now have.

Senator **Leahy**. If the Government were to try to punish somebody speaking, if the speech is not obscene, does the first amendment protection depend upon whether the speech is related to political matters?

Judge **Bork**. No. I think that is thoroughly settled. We are talking about a thoroughly settled body of case law.

Senator **Leahy**. Let me show you a couple of books. I am not really trying to plug anybody here, but the one on the right is Speaker O'Neill's latest book. It is number "n" or something on the best seller list.

A capsule description, the Post says: "The former Speaker of the House recounts half a century in public life as a bread-and-butter liberal." The other is on the nonfiction paperback best seller list, "Fatherhood" by Bill Cosby. It is described in the reviews as an actor on the subject of children.

Now, let's assume neither book is obscene.

Judge **Bork**. I am willing to assume that, Senator.

Senator **Leahy**. I have not read either one of them, but I will assume that, too. Does it make any difference in first amendment protection—I mean the fact that this one is obviously political—the excerpts I have read are very political—and this one of Mr. Cosby's, I assume, is not—that does not make any difference, does it?

Judge **Bork**. Under settled law it does not and I accept it. It seems to me that the settled law is now that the person writing the book does not have to prove that it is political or any way connected to politics. The settled law is the Government has to prove it is obscene.

Senator **Leahy**. So if we were dealing with—at least by the title of it—something, a movie, on the one hand, "The Making of the Constitution," and the other one, "Revenge of the Nerds," at least by the title it does not make any difference?

Judge **Bork**. No. That does make any difference, and I have seen so many movies about the Constitution that I would now choose the second movie. [Laughter.]

Senator **Leahy**. Now, the reason I am asking so many of these questions, Judge Bork, is that I am concerned. I do not want this—an expression I have used—being a confirmation conversion. That is going to be a question in the minds of a number and that is why I am going into such detail.

You have a 1987 statement calling for a case-by-case review of these matters to consider where they go in the political process.

Judge **Bork**. May I know what that is, Senator?

Senator **Leahy**. May 28th, 1987—I did not realize I had it here in my book—it was a Bill Moyers interview. In fact, I asked them for the transcript. Let me read down the part—I would be happy to give it to you—but the part that I am relying on, Mr. Moyers said, speaking to you, "Do you think they were dealing primarily, at least in their"—speaking of free speech—"at least in their frame of things, with the speech of the republic, the speech of the political universe that we operate in as citizens,"—speaking of those writing the Constitution.

You answered,

Sure, but in addition to that I am sure they recognized that other kinds of speech—speech about moral issues, speech about moral values, religion and so forth—all of those things feed into the way we govern ourselves, so it does not have to be explicitly political speech to be protected.

MOYERS. So novels.

"BORK. Scientific speech.

MOYERS. Art.

BORK. "I think you are getting towards the outer edge there and where you draw the line would be a case-by-case basis."

So you have gone actually beyond that today.

Judge BORK. No. When you get to art you may be into the area of pornography and obscenity.

Senator LEAHY. Is that what you meant?

Judge BORK. I think so, yes.

Senator LEAHY. That is the only thing?

Judge BORK. Senator, let me speak to this issue of confirmation conversions. I have got a lot of positions that I have taken in the past that I have reaffirmed here which I have not converted. On this issue I do not know where I would draw the line as an original matter under the first amendment. I have not rethought that whole thing and there would be a lot of arguments both ways.

It is not an original matter. We now have an enormous body of case law which is well settled and should not be overturned or should not be cut back. It is there. I mean, if there is any body of case law that is massive and solid, it is that body of case law.

Senator LEAHY. I agree with you. But the reason I asked you the question and your first very strong statement that we referred to—the Indiana Law Review article—was 2 years after the *Brandenburg* case. And that is why many of us felt it was well settled then.

Judge BORK. Well, let me address that then, Senator. Back then I was speaking as a theorist about what the courts had a right to force upon legislatures by way of free speech. And it seemed to me that the judgment of whether or not to allow speech that called for the overthrow of the government, or violence, was really a matter of prudence. That kind of speech does not feed the way we govern ourselves very well.

Therefore, I questioned whether or not—it seemed to me that that prudential decision might well be left to the legislature. The law did not develop that way. It developed otherwise and an additional safeguard was added by the Supreme Court—that is, the necessity of showing the imminence of lawless action.

I am not sure that if I sat down and argued it theoretically I would not criticize *Brandenburg* again. But it is a settled position and I accept it.

Senator LEAHY. But on June 10th of this year, just a month before the President nominated you, you said even then that a judge has to decide whether a work of art or literature falls on one side or another of a wavering line between speech that has some relationship to the political process and speech that does not and only then can a judge decide whether work is protected by the first amendment.

Judge BORK. Where was this? Oh, this is Moyers?

Senator LEAHY. Well, this, I believe, is your Worldnet interview that has been referred to earlier here today.

Judge **Bork**. May I see it, please? Do we have it? Wait, somebody gave it to me in the morning and I have now lost it.

Senator **Leahy**. Page 26.

Judge **Bork**. I have now lost it. It is in another room. Well, that is certainly not the law. That was a back and forth over a satellite hookup and that is—wait a minute, Senator. I think what I said was a little better.

I said, "I am afraid the judge has to draw a line. It may be a wavering line." And that is true. As you go case-by-case you are going to get a wavering line. There is no escaping that in matters of human judgment.

> It may be that wherever he draws it you can point out that it could have moved somewhere else along the spectrum.

That is always true.

> Clearly, as you get into art and literature, particularly into forms of art, and if you want to call it literature and art, which are pornography and things approaching it, you are dealing with something now that is not in anyway and form the way we govern ourselves and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that.

Senator **Leahy**. Judge, that was not the question. The question was—it was not on pornography. It was on, can one really separate those forms of self-expression that feed into what you call the discourse in a free society, from political speech or from the formation of a climate of opinions? Can you really draw borders there? And that is when you said you would draw a line, albeit possibly a wavering line.

Judge **Bork**. Well, but I then gave an illustration, and my illustration was art and literature which is pornography or approaches pornography. That is the only illustration I gave of where you get into the line.

Senator **Leahy**. Well, your view of June 10th is your view of September 17th?

Judge **Bork**. Yes.

Senator **Leahy**. Okay.

Judge **Bork**. If I sat down to write it, I would express it rather more clearly, but what it says is, when you get to literature and art which is really pornography, then you are dealing with something now where you draw a line.

Senator **Leahy**. Let me ask you about another free speech concept. Just one question. That is the idea that a local community would have the right to suppress speech that does not meet the legal test of obscenity on the grounds that the speech is harmful to the community moral standards.

Judge **Bork**. Where is this, Senator?

Senator **Leahy**. Well, in your 1979 University of Michigan speech on page 15.

Judge **Bork**. Yes. Well, on page 15 I am talking about a taste for pornography and I was making a distinction. I said,

> The court and some judges do tend to assume that it is not a problem if willing adults indulge a taste for pornography in a theatre whose outside advertising does not offend the squeamish.

I said:

> The assumption is wrong. The consequences of such private indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, taste and moral values inculcated do not stay behind in the theatre. A change in moral environment and social attitudes towards sex, marriage, duties toward children and the like may as surely be felt as harm as the possibility of physical violence.

And I was complaining that the Court has not explained what the public feels to be harm in that way may not be counted as one. But again, I am talking about pornography.

Senator LEAHY. Pornography or obscenity as we use it in the legal term?

Judge BORK. Yes.

Senator LEAHY. Both are the same, or are you using the terms interchangeably?

Judge BORK. Well, I have been using them interchangeably. Probably I should not. But obscenity. All right.

Senator LEAHY. I understand my time is up. I also understand we have a vote on.

The CHAIRMAN. We have 7 minutes left in the vote. When we come back we will start with——

Senator HUMPHREY. Mr. Chairman, I wonder if by prior agreement already reached between Senator Specter and me and you I might have 2 minutes at this point. Are you planning to recess at this juncture?

The CHAIRMAN. I was, but if it is 2 minutes, fire away.

Senator HUMPHREY. It is timely. I thank the Senator from Pennsylvania for yielding to me for this purpose.

I want to correct the mistaken impression which was left by the line of questioning pursued by the Senator from Vermont on the subject of pro bono service. Let me ask the Judge these quick questions.

How many years did you serve in the Marine Corps, Judge?

Judge BORK. I guess a total of three and a half or four, something like that.

Senator HUMPHREY. All right. Let's round it off to four. How many years did you teach at Yale in total?

Judge BORK. Fifteen years.

Senator HUMPHREY. And how many years did you serve as a Solicitor General?

Judge BORK. A little over three and a half, almost four.

Senator HUMPHREY. You have been 5 years, five and a half on the Circuit Court?

Judge BORK. Five and a half on the Circuit Court.

Senator HUMPHREY. That is 28 years during which time this man has chosen not to devote himself to lucrative private law practice at which he could have by now become a multi, multimillionaire. None of us in this panel doubt it.

We are not talking about a man who is coming to us from 30 years of private practice where he has made a lot of money. We are talking about a man who has sacrificed for himself and his family so that he could serve in the role of teacher and serve in the role of public service. For someone to say that someone who has devoted himself for 28 years selflessly to teaching and to public service at the sacrifice of his family, for anyone to suggest that he has not given a good part of his life in pro bono service is ridiculous.

Now, I know the Senator from Vermont did not mean that in a mean spirit. I think he said it in a mistaken spirit, but I wanted to correct the record because I think that is an outrageous impression to try to create.

Senator **LEAHY**. Mr. Chairman?

The **CHAIRMAN**. Yes.

Senator **LEAHY**. Judge Bork, I just want to ask you, according to the report you gave to us, you spoke of your—and I realize that you have sacrificed to be a Solicitor General just as Members sacrifice to be here—but if I am correct in reading your report to this committee, and something that perhaps the Senator from New Hampshire has not had a chance to read, that in 1979, assuming your consultant work at $175 an hour, you made approximately $197,000 that year for consulting work; in 1980, assuming $225 an hour, around $250,000 to $300,000 a year for consulting work; in 1981, assuming $225 an hour and leaving Yale about mid-year, around $150,000.

Are those figures at least in the ball park?

Judge **BORK**. They are in the ball park. Those are the only years I ever made any money in consulting.

Senator **LEAHY**. Yes, but I just do not——

Judge **BORK**. And there was a reason why I did it and I do not want to go into it here.

Senator **LEAHY**. I understand. And I understand those reasons and I agree with them and I have absolutely nothing against that. You were absolutely justified in earning that, but each one of us made certain decisions to go into private light and I did not want the Senator from New Hampshire to leave a mistaken impression. You were absolutely justified in making those fees. They were totally proper and nobody is suggesting otherwise.

Judge **BORK**. All right. Those were the only years in which I did.

Senator **LEAHY**. Thank you.

Senator **HUMPHREY**. Judge Bork, this is a very personal question. If you would prefer not to answer it, by all means do not. But were those years in which you engaged in outside employment years which coincided with heavy medical bills in your family?

Judge **BORK**. Yes.

The **CHAIRMAN**. I think it is appropriate we stop and take a vote.

[Recess.]

The **CHAIRMAN**. The hearing will resume.

Judge, with the grace of God, the good will of the neighbors, and the cooperation of the Senate, we will have you out of here in an hour.

Judge **BORK**. All right. Thank you, Mr. Chairman.

The **CHAIRMAN**. Okay? Sorry we are going so late.

Senator Specter?

Senator **SPECTER**. Judge Bork, I regret that I missed a good part of the proceeding today because I had a prior commitment to join the President and go into Philadelphia for the celebration. But I have been briefed and I hope that I will not ask you on areas which have already been covered otherwise.

But I would like to return now to the question of first amendment freedom of speech. You had made a comment in the latter part of the questioning of Senator Leahy about what you termed confirmation conversion, suggesting that there may have been some changes in your approach today caused by the confirmation process.

You had made a comment that *Brandenburg* was "not a great change of mind" for you on this issue. And I raise a question with you, Judge Bork, about the candor of that representation. This is a very complex subject. You have to wade through an enormous number of cases to really come to grips with it.

You had commented, back in the Indiana Law Review article, at page 20, that "I am, of course, aware that this"—referring to the clear and present danger test—departs drastically from existing court-made law."

You also said, in the University of Michigan speech, that "*Hess* and *Brandenburg* are fundamentally wrong interpretations of the first amendment. And in the Indiana Law Review article, you go on for 15 pages spelling out the differences, so that it seems to me that it is really plain on the face of this record your understanding and acknowledgement that there is really an enormous difference between the principles you article and that Justice Sanford had articulated years ago, and what the clear and present danger test stands for and what *Brandenburg* stands for, isn't there?

Judge BORK. That is correct, Senator, but let me speak to this issue of confirmation conversion, which I think is quite wrong and I have adhered to a number of positions that I have taken previously that are controversial, or at least seem to be.

On *Brandenburg*, I did not say my mind had changed. I think it would have been legitimate for the Court to follow the line I took, which was that advocacy of violent overthrow of the Government or advocacy of lawless behavior, violation of law, when you are not trying to test the constitutionality of the law, the Court could have said that the legislature may prohibit that speech.

But what I said was, as a theorist, I doubted *Brandenburg*. I think *Brandenburg* may have gone too—went too far, but I accept *Brandenburg* as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as settled law.

Senator SPECTER. Well, when you say that *Brandenburg* and your acceptance of it is not a great change of mind, it seems to me that that is not really quite on target considering your very forceful disagreement with the Holmes clear and present danger test and with *Brandenburg*.

Judge BORK. Well, I am not saying that I think—if *Brandenburg* and the clear and present danger test came up for the first time, I think I might not agree with them, as a theorist and maybe even as a judge. But they are not coming up for the first time, they are settled law. That is, *Brandenburg*, I suppose, lies somewhere on the spectrum between my position when I agreed with Sanford and the clear and present danger test.

And, as a theorist or as a judge facing it for the first time, I might not vote for *Brandenburg*.

Senator **Specter**. Well, *Brandenburg* is pretty much the clear and present danger test. It really follows from the clear and present danger test as you wrote and spoke at the University of Michigan.

Judge **Bork**. Well, I was corrected on that once. I was arguing a case in the Supreme Court and I referred to the clear and present danger test, and Justice Douglas said, "We got rid of that with *Brandenburg*." So they at least intended *Brandenburg* to be something different altogether.

Senator **Specter**. Well, that is when you were arguing *Parker* v. *Levy*.

Judge **Bork**. That is correct. Now, what I am simply saying is I am not sitting here today telling you that if I write an article again as a law professor that I would say *Brandenburg* is wonderful. All I am telling you is that as a judge I accept *Brandenburg* as the law.

Senator **Specter**. But the difficulty, Judge Bork, is that the cases arise and there are many nuances, and when you interpret the clear and present danger test, *Brandenburg, Indiana* v. *Hess*, a mind-set is of importance.

When you commented about this yesterday, we talked about ideas which were old ideas, but you had pretty much adhered to your position that you had written back in 1971 and that you had spoken about at Michigan in 1978 when you addressed the Judge Advocate General's School back in 1984, hadn't you?

Judge **Bork**. I forget what I said at the Judge Advocate General's School. That was a talk made from notes. Originally, I don't think it was written out much.

Senator **Specter**. No, there is a text.

Judge **Bork**. Is there? Might be a transcript.

Senator **Specter**. Well, I don't know about a transcript. You provided text to us of about 80 of your speeches, and in that speech you talk about the clear and present danger test, or you talk about *Brandenburg* and you talk about Justice Douglas 'comment to you, and you make the statement here that you almost had pity, but there is no question from the context of the speech at pages 9 and 19 that you stand firmly behind your opposition to the clear and present danger test.

Judge **Bork**. May I see it? The only thing I want to see is the Judge Advocate General's School talk. That is the only one I don't have.

Senator **Specter**. You are welcome to it.

Judge **Bork**. All right. Thank you.

Senator **Specter**. Let me move on for a moment, and we can come back to it, Judge Bork.

Judge **Bork**. Well, let me just say this, Senator. If disagreement on theoretical basis with a case you are willing to accept as an established precedent is somehow a problem, then I think every candidate who has thought about areas of the law is going to have a problem. Because many cases we accept we don't agree with, and that is just the nature—I don't think there are any two judges or lawyers who would agree on all these matters.

Senator **Specter**. Well, Judge Bork, that brings up the subject down the line as to original intent and how firmly committed you are to accepting *stare decisis*, and there are some strong statements which you have made that an originalist ought not to accept, cases which have been established because of the complexity of the amendment process. That is a somewhat different discussion, but I am concerned about your views for two reasons.

One, the next case will have a shading and a nuance and I am concerned about your philosophy and your approach. And, secondly, I am concerned about your acceptance of these cases. If you say you accept this one, so be it. But you have written and spoken, ostensibly as an original interpretationist, of the importance of originalists not allowing the mistakes of the past to stand.

Judge Bork. I think that I—I, obviously, have also said that the commerce clause and the federal power generally was probably not intended, but they have to stand because it is to late in the day to overturn them—to much has happened, too much has grown up around them: statutes, institutions, expectations, and so forth. I have said that about a number of areas.

So that any idea that an originalist, I don't think an originalist, a person who believes in original intent, can do without a doctrine of precedent; otherwise, he would be constantly trying to rip up the nation and its laws, and you can't do that.

Senator Specter. But you have made some very strong statements about changing precedents where they are at variance with original intent.

Judge Bork. Well, that certainly is one factor to be considered, no doubt about it.

Senator Specter. Let us pick up the underlying thrust of your criticism of the clear and present danger test because I think this is very important in terms of where you go with the next case. Assuming, and I accept your statement that you agree, or were willing to apply *Brandenburg* and *Hess* v. *Indiana*, but the next case——

Judge Bork. Well, I didn't speak to *Hess* v. *Indiana*, Senator.

Senator Specter. Okay. How about *Hess* v *Indiana*?

Judge Bork. All right. No, I am not so wild about *Hess* v *Indiana*. That is a case of obscenity in the public streets, and sometimes the Supreme Court allows people to stop obscenities, sometimes it doesn't.

Senator Specter. Well, the Supreme Court decided *Hess* on the *Brandenburg* doctrine flat out.

Judge Bork. But I think there was a problem of obscenity in there and not just the problem of inciting to lawlessness. Now, if the gentleman had said what he said without the obscenities, that's right, *Brandenburg* covers it.

Senator Specter. Well, the Supreme Court said *Brandenburg* governed *Hess*.

Well, I have got a copy that I can make available to you.

Judge Bork. All right.

Senator Specter. We will come back to that. Let me move ahead to the underpinnings of the clear and present danger test, and let me read a very short extract from Holmes' dissenting opinion in *Abrams* at page 630 of 270 United States Reports. And I think, Judge Bork, this is really the essence of the first amendment freedom of speech, and this is the doctrine which you have characterized as being "internally inconsistent" and being "terrifying frivolity."

> But when men have realized that time has upset any fighting fates they may come to believe, even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.

Now you had very strongly criticized the Holmes statement which appears at page 20 of your Michigan Law Review speech, and you say this:

> There is doubt about even the proviso, for Holmes could bring himself to write in *Gitlow*, and Brandeis to join him, that, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." That statement [and this is you speaking now] defies explanation.

It seems to me, Judge Bork, in studying the long line of cases on freedom of speech, that the essence of a lusty debate and full discourse is to let it go on and on and on until you reach the point of imminent violence. And if there is imminent violence, then there is a clear and present danger, and it stops and it becomes wrongful conduct, and it becomes criminal conduct.

But even in the context where the proponent argues the proletarian dictatorship, as much as we dislike it, we say, go ahead. Or even as much as the proponent says, "Let's have a revolution to get there," which is the advocacy of lawlessness which you also condemn, that seems to me to be within the Holmes doctrine and a proper description of the law and the spirit of freedom of speech. Because if the person has to resort to violence in a democratic society, it shows the absurdity of his position, when he doesn't need under our system to resort to violence.

But as long as it is mere words, he ought to be permitted to say it, and that, as I read the cases and get the feel of the first amendment. And freedom of speech is really the core value, and is hardly frivolous.

Judge **Bork**. Senator, let me address Holmes' rationale—Holmes' reasoning, which I think defies explanation on his own terms. He is saying, and in this first part I agree with him entirely, that the first amendment is intended to protect free trade in ideas, and the test of their truth is their acceptance in the marketplace of ideas. That is fine.

Then he says it is all right for people to advocate revolution to shut the marketplace of ideas—to advocate violence by which a minority will seize the government and shut off the marketplace of ideas. And he concludes that by saying,

> If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is they should be given their chance and have their way.

Dominant forces in the community is not a majority voting for proletarian dictatorship, and the man who was speaking there was not advocating an election to put in proletarian dictatorship. He was advocating violence to close the marketplace of ideas. He was advocating violence to close, to stop the free trade in ideas.

Now that it seems to me you can't get from "the most wonderful thing about our society is the free trade in ideas" to "it's all right for this fellow to try to get people to overthrow the government so that they can close the free trade in ideas."

Senator SPECTER. Well, I disagree categorically—if you don't get to the point where violence is imminent, to argue that there ought to be a proletarian dictatorship. It is a terrible system as you and I see it, but on the merits, let him argue it.

Judge BORK. Oh, I would let him argue it.

Senator SPECTER. You would let him argue the proletarian dictatorship?

Judge BORK. Oh, sure. I would let him argue it.

Senator SPECTER. Why not let him argue violence if it doesn't come to a point of inciting to violence? Isn't the very argument, itself, undercutting any rationality of the argument?

Judge BORK. No. The——

Senator SPECTER. As long as there is no violence that is imminent.

Judge BORK. Well, one—Sanford's point, a point I think that had some merit to it, is that if you get a lot of these arguments going on you don't know when violence is imminent. A lot of this is conspiratorial and advocacy taking place in organizations that organize like military units.

Now it does seem to me, or it seemed to me then and I suppose it seems to me now, that it would be a defensible first amendment position to say that whether or not there is a real danger to our form of government and to our freedoms and to our free speech posed by this kind of thing, advocacy of violence to close the marketplace of ideas, is a legislative judgment, and they may choose to let that speech go forward or not. That was what I said then, and it seems to me it is a tenable philosophical position now.

However, I have also said that, that is, the settled law has become otherwise. The Holmes-Brandeis position has triumphed in the law, and *Brandenburg*, while it is different from the clear and present danger test, and you can tell that because the clear and present danger test was applied in the *Dennis* cases, you know, the *Smith Act* cases about the Communist Party, and *Brandenburg* would not uphold the Smith Act—the *Dennis* case, we have now come to the *Brandenburg* test. And I think, as I have said, I don't know, if we were starting over again, that I wouldn't have agreed with Sanford in the first place. I mean, a majority of the Supreme Court agreed with it.

All I am telling you is I now accept, as a judge, the position that the law has reached, and I have no desire to overturn it. I have no desire to whittle it away. But that does not mean that I have abandoned my original critique of those theories. I haven't even thought about them again, much less abandoned them.

Senator SPECTER. Well, when you talk about *Brandenburg* being different from the clear and present danger test, I don't think it is, and that is not the way you wrote it.

Judge BORK. Well, it is. May I see that? Do you have the *Dennis* case there?

Senator SPECTER. Well, this is what you said, analyzing the doctrine at the University of Michigan, at page 20 going onto 21:

"The Holmes-Brandeis position held that virtually the only harm caused by speech that society can protect itself against is the prospect of imminent violence. After much weaving through such cases of *Dennis* and *Yates,* that reading was imposed upon the first amendment in the last year of the Warren Court in *Brandenburg* v. *Ohio.*"

So you flatly say there, as a matter of analysis, that *Brandenburg* does pick up the Holmes-Brandeis doctrine of clear and present danger.

Judge BORK. Well, I may have said that there, Senator, and I may have misspoken. Because I think if you look at what *Dennis* v. *United States* did, how it interpreted clear and present danger, it said—they picked up Judge Learned Hand's definition of clear and present danger.

Senator SPECTER. Well, Judge Learned Hand's definition was picked up in a plurality opinion by Chief Justice Vinson, but that wasn't the opinion of the Court; there weren't five Justices. And the Frankfurter concurrence deals with clear and present danger in great detail.

Judge BORK. Um-hum.

Senator SPECTER. And it is running through the Frankfurter concurrence and it runs through the Jackson concurrence, and it is really the dominant theme of the case.

Judge BORK. Well, the plurality opinion says—and I can't find it here because this is not my——

Senator SPECTER. It picks up Judge Learned Hand's definition——

Judge BORK. Yes. The *Florida* opinion says that you must look at the gravity of the danger——

Senator SPECTER. Play it against the evils.

Judge BORK.—Discounted by the probability of its occurrence, and that is not the *Brandenburg* decision. Because under that version of clear and present danger, which is one version of it that it seems to me quite possible to hold, under that version of clear and present danger there may be no imminent act. It may be quite a way down the road. But if the danger is greater enough, that doesn't matter.

Now, *Brandenburg* said we need a closer connection between the speech and the danger. We need a closer nexus. It has to be imminent lawlessness. So I think *Brandenburg* does differ from at least the way Hand and a plurality of the Supreme Court interpreted clear and present danger.

Senator SPECTER. As we have already agreed, you had taken the position in a scholarly analysis before that *Brandenburg* was the Holmes-Brandeis clear and present danger test.

Let me move on. We don't have a great deal of time, Judge Bork. Let me pick up the question of equal protection of the law.

Here again, it may be that the short explanation is that you have shifted from your writings, as recently as 1984——

Judge BORK. Senator, may I interject there?

Senator SPECTER. Sure.

Judge BORK. I think our discussion of *Brandenburg* and clear and present danger demonstrates that I have not shifted from my writings. I have said that, as a judge, I accept those cases as precedent and will apply them. It's settled law. That's all I've said. I haven't said that these writings were wrong. I have said that I accept that body of precedent and will apply it. That's all I've said.

Senator SPECTER. Well, when the next case arises and it's distinguishable from *Brandenburg,* where will you be?

Judge BORK. It depends, Senator, entirely on what the next case is and what it shows.

Senator SPECTER. Well, that's the reason that judicial philosophy is so important. If you have a judicial philosophy, there is some predictability as to where you'll be when the next set of facts comes up which are different than *Brandenburg.* No two cases are identical.

Judge BORK. No, that's right.

Senator SPECTER. The application of a legal philosophy very much depends upon the way it is held, and that's why, if you still disagree philosophically with *Brandenburg,* and you still disagree philosophically with the clear and present danger test, that raises a question in my mind as to how you will apply it to the next set of facts.

Judge BORK. Well, I'll apply it as honestly as I can. That's all I can say to you.

Senator SPECTER. Judge Bork, let's go to the equal protection clause, which I consider to be a very central matter. Here again, it may be the same line of consideration.

As recently as this year, June 10, 1987—it's the Worldnet comment, and this is at page 12, where you talk about the equal protection clause. You say, "I do think the equal protection clause probably should have been kept to things like race and ethnicity", and back in the Indiana Law Review you had written in stronger terms that the equal protection clause applied only to race.

My first question is, if you work from the framers' intent, and you have said that the framers' intent covered only race, how do you even justify covering ethnic distinctions? How do you even justify the *Yick Wo* case in 1886 involving the Chinaman who had applied for a license to have a laundry and got turned down in San Francisco? Can you imagine not having Chinese laundries——

Judge BORK. Yeah. That was a race——

Senator SPECTER. The case goes to the Supreme Court and they say equal protection applies.

Now, if you're an originalist, and original intent governs, and original intent was only to cover race, which you say flatly in the Indiana Law Review, how can you apply equal protection to ethnics?

Judge BORK. Well, I take it that Chinese people are a racial classification.

Senator SPECTER. Well, you're not saying that that's within the intentment of the equal protection clause passed after the Civil War; the Civil War didn't involve the Chinese.

Judge BORK. No, it didn't. It certainly didn't. But the equal protection clause clearly covers whites, and I think the framers——

Senator SPECTER. Does it clearly cover whites under original intent?

Judge BORK. Yeah, I think it does, Senator.

Senator SPECTER. Where does that come from?

Judge **Bork**. From the statements of the people who were involved in drafting it and ratifying it.

Senator **Specter**. That there was an intent by the drafters and ratifiers of the equal protection clause of the 14th amendment, to give equal protection to whites?

Judge **Bork**. Yes.

But let me go on with that, Senator, because——

Senator **Specter**. Where?

Judge **Bork**. Well, I don't have the citations in front of me. If you look at Congressman Bingham's discussions, he, of course, talked about almost everything that it covered. But he is not the only one. He merely proposed the amendment, and he proposed—By the way, he thought it incorporated the Bill of Rights against the States.

If you go to the ratifiers, there's a great deal of talk about various things. If one approaches the amendment by saying it applies to groups, and you have to decide which group is covered and which group is not covered, then I think you're going to have to say they were talking about race and perhaps, as Justice Rehnquist has said, race-like things, whatever those are.

Now, there is a difficulty with that, and the difficulty is that the text doesn't read that way. But more than that, the fact is that the Supreme Court, for all of this century and perhaps before, has come up with a reasonable basis test so that they have applied the equal protection clause under that test to everything, even to economic distinctions. If you take the reasonable basis test seriously, which they have not always done, when they called it a rationality standard, if you take the reasonable basis test seriously, then the clause applies to the reasonableness of all distinctions between people and it applies to things well beyond race. That is settled doctrine and it's been going on for a long time now. It doesn't require you to say which groups are in and which groups are out, which is the way the Supreme Court was approaching it.

Senator **Specter**. But, Judge Bork, if you accept that, you're totally away from original intent, which was for blacks, as you wrote it, and for blacks as a racial issue. It doesn't talk about—that doesn't include women, it doesn't include illegitimates, it doesn't include indigents, it doesn't include a whole pile of equal protection clause cases.

Absent the equal protection clause, you would find no basis for striking a State law simply because it didn't have a reasonable basis on a public interest, a classification logically related to achieving a legitimate State interest.

Judge **Bork**. No. I think the equal protection clause is the primary, if not the sole, way to approach those things. What I am trying to say is that there is a settled line of Supreme Court precedent running back at least 90 years which adopts a reasonable basis test and applies the equal protection clause to all kinds of things.

Senator **Specter**. No doubt about that. And the Court, in doing that, has departed totally from the original intent of the framers and the ratifiers. The framers and ratifiers did not have women in mind, did not have illegitimates in mind, did not have poor people in mind, did not have Mexicans in mind, did not have Chinese in mind. So I think the Court is right, and I'm certainly not objecting to that interpretation of the equal protection clause. But what I am trying to do is square that with your very forceful statement that you are going to carry out original intent.

Judge BORK. Well, I have also said, Senator, that anybody who tries to follow original intent must also have a respect for precedent, because some things it's too late to change.

Now, the application of the equal protection clause to all kinds of people other than racial groups is so settled, and so many expectations have grown up around that, so many segments of our population have internalized that kind of protection, so many institutions are built on it, that it's an interpretation that should not be overturned.

Senator SPECTER. Are you saying, then, that you will apply equal protection to women, just as the Court currently does?

Judge BORK. Yes. In fact, I said this morning, I think twice, in different questioning, that I think a reasonable basis test gives you the same results as to gender that the Supreme Court has been reaching.

Senator SPECTER. How about the strict scrutiny test, classification necessary to protect a compelling State interest?

Judge BORK. Well, that's what I was objecting to, Senator.

There are two methodologies——

Senator SPECTER. That's really the essence of equal protection, though, isn't it? If you use the reasonable basis test, a rational basis, pretty much everything is stricken, that there is always something that can be conjured up as a rational basis?

Judge BORK. No, no, Senator. They did that, and I objected to it. I think I objected to it in the Indiana article, because they begin to imagine rational bases.

For example, I cited the cases—I cited critically in the Indiana article. They upheld the statute that said women couldn't be bartenders unless they were related to a male owner or proprietor of the bar. I thought that was a ridiculous distinction and I criticized it.

There are two methodologies. Let me be as clear as I can about this. One is to say we will pick a group and say which level of scrutiny does it get. It is often said that race distinctions get strict scrutiny and require a compelling governmental interest.

Then there is intermediate scrutiny. Then there is rational basis, which is not what I'm talking about on an unreasonable basis. Those are almost conclusions. You know if they get strict scrutiny, the statute is going to be struck down. You know if it gets rationality scrutiny, it's going to be upheld.

In the intermediate case, the intermediate level of scrutiny, you don't know what they're going to do. There is no predictability to it.

I prefer to apply a reasonableness basis test to all of those levels, and the result of that is that distinctions based on race almost never will be reasonable, except in the most urgent circumstances. Distinctions based upon gender will rarely be reasonable because, in our society, as we now view the place of women in society, only extreme cases based upon biological differences would probably be upheld. I mean, things like women in combat, only men in combat.

Senator **Specter**. My time is up. Let me just make a final observation.

What troubles me as I hear your testimony, after having studied your writings and your opinions, is the very significant and pronounced shifts. You start as a socialist, you become a libertarian, you write a theory of constitutional law in 1968, as you described yesterday; you change that in 1971 on neutral principles; you articulate that doctrine in many speeches, dozens of speeches, through the seventies and through the eighties. You are willing to assure us that you will apply *Brandenburg,* which you think is fundamentally wrong, and a drastic change from your other writing.

The concern I have is, where's the predictability in Judge Bork? What are the assurances that this committee and the Senate has as to where you will be given the background and this history. I don't know that you can really answer that, but I would be pleased to hear your comments.

Judge **Bork**. In the first place, Senator, the fact that as a teenager and into my early twenties I was a socialist hardly seems to me to indicate fundamental instability. As Winston Churchill, I think it was, said, "Any man who's not a socialist before he's 40 has no heart, and any man who is a socialist after he's 40 has no head." [Laughter.]

I think that kind of evolution is very common in people, very common.

Now, the original intent philosophy I have been publishing now for 16 years, and I don't intend to move from it. Other things—*Brandenburg,* I have not shifted. I have said to you that I would have thought, as an initial matter, that advocacy of law violation could be prohibited when you're not using it to test the constitutionality of a statute.

I have also said the Supreme Court added to that the fact that advocacy of law violation may be prohibited if lawless behavior is imminent. I don't think they needed to add that. I am willing to accept the fact that they added that, as a judge. And my first obligation as a judge is not to write theoretical essays; it is to decide cases and keep the law, insofar as possible, stable and continuous.

Senator **Specter**. Judge, how can you say that you're standing by original intent when you say that you're prepared to accept the Supreme Court decisions on equal protection which have deviated totally from original intent?

Judge **Bork**. You see, I don't know, Senator, that that's entirely true. I think they were thinking about race. But I think they may have also thought about reasonableness. I'm not sure. I'm not an expert on this. But in any event——

Senator **Specter**. Wait a minute. You have written flat out—and this isn't a matter of accepting a Supreme Court opinion; this is a scholarly work, where you say that when the equal protection clause of the 14th amendment was adopted, the framers and the ratifiers had race in mind and race only.

Do you now think they had something else in mind?

Judge **Bork**. I don't know. I do not know that history. There's been a lot of historical research since then and I'm not relying upon original intent. What I am relying upon is a mode of analysis that the Supreme Court instituted in the last century. It seems to me a little late for anybody to tear that up, even if it doesn't square with original intent. That's what I'm saying to you.

There are established doctrines that—somebody may go and examine the history of the 14th amendment and say that doctrine really isn't supported by the original intent. But if it's established——

Senator SPECTER. It's too late to tear up the doctrine of privacy?

Judge BORK. We will face that when we come to it, Senator. I have told you how I would face it.

Senator SPECTER. We're facing all these other matters this afternoon.

Judge BORK. No, but some things are absolutely settled in the law. I have told you what they are. I have told you that the incorporation doctrine is; I have told you the commerce clause is and so forth. These are things of not only long standing but all kinds of things have grown up around them. Any judge understands that you don't tear those things up.

When you ask me about a current controversial issue, I cannot, and I should not, give you an answer.

Senator SPECTER. Thank you very much.

The CHAIRMAN. The Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I thank my colleague, Senator Heflin, for yielding to me, and I yield briefly to Senator DeConcini for a statement.

Senator DECONCINI. Mr. Chairman, I have just been contacted by former Dean Paul Marcus of the University of Arizona. He has informed me that no one has secured his approval for his name to appear on the list of the Senator from Utah published here a few minutes ago of 100 select law professors. He has not taken any position in favor of or in opposition to Judge Bork. He is sending me a letter stating that and has copied Judge Bork on that matter. But he is concerned that he is being represented as supporting Judge Bork and he takes no such position.

I wanted the record to show this.

Senator HATCH. Let me say this. It is my understanding that he was, but if that's so, there are still 99 there. We will check on that and we'll go with the 99, because they're all eminent, every one of them are good, and I would hope he will reconsider as he considers Judge Bork's testimony here.

Senator DECONCINI. I thank the Senator from Illinois.

The CHAIRMAN. The Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

Judge Bork, I was a little startled to hear your response to Senator Leahy on the *pro bono* work. One of the things that is important for a Justice on the Court, or a judge on the federal bench, to have is some understanding for those less fortunate in our society.

Are there other things that you have done with the less fortunate in your 60 years of work, helping or volunteering to work with the retarded or whatever it may be?

Judge BORK. No, Senator, I can't claim a record of that sort.

Now, if you ask me do I know anything about such people, obviously I do, through a variety of ways—not the retarded in particular, but obviously I do through a variety of life experiences. But I have not done what you suggest.

Senator SIMON. I thank you.

Let me turn to another area of concern, and that is something we discussed yesterday. I said,

> One point, at a speech at Berkeley in 1985, you say "What a court adds to one person's constitutional rights, it subtracts from the rights of others."

That's a quote.

> Do you believe that is always true?
>
> Judge BORK. Yes, Senator, I think it's a matter of plain arithmetic. I think our Constitution gives a constitutional right or a liberty in areas where the Bill of Rights or the Civil War amendments don't prohibit it, citizens to sit down and elect their representatives and make their laws.
>
> If a court strikes down such laws on behalf of a plaintiff claiming liberty, it automatically deprives the first group of its liberty. So what you're talking about here is a redistribution of liberty.

My concern is that we're not just talking about taking two oranges off a shelf and shifting them to another shelf, that there is no arithmetical equality here. Let's use the case we used yesterday, of slavery. When you take away the liberty of a slave owner to have slaves, and grant liberty to those who are slaves, while I suppose you are taking one right away from the slave owner, the disparity is so great that it is important that that liberty be granted.

Judge BORK. Oh, it is. I entirely agree with you.

Senator SIMON. So when you say "I think it's a matter of plain arithmetic——"

Judge BORK. Well, obviously, if you tell somebody he has a right against somebody else, the other person loses something. That's all. That is standard legal analysis. I don't think there's any question about it.

The fact is that in the case of slavery, we have the 13th amendment because we thought it was important to give slaves rights. We have the 14th amendment because we thought it was important to give former slaves rights, and the 15th amendment on voting rights was equally because we wanted to shift power or rights away from a ruling class that had it and give it to an underclass that needed it.

I have no objection to that. I just say that one must recognize that when you—when a community passes a law because it, say, wants to prohibit something, and the court says that law is invalid, it gives the people who object to the law liberty and takes it away from the folks who wanted the law.

That's fine, and I like it, if it's in the Constitution. The Constitution itself redistributes rights and it's intended to, and it should. The only thing I have ever objected to was the court doing it without constitutional authority.

Senator SIMON. But when you look at the Constitution, you're not looking at the Tax Code. If you're writing a Tax Code, and if you grant some group 1 billion dollars' worth of exemptions, you eliminate 1 billion over on the other side. You recognize that?

Judge BORK. Of course. But I was not saying that the liberties of the two groups are of equal value. We redistribute liberties all of the time, not only through the Constitution but through statutes, regulations and so forth. That's the way government operates.

But what I was objecting to in that speech was the rhetoric, that every time the Court makes up a new right, it enlarges liberty—

well, it does for one group, but it diminishes it for another group. That's all I was saying.

Senator SIMON. I guess my concern is, as I hear it, you seem to almost equate the two.

Judge BORK. No.

Senator SIMON. All right.

Judge BORK. Let me back up.

It may be—one has to mention various categories. It may be, if the Constitution says you may not do this to this minority, and the Constitution says that frequently about various kinds of minorities, then that's fine. The Constitution has made the determination that the rights are to be there and not with the larger group. That's fine. That's exactly what constitutional law is about.

If a court, without guidance from the Constitution, says to an individual or a minority that "you may not be regulated in this way", then the court has redistributed the liberties without authority from the Constitution. It is wrong to say they have just increased liberty. They may or they may not. They've certainly redistributed liberty.

My only point was that a court has no authority to do that without constitutional mandate.

Senator SIMON. I have long thought that it is fundamental in our society, that when you expand the liberty of any of us, you expand the liberty of all of us.

Judge BORK. I think, Senator, that is not correct.

For example, to take an example that I think most people would recognize—and we've been around this, and I don't mean to keep harping on this one example, but it's an obvious example. If a community decides that it wants to ban certain forms of obscenity, because that obscenity impacts on their children, their family life and attitudes and the moral environment, and if a court should come along and say you may not ban that obscenity, so that the practice of showing obscene materials and so forth increases, I think the majority has lost some liberties. Not everybody's liberty has been expanded.

Now, we can differ about that, but it seems to me fairly evident. One of the great liberties we have is to govern ourselves through representative bodies like the Senate and the House of Representatives. If a court takes that away from us, we've lost a liberty. A court ought to take it away from us if the Constitution says so. It ought not if the Constitution does not say so. It should leave us the liberty of electing our Representatives and Senators and having them make public policy for us.

Senator SIMON. Then we get back to the exchange you had with Senator Specter here, where if I follow you correctly, and please correct me on this—you go back to original intent, but you accept precedent for the Chinese, for others, under the equal protection clause. But you are not willing to create the precedent in behalf of liberty.

Judge BORK. Yes, I am. Under the equal protection clause, since—Once you begin to operate, as the Court has, and as John Paul Stevens suggests, with a reasonable basis test which would produce the same results in race and gender, as the Court currently gets through its multi-tier analysis, then as various challenges come up under the equal protection clause, the question will be whether this is a reasonable distinction or whether it's an outmoded stereotype of some sort.

If a new challenge is made by a new group, then I would create precedent, obviously, if I apply that test as I said I would. The Constitution says any person, and if you look at—that any person is protected under the equal protection clause—if you look at the language, which an original intention person should, I think you're driven to a reasonable basis test.

Now, I am sure that the framers of that 14th amendment did not think that the way women were treated in those days was unreasonable. That was seen to them very natural. Now, as women's place in society has changed, all of those distinctions that they made and thought were entirely reasonable now look to us unreasonable. That's the way constitutional doctrine evolves.

Senator SIMON. Let me again read—and I recognize you have changed your opinions from this Indiana Law Review article, which you have heard more about in the last three days than you probably want to—but let me just read a few sentences here.

"Compare the facts in *Griswold* with a hypothetical suit by an electric utility company——"

Judge BORK. Could I have the page, please, Senator, so I can follow you?

Senator SIMON. It is pages 9 and 10.

Judge BORK. All right. I'm sorry to stop you.

Senator SIMON. "Compare the facts in *Griswold* with a hypothetical suit by—" this is the case where the law outlaws the use of contraceptives "—with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical." Now, I could go on and read the rest. But you say "It is clear that the court cannot make the necessary distinction."

Do you really believe that in one case, where a couple uses contraceptives and the majority in the court rules that that is unconstitutional, that that is really identical with an electric utility company violating a smoke pollution ordinance?

Judge BORK. Let's be—I must be very clear about what that means, because it is explained in the pages that follow. We are now talking about a case—Let me back up.

As a legislator, if I were a legislator, I would clearly vote for the smoke pollution ordinance and I would vote against the anti-contraceptive ordinance, and as a citizen I would oppose the anti-contraceptive statute and I would vote for the smoke pollution statute.

I am talking here about two cases in which, if there is no constitutional objection to either statute, then a judge has no way of imposing his moral preferences upon the Constitution. That's all I'm saying. I'm saying the judge may not have a hierarchy of values that does not come from the Constitution. He may not say to a consumer, "You value your low-cost electricity, but that's an ignoble value, whereas the other is a noble value" unless the Constitution tells him to make that choice.

A legislator can make that moral distinction because a legislator is responsive to the people and must make moral choices all the time. I think a judge is supposed to enforce the morality of the people who made the law—in this case, the Constitution. That is the only reason I say the judge has no way to tell those two cases apart if the Constitution does not speak.

Senator SIMON. But I guess that gets back to whether you use the Constitution to expand liberty, as Justice Harlan indicated in that quotation I read yesterday. My hope is that the courts, through the decades ahead, will, where it is prudent, see that we can expand liberty, the right of privacy and other things.

My concern, as I look at your record and a host of things, is you are moving, perhaps somewhat reluctantly, and if not reluctantly, then after the fact, accepting the decisions and the precedents of the Court, but not leading in seeing that people have these rights.

Is that an inaccurate reading of the record?

Judge BORK. Well, the difficulty with the record is that I wrote only about what I regarded as excesses by the Supreme Court. I did not write about the ones that I thought were approving. As a matter of fact, over the period of years I was discussing, I don't suppose I was criticizing more than one or two Supreme Court cases a year. When they made a proper expansion of liberty, I did not sit down and write an approving article. Perhaps I should have. It was only when I thought a principle or a mode of decision that was coming into the law was not justified that I wrote an article.

That is why you will not see the other side. But, you know, I have said there are a lot of opinions that I—I approve of most Supreme Court opinions. Some of them expand liberty.

Senator SIMON. I thank you, Judge.

Let me just add again my concern, that through the courts, as well as through the House and Senate, and through the White House, that we provide leadership in protecting the rights we have and expanding that base of rights. I want those on the Court, where that leadership has been so important, to be sensitive to the less fortunate, sensitive to those who sometimes are unprotected in our society.

Judge BORK. Well, Senator, we had a discussion this morning—not you and I—in which I pointed to my record as Solicitor General and my record on the court of appeals, which has been—as I said, I have the material here and I will submit it for the record later—which has been, in seven out of eight cases, involving claims by racial minorities or by women, in seven out of eight cases I have voted for the racial minority or the women.

I have a lot of labor union cases in which I voted for the labor union. There simply is no reason to expect that I will not continue to do that. I wouldn't have done it in the first place if I didn't think the law called for it.

Senator SIMON. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from South Carolina.

Senator THURMOND. Judge Bork, I just want to commend you for being so frank and open with your testimony. You have answered all the questions, and you have answered them not one time but three or four times. You have proven that you're a real scholar and we are proud of you. I think you will make a great Justice.

That's all, Mr. Chairman.

Judge BORK. Thank you, Senator.

The **Chairman**. The hearing is recessed until tomorrow morning at 10:00 o'clock.

[Whereupon, the committee adjourned at 6:37 p.m.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 18, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also, present. Senators Thurmond, Kennedy, Heflin, Leahy, Metzenbaum, Simpson, Hatch, Grassley, Humphrey, DeConcini, Specter.

The CHAIRMAN. The hearing will come to order.

Welcome, Judge. As I said yesterday, with the grace of God and the good will of the neighbors and short questions and short answers, we just may get finished today. That is my hope.

Senator Leahy has indicated that he would like the floor for a minute, and I will yield to him in a minute. After that, we will then begin this morning's questioning with Senator Heflin. Then we will move to Senator Humphrey. Then we will start a third round of questioning.

I yield to the Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. Good morning, Judge Bork.

Judge BORK. Good morning.

Senator LEAHY. There is something that you and I spoke about last night that I would like to mention publicly today. I think a lawyer's pro bono obligations under the canons of ethics are, of course, a legitimate question for any nominee. But I am certainly sorry that my line of questioning may have evoked some painful memories for you. As I said yesterday, it is perfectly proper for you to have consultant fees. In fact, they are an indication, I believe, of your stature in the field of antitrust.

Thank you, Mr. Chairman.

Judge BORK. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

Senator Heflin.

Senator HEFLIN. Mr. Chairman, first I would like to commend you for the way that you have handled the hearings. I think you have been eminently fair. Frankly, I think you have even leaned backwards every now and then, I would guess. I think that some of my colleagues in the Democratic Party ought to have their heads knocked a little bit, and there ought to have been a little hair pulling on the other side over there in regards to matters.

Senator **Leahy**. Some of us could not stand the hair pulling.

Senator **Heflin**. Anyway, I think you have been eminently fair, and I say that I have the greatest confidence in your integrity and your honesty.

The **Chairman**. Thank you, Senator.

Senator **Heflin**. Judge Bork, I believe we have pretty well covered the waterfront on the various judicial theories, except that I do not recall that anyone has questioned you about the concept of incorporating certain parts of the Bill of Rights into the due process clause of the 14th amendment.

That has been a highly debated and controversial area of jurisprudence particularly with the Warren Court, and there were efforts made, I think, first, to try to go through the privileges and immunities clause. Then they developed the concept of the due process clause and the various writings that had differed pertaining to that.

Would you give us your feelings of whether or not this was judicial activism, judicial imperialism, or what is your feeling pertaining to the reasoning that took place in the sort of selective incorporation theory?

Judge **Bork**. Senator Heflin, the historical evidence on that is still coming in. When I first went into teaching, I think the received wisdom was the article by Professor Fairman that appeared in the Harvard Law Review, arguing that there really was not any historical evidence for incorporation. He was responding to Justice Black's opinion in the area. Since then, there has been more evidence that incorporation was intended.

Now, it is perfectly clear, when we say "incorporation," as you and I know but maybe not everybody who is listening to us does, we are talking about the theory that the due process clause of the 14th amendment applies against the States the Bill of Rights which originally applied only to the federal government. Since then, as I say, there has been more evidence which tends to show that incorporation was intended. It is very clear that Congressman Bingham, who wrote much of the clause and managed it in the House, and Senator Howard, I think it is, who was the member of the committee that drafted it and was the floor manager in the Senate—both of them clearly intended to incorporate not just the Bill of Rights but any personal protection to be found in the Constitution, including the original Constitution.

So there is some pretty good historical evidence that it was intended. There is an argument whether the ratifying conventions understood that or not. I do not know the answer to that, but it seems to me that now the Court has done it. It seems to me that there is some evidence that what they did was correct.

In any event, it seems to me a beneficial development and thoroughly established, and I do not think anybody really wants to see the States free of the Bill of Rights. And as I say, I think there is considerable historical evidence that it was intended, some that it was not.

Senator **Heflin**. Well, I have not found and my staff has not found—and as far as I know, nobody else has found—that during the period that this was developing that you wrote anything that was basically critical of the doctrine at that time. Do you recall ever writing anything pertaining to that aspect?

Judge **Bork**. No, I do not, Senator. I have mostly read secondary sources. I read the Fairman article, and Professor John Ely, who was recently dean of the Stanford Law School, wrote a book which I read since then. He says that the evidence is not as clear as Fairman made it. In fact, they have some evidence, much evidence for incorporation.

I have never written about it. I have never examined the original sources. I think there is some historical support for it, and it is a thoroughly established doctrine and it will stay that way.

Senator **Heflin**. In some of your writings and in your testimony you have used the term "judicial imperialism." It seems to me you make a distinction between judicial activism and judicial imperialism.

Do you see a distinction? And if so, what is the distinction that you have used and the context that you have used it?

Judge **Bork**. It is just a distinction. I do not want anybody to think that I think courts should be passive and not defend individual liberties. They should be very active in that field. I prefer the word "imperialism" to describe a process which they should not do, which is to intrude upon, encroach upon the proper province of the legislature.

Senator **Heflin**. Well, is it with more emphasis that you use the words "judicial imperialism" as opposed to "judicial activism"?

Judge **Bork**. Well, activism does not mean the same thing as imperialism to me. As I say, courts should be active in enforcing the Constitution and the statutes. I do not believe in a passive court that just sits there and defers to everybody.

On the other hand, imperialism implies that somebody is taking over territory that does not belong to them. That is what I mean when a court takes over a territory that belongs to the legislature.

Senator **Heflin**. In an article in the "District Lawyer," which was an interview between you and an attorney you made some comments on stare decisis, which means let the decision stand. Sometimes I think we get very legalistic here, and the public that is watching may have to run to the dictionary. If it is not a law dictionary, they may not find some of these terms. Maybe we will try to explain the term of precedents and the concept which is a very strong one, it provides certainty to the law and predictability to affairs of persons, we follow the concept of let the decision stand after they have been decided. I think maybe we should illustrate that.

Anyway, you were asked a question in that article, and the question was:

> That suggests that the principle of stare decisis may be less weighty in constitutional matters than in statutory matters. Is that your view?

And your answer was,

> That has been the practice of courts throughout our history, and I am not prepared to say it is wrong. There are some constitutional decisions around which so many other institutions and people have built, that they have become part of the structure of the nation. They ought not to be overturned even if thought to be wrong. The example I usually give, because I think it is non-controversial, is a broad

interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations and so forth have been built up around the broad interpretation of the commerce clause that it would be too late even if a Justice or a judge became certain that the broad interpretation is wrong as a matter of original intent to tear it up and overturn it.

I assume that you still agree with your statement that is made there.

Judge **Bork**. Oh, I certainly do, Senator, and I have previously in many speeches expressed that point. As we have discussed here, it is not just the commerce clause, but the legal tender cases, the incorporation doctrine and so forth now part of the fabric of the nation.

Senator **Heflin**. Then the question is,

> But subject to that kind of prudential restraint where people have relied on precedents, a body of legal doctrine, your views would be that a Justice is entitled as a part of his responsibility to re-examine constitutional questions de novo.

Answer,

> I would think that is true of a judge and true of a law court judge unless he is bound by a Supreme Court precedent. After all, there are a lot of considerations that go into it. But at the bottom, a judge's basic obligation or basic duty is to the Constitution, not simply the precedent.

Now, is that your thinking still today?

Judge **Bork**. Yes; that is a very conventional view, Senator. I have here quotations from Justice Brandeis and Justice Douglas. That has been the court's practice. I learned that in the first year of law school that judges respect precedent in all fields, but somewhat less so in constitutional law than they do in statutory law. I remember I learned that in my first class from then Professor Edward Levi, later Attorney General, among many other things. And it is in his book, "Introduction to Legal Reasoning."

The Supreme Court has always said that, and many Justices have said that. That is conventional wisdom.

Senator **Heflin**. In April of this year, to the Philadelphia Society, you delivered a speech which has been entitled "Bork's Wave Theory of Law Reform."

Judge **Bork**. I do not think that was my title, Senator. Somebody else put that title on there.

Senator **Heflin**. Well, maybe it was entitled "A Crisis in Constitutional Theory: Back to the Future."

Judge **Bork**. That was the title, yes.

Senator **Heflin**. Well, now, in that speech—I have been trying to get it and I just got it—basically, as I understand it, these words were contained—and if you have a copy of that speech, they are excerpts from it.

Judge **Bork**. I have a copy, Senator. Do you have a page number?

Senator **Heflin**. Well, I just got this. There was an article in the National Review that had excerpts where part of it was left out, that sort of thing. So my question is framed at the time and the context of that as well as other writings that we have had, well, sort of excerpts from it. If it is not fairly presented to you, let me know. I want to be completely fair. But this is basically what I gather the speech contained.

> What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discov-

ered. To future generations, this will be known and revered as Bork's Wave Theory of Law Reform. The courts addressed what they regarded as serious social problems after World War II, and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from academies, in sympathy with the courts, politically began to construct theories to justify what was happening. So was non-originalism born. That wave has become a tsunami—

As I understand it, that is a hurricane wave—

Tsunami, and its intellectual and moral excesses are breathtaking. These theorists exhort the courts to unprecedented, imperialistic adventures, but the second wave is rising. When I first wrote on original intent in 1971, one of my colleagues at Yale told a young visiting professor not to bother with it because the position was passe. So, indeed, it was. But it is more than passe. It was, I think, the future as well. There are many more younger people often associated with the Federalist Society and who are of that philosophy and who plan to go into law teaching. It may take 10 years, it may take 20 years for the second wave to crest, but crest it will, and it will sweep the elegant, erudite, pretentious and toxic detritus of non-originalism out to sea.

Judge **Bork**. That was an after-dinner speech, Senator. [Laughter.]

Senator **Leahy**. It must have been one heck of a dinner.

Senator **Heflin**. Of course, that causes me concern that you have got an agenda which would, in effect, be contrary to somewhat of your previous statements on stare decisis.

Judge **Bork**. Senator, may I answer that?

Senator **Heflin**. Yes.

Judge **Bork**. I am not talking here at all about adhering to the law or to precedent. I am talking here about the way constitutional theory is taught in the law schools. You will find that most of the writing now urges that one form or another of a moral philosophy is the way the Constitution should be made up.

When I said that "Constitutional theorists from the academies are exhorting the courts to unprecedented, imperialistic adventures"—and they are—I am talking here about people of an opposite point of view of philosophy of original intention are going into teaching, and I think they are going to win the argument in the academy. I am not talking about sweeping past precedent out to sea. I am talking about sweeping the philosophy of non-originalism, of making up the Constitution out of moral philosophy out to sea. This is not at all a discussion of what we are going to do with the cases the Court has decided.

Senator **Heflin**. Well, I have just gotten the copy of your full speech. In the text of the way it was written in certain publications, it could be construed as this is an agenda if I get on the Court.

Judge **Bork**. No, no, Senator. This entire speech is a talk about constitutional theorists in the academy. I said on page 3, "The non-originalists or non-interpretive theorists now dominate constitutional debate," and later on in the past that you quoted, I said, "They are urging the Court on to greater adventures," and they are urging the courts on to greater adventures.

But the people I dealt with, for example, I disagreed here. The first person I disagreed with who had a non-originalist philosophy originally when he started out was Prof. Alexander Bickel, my good friend. This entire business is about legal academics. I think if you read it you will see it is an argument with professors about how to deal with the Constitution. That dramatic language about sunamis and sweeping the toxis de tractus out to sea is about the theories that are current in the academy, which I must say no court has even gone anywhere near as far as some professors think they should, and are urging them to, to create constitutional law.

Senator **Heflin**. Well, you mentioned some judges in it following this concept. I want to read it, and then I may ask some more questions about it later on, the full speech.

Judge **Bork**. All right.

Senator **Heflin**. It is sometimes that publications of certain persuasion write it as showing some sort of appeal to their readers.

Judge **Bork**. That could be.

Senator **Heflin**. So it may well be that in the presentation form it may well have been misrepresented.

I continue to look at you, your complexities, look at your opposition, and there are certain aspects of this that give me problems. One, for example, is that you came up for Solicitor General. Most of the writings that have been referred here today were writings that occurred before that time. You were questioned somewhat about some of those writings at that Solicitor General's hearing. Senator Tunney went into it in some detail.

In effect, you admitted the writings and had some of those views then, but said that would not bother you. You were a lawyer, and it would not keep you from representing the Government's position even if you had personal contrary views to a position that you might be called upon to take as a Solicitor General.

Then you came up for hearings in the Judiciary Committee again in 1982. I believe the Solicitor General was about 1973. In 1982 you had a hearing pertaining to the District Court of Appeals, the position that you are on. You were questioned about some of the writings, some of those in detail. But you were not really opposed. The civil rights groups, the others did not make a battle against you.

Now, this causes me concern of why they did not make a battle then and are making a battle now. There is some sort of concept of statute of limitations, laches, other things of this sort that I think a person has to bear in mind on this. Some people feel that the issue of abortion is so dominant in this that it has influenced other people who really are not associated particularly in that one specific field.

Now, I suppose this is an area that deserves consideration, just like every other area. You are very complex, as I pointed out, in previous questions as to what you will do. Frankly, I do not know. I said I ought to be a psychiatrist, and I really think that I would have to be more than a psychiatrist to try to look at your background and make some predictability.

But do you want to respond to this? I think this is a legitimate area. Basically, of all of these things, your previous hearings—well, I suppose it is on the concept of sort of like a statute of limitations. Do you want to respond to that?

Judge **Bork**. Senator, do you mean why are people opposing me now that did not before?

Senator **Heflin**. Well, should I pay attention to the fact that they did not do it before? I suppose that is what the question is.

Judge **Bork**. Well, yes.

Senator **Heflin**. Because I intend to ask the people, the witnesses that come.

Judge **Bork**. Yes, it is a little curious, as you say. They did not oppose me before, and since I have been on the court, my record has not been one they can object to. We have been over this in the area of minorities and women. In eight cases involving substantive issues, I have voted for the claim of the minority or the woman seven times out of eight. In labor cases, I have a lot of votes for labor unions and employees. So nothing that has happened in the past 5½ years seems to me to provide any basis for opposition now. I would think it was quite the other way around. They should have been more exercised on the basis of some theoretical things I had said before becoming a judge than they are on the things I have done as a judge, than they should be on the things I have done as a judge.

Senator **Heflin**. Well, of course, somewhat of an argument has been made to me, as I asked this of certain people who are very strongly against you. Primarily, what they are saying is this would indicate that you will not protect the rights of minorities. They say, well, the District Court of Appeals at the time was not nearly as divided as it is now, and that the U.S. Supreme Court is one where if you were to follow the agenda that they fear you follow, that you could do terrible harm to the rights of minorities, to racial progress that has occurred.

That is their argument. Now, do you have any response to that?

Judge **Bork**. Well, aside from the fact that that argument assumes something about me that is not true, it also assumes that there are four other Justices who have equally sinister views—which is not true. It overlooks my record in this field as a judge, and it overlooks what I have said.

Now, you know, one thing, this is a hearing which you gentlemen refer to a historic, you refer to it as one of the most complete and so forth. I have expressed my views here, and those views are now widely known, more widely known than any views of mine before have ever been.

It really would be preposterous for me to sit here and say the things I have said to you and then get confirmed and get on the Supreme Court and do the opposite. I would be disgraced in history. Aside from everything else, I am not going to do that.

But believe that or not, the fact is my record as a judge does not justify the opposition of these groups.

Senator **Heflin**. Well, you know, I have looked back on a lot of decisions, but this poll tax, this Virginia thing, gives me concern. You basically, as I understand it, say that it was not discriminatory.

Judge **Bork**. There was no allegation of discrimination in that case.

Senator **Heflin**. There was no allegation? Is that the distinction you made? Because there is no question to me that a poll tax that required three years of history of payment, that the last payment had to be 6 months in advance, and you had to go to the courthouse to pay it was designed to prevent the poor and blacks from voting. I do not think there is any question that that is it.

Judge **Bork**. Senator, I did not discuss the case in those terms, and the Supreme Court did not discuss the case as one in which a poll tax that was designed to keep blacks from voting. Had they discussed it in those terms so that it was shown to be a discriminatory poll tax, it certainly should have been struck down. I have no objection to that; not only no objection to it, I affirmatively agree with that. I always have.

Senator **Heflin**. I have found some writings that you have made that would indicate that you took strong positions at times which would have meant that you believed in equal treatment of blacks, and came at a time when the heat was almost as much as the heat is now on the issue of abortion. That is the busing issue. I found in the testimony that you testified before a House Committee on the equal education opportunities in 1972—and I think that was pretty well the height of the busing fire that was raging in the country—that you testified at that time,

> I would be clear about this. Congress certainly may not identify all remedies for segregation. I do not think Congress could even completely ban busing as a single remedy. As the court noted in the strong opinion involving the North Carolina busing statutes, there are cases in which busing is essential to the vindication of a constitutional right. I would think it highly doubtful that Congress would ban busing and have that statute stand up in court.

This would indicate not only your stand on busing, but it would indicate that the Supreme Court has the constitutional right to structure remedies, and you do not feel that Congress can take away from the court the availability of judicial remedies in carrying out the decisions.

Now, do you want to comment on that particular one?

Judge **Bork**. Well, Senator, yes. I have never opposed busing. The only thing I ever opposed was busing that went far beyond the original violation of law. It was much beyond what was necessary to cure the violation of law. That is a standard principle, as we both know, of equitable remedies. The remedy is as broad as the violation.

Now, I filed a brief like in the *Austin, Texas,* case which was remanded, so the Supreme Court did not decide the issue. But later, in the Carter administration, in the *Dayton* busing case—*Dayton I,* I think it was—the Carter administration filed a brief signed by Griffin Bell and by Drew Days, the Assistant Attorney General for Civil Rights, which took the identical position I had taken on this subject; and the Supreme Court accepted it eight to nothing, the principle that you do not create a remedy much broader than needed to cure the effects of the violation.

The position I have taken on that is now the law of the land.

The **Chairman**. Senator, make this your last question, okay?

Senator **Heflin**. Well, I will just stop with that.

The **Chairman**. No, go ahead.

Senator **Heflin**. That is all right. I would get into another one which would probably take a longer time.

The **Chairman**. Judge, one point of clarification I would like to have—as might other members—before I yield to the Senator from New Hampshire. That is the constant comparison by your proponents and opponents of your record on the circuit court and what it might or might not be in the Supreme Court. As an originalist, what is your view of the limitations that a circuit court judge has relevant to Supreme Court precedent? Could you have overruled, at any point as a circuit court judge, any standing constitutional principle enunciated by the Supreme Court?

Judge **Bork**. Of course not. I could not overrule it, Mr. Chairman, but I am certainly free in many cases to—you know, these cases, as has been pointed out here, are not all the same. They come down with different gradations. In a number of those cases, I could have gone the other way and written an opinion that—

The **Chairman**. I am not suggesting you could. Could you as a Supreme Court Justice disregard precedent if you so chose?

Judge **Bork**. No, not if I so chose. In a number of speeches you have, I have said repeatedly that there are many precedents—these are speeches I made before I came here—that are simply too much part of the fabric of the nation.

The **Chairman**. No, that is not the point. We will get into that later. I do not want to take too much time. As I understand the law as a lawyer, a Supreme Court Justice is not bound as a matter of constitutional law to accept the precedent that has gone before if he or she has another reason or rationale to disregard it. I am not saying you do. I just want to establish the principle.

Judge **Bork**. That is entirely true. Every Justice I have ever heard of and every legal scholar I have ever heard of says that the Supreme Court may overrule prior cases. But they all place limitations on that.

The **Chairman**. But a circuit court judge may not overrule constitutional principles stated by the Supreme Court. Is that not also correct?

Judge **Bork**. That is also correct. It depends on the application on the principle.

The **Chairman**. I understand.

Judge **Bork**. There is often a lot of leeway in there.

The **Chairman**. I just want to make sure, because I think we are confusing—not you, we—are confusing people, and I want to make sure I understand that a circuit court judge cannot under the law overrule an established principle that has been laid out by the Supreme Court in the past. It cannot reject that principle. But a Supreme Court Justice could if he so chooses. I am not saying what you might choose to do. I just want to make sure we understand.

Judge **Bork**. Yes.

The **Chairman**. The Senator from New Hampshire. I thank him for his indulgence.

Senator **Humphrey**. You are quite welcome since you indulged me. I apologize for my tardiness. I had the pleasure of escorting some of our counterparts from Pakistan—that is, democratically elected representatives of their Parliament—on to the floor of the Senate this morning.

It is always nice to examine a bright spot in the world, is it not? There is a nation that has risen from martial law and in which democracy and the rule of law, the law made by legislators, not by generals or judges, is on the ascendance.

Well, Judge, this is day four and the game is in the fourth quarter, and I think you are doing very well, indeed. The nuance is coming out, the nuance of Judge Bork the judge and Judge Bork the person. I was impressed by one of those nuances which came out. I have forgotten which Senator on the Democratic end brought it up, but it was about the fact that you as a very young lawyer, a junior member of your firm, confronted some crusty old curmudgeons with 30 or 40 years' service to that firm, senior partners, and said, look, this Jewish quota business is dumb. I am putting words in your mouth. You were probably a little more diplomatic as a very junior member, but you confronted the establishment on behalf of a man you did not even known, you barely knew, but whose credentials, I guess, impressed you. That vignette is impressive to me.

Here is another one, published yesterday in an op-ed piece by a man named Stewart A. Smith, who practices law in New York City. I do not know Stewart Smith from Adam, any more than I knew you from Adam until you walked into this room the other day. It is entitled, "Bork Deserves to be a Justice."

Mr. Chairman, I would ask unanimous consent that this piece be printed in the record.

Senator KENNEDY. Without objection.

Senator HUMPHREY. Thank you.

[Article follows:]

Bork Deserves To Be a Justice

N Y Times 9/16/87 OP-ED

By Stuart A. Smith

In Robert H. Bork, President Reagan has chosen one of the most distinguished legal minds of our generation to serve on the Supreme Court. But instead of accolades, the nomination has provoked a variety of ill-informed reactions.

I served as tax assistant under three different Solicitors General, during both Democratic and Republican administrations, including Judge Bork's tenure from 1973 to 1977. I can attest on the basis of personal observation that his conduct as the Government's chief lawyer before the Supreme Court was marked by intellectual honesty, integrity and a professionalism much appreciated by the Court itself.

Two instances illustrate these qualities. In 1974, a suit was brought by an antiwar group to challenge as improper the practice whereby members of Congress served in the armed forces' reserves. The Solicitor General successfully opposed the suit on various grounds, including "justiciability" — a doctrine that permits the courts to dismiss cases that are not suitable for judicial resolution. Here, the claim of justiciability relied upon the constitutional doctrine of separation of powers — that each house of Congress is to regulate the practices of its members rather than having those practices regulated by a coordinate branch of Government, such as the courts.

'Intellectual honesty, integrity.'

When Mr. Bork advanced the Government's justiciability point before the Court, Justice William O. Douglas, who rarely spoke, challenged the argument. He asked whether, in the Government's view, a suit to recover back pay by a member of Congress who was dismissed from the reserves would also be nonjusticiable, given the fact that suits for back pay are routinely handled by the Federal courts.

Before Mr. Bork could answer, another Justice observed that there was no evidence that a back pay claim had been filed in this particular case. The Solicitor General agreed but rejected this easy way out of what was a difficult question. He went on to state that Justice Douglas's question "properly tests the limits of our theory." He then answered the question.

I no longer recall the substance of the answer, but I do recall the nature of the process: two powerful minds engaging in a demanding exchange in which each rejected a simple solution and acknowledged and responded to an opposing point of view with unfailing candor and courtesy. A man less concerned with the pursuit of truth, less committed to his obligation to help the Court reach the legally correct decision, and more concerned — as sometimes lawyers are — simply with winning a case, would have avoided such a question.

A second episode illustrates in another way his professionalism and integrity. A black man had been convicted in a Southern state of various drug and criminal income tax charges. In his petition for Supreme Court review, the defendant claimed that the Government's principal witness had committed perjury.

As the lawyer responsible for presenting the Government's tax cases to the Supreme Court, I directed that an independent evaluation be made, and concluded that the defendant's claim was factually correct. Accordingly, I recommended to Mr. Bork that the Government confess error and ask the Supreme Court to return the case to the court of appeals to consider whether the conviction should be reversed.

The Solicitor General unhesitatingly agreed with my recommendation. He took this principled action despite the strong protests of the local United States Attorney. As Mr. Bork saw the matter, the Government's criminal prosecutions had to be conducted with the utmost fairness and the Government owed a special obligation to the Supreme Court to admit when the process had been defective, whatever the costs might be. A lesser man, again, would have yielded to institutional pressures and deprived a black man of his rights in order to protect the reputation of another Federal officer.

It is fortunate when a person of Judge Bork's demonstrated ability comes to national prominence. It is even more fortunate when a person of Judge Bork's professionalism does — a professionalism that guides him always, when dealing with the powerful and the powerless, to act with the utmost honesty and responsibility. Judge Bork would enhance, indeed grace, the important work of our nation's highest tribunal. The Senate should act speedily to confirm his nomination. □

Stuart A. Smith practices tax law in New York City.

Senator HUMPHREY. Thank you. Let me just read a few passages from this by Stewart Smith.

> I served as tax assistant under three different Solicitors General during both Democratic and Republican administrations, including Judge Bork's tenure from 1973 to 1977, and I can attest on the basis of personal observation that his conduct as the Government's chief lawyer before the Supreme Court was marked by intellectual honestly, integrity and a professionalism much appreciated by the court itself.

Then skipping on to the last three or four paragraphs,

> A second episode illustrates in another way his professionalism and integrity. A black man had been convicted in a southern State of various drug and criminal income tax charges. In his petition for Supreme Court review, the defendant claimed that the Government's principal witness had committed perjury. As the lawyer responsible for presenting the Government's tax cases to the Supreme Court, I directed that an independent evaluation be made and concluded that the defendant's claim was factually correct.
>
> Accordingly, I recommended to Mr. Bork that the Government confess error and ask the Supreme Court to return the case to the court of appeals to consider whether the conviction should be reversed.

So here is the situation. The spring is all wound up. The Government is already to go in the case before the Supreme Court, and here comes this little junior attorney to Robert Bork who said,

> Wait a minute. The defendant is right. The defendant is right. We had better pull in our horns as embarrassing as it may be.

Continuing,

> The Solicitor General Bork unhesitantly agreed with my recommendation. He took this principled action despite the strong protests of the local U.S. attorney. As Mr. Bork saw the matter, the Government's criminal prosecutions had to be conducted with the utmost fairness, and the Government owed a special obligation to the Supreme Court to admit when the process had been defective, whatever the cost might be. A lesser man would have yielded to institutional pressures and deprived a black man—

It does not matter what his color was, but that is what Smith says—

> Deprived a black man of his rights in order to protect the reputation of another federal officer. It is fortunate when a person of Judge Bork's demonstrated ability comes to national prominence.

Indeed. My remark.

> It is even more fortunate when a person of Judge Bork's professionalism does, a professionalism that guides him always when dealing with the powerful and the powerless to act with utmost honesty and responsibility. Judge Bork would enhance, indeed grace, the important work of our nation's highest tribunal.

Well, I can tell you, you certainly graced the confines of this marble inquisitorial hall these last 4 days, Judge.

Judge BORK. Thank you.

Senator HUMPHREY. So I have come to admire you and respect you, as I expected, but I have also come to be very fond of you as a human being. You have stood the attacks well. You have been under fire. Some very stinky stink bombs have been dropped on your head these last 2 months, including some in this room, I regret to say.

Here we are in the fourth day, and perhaps it is worth a brief recapitulation of where we are.

It is interesting to me and I am sure it is interesting to you, that your antagonists, your opponents insist upon focusing almost exclusively on your writings as a college professor. They say that the cases you have decided, your record on the second-most important court in the country over the last 5 years is irrelevant. We have demolished that charge because, in fact, circuit court judges do have a lot of leeway in the sense that cases do not come before you in neat little packages that fit into neat little Supreme Court precedent pigeonholes. There is a lot of latitude.

In any event, you said that you would have decided all of those cases the same way—I am speaking of the seven of eight civil rights cases in which you upheld the claim of a minority or a woman plaintiff or person—that you would have decided all of those cases the same way had you been on the Supreme Court. Nonetheless, the point I am trying to make is this, that the opponents insist upon focusing on your record, almost exclusively, your record as a college professor and your writings, while suggesting that your record as a judge is irrelevant, that your record as Solicitor General is irrelevant, with the exception of Watergate, of course. It is all irrelevant except for the Cox episode. That is relevant. That is an interesting selectivity, isn't it?

Well, we have established that, contrary to the remarks about no room at the inn and no place in the Constitution and all that baloney, that you stood for minority and women parties in the seven of the eight cases that came before you in your capacity on the D.C. Circuit Court where substantive civil rights issues that were at contest.

I want to focus further, and this will duplicate, I think, overlap somewhat the fine efforts of Senator Hatch yesterday, looking at some of these amicus briefs that you filed. After all, the charges against you, the false charges, have been repeated over and over so it does not hurt to overlap a little bit in your defense.

Now, what about this parallel charge that your record as Solicitor General does not matter because you were working for a client and, implied in that, is that you just followed orders? Is that so?

Judge **Bork**. Well, there is latitude, but in addition to that, I think, Senator, it should be pointed out that insofar as I respected my function as Solicitor General and lived within the limits of that function, that is the way I have always tried to approach any job. People ought to be reassured by the fact that I lived up to my view of the function of that job and did not do something else. Solicitors General can, if they wish, impose their policy views on other people in the Government and some have done that.

Senator **Humphrey**. In an case, in the matter of filing amicus briefs, that is a matter of complete latitude to the Solicitor General, is it not?

Judge **Bork**. I would not say complete but you certainly have much more——

Senator **Humphrey**. The most.

Judge **Bork**. Much more latitude there than you do when you are defending the Government as a client.

Senator **Humphrey**. I want to go through some of these cases in which you filed an amicus brief and if in any of those cases you did so because someone twisted your arm or you were under fire or in any way under compulsion, please tell me because I will dismiss the case. I have been hanging around these lawyers too much you see, I am beginning to talk like them. I will throw out that example.

By the way, I could never be a lawyer or a judge because I cannot stand paperwork and I have a hell of a time keeping all this straight.

Judge BORK. Well, if that is the criterion, Senator, I am in trouble too, because I cannot find anything here either.

Senator HUMPHREY. All right. *General Electric* v. *Gilbert* was a 1976 case in which you filed an amicus brief—I should have a little beep here for the sake of lay people like me. An amicus brief is a so-called friend of the court brief. This is for the TV audience obviously.

Judge BORK. It is where the party filing the brief is not a party to the case, but wants to file a brief to make views known.

Senator HUMPHREY. Yes. It is a gratuitous effort, in a sense. Not required.

Judge BORK. No.

Senator HUMPHREY. The person filing the amicus brief is in no way a party on either side of the case.

In *General Electric* v. *Gilbert,* that was a 1976 case, you filed a brief arguing that the exclusion of pregnancy-related benefits from an employer's disability plan violated the sex discrimination provisions of title VII of the Civil Rights Act. The side on which you filed an amicus brief lost, did they not? Do you want to tell us? Do you remember the details of this case?

Judge BORK. All I remember is I have a note here that six justices rejected my argument. It was an argument that I did not have to file because it was a controversial position.

Senator HUMPHREY. In other words, you were advocating a broader interpretation of title VII of the Civil Rights Act than the Supreme Court was willing to embrace?

Judge BORK. That is correct.

Senator HUMPHREY. With respect to pregnancy benefits in sex discrimination law, is that right?

Judge BORK. That is correct.

Senator HUMPHREY. In other words, you were standing with an individual. This was an individual person, right?

Judge BORK. I was. I should not take too much credit for this. The Civil Rights Division wanted me to do this and I went along because I thought it was a good argument.

Senator HUMPHREY. You were under no compulsion?

Judge BORK. Oh, no. I was under no compulsion.

Senator HUMPHREY. You thought it was the right thing to do?

Judge BORK. Yes.

Senator HUMPHREY. And this was only an amicus brief but, nonetheless, you took the position that a broader application of title VII of the Civil Rights Act was in order in this case and the Supreme Court said, to the other parties and, indirectly to Bork, you are wrong.

Judge BORK. Yes.

Senator HUMPHREY. You're trying to apply the law too broadly. It is interesting to note that Justice Powell, the man whom you will replace if confirmed, voted to reject your expansive interpretation. It is interesting to note also that Justice White, President

Kennedy's nominee to the Supreme Court, also rejected the expansive interpretation which you argued in your brief. Nobody questions the commitment of Justices Powell and White or President Kennedy to equality before the law for all of our citizens.

Let's talk about another 1976 case, *Runyon* v. *McCrary*. You filed an amicus brief arguing that Section 1981 of the Post-Civil War Civil Rights Act could be applied to private schools which excluded qualified children because they were black. Do you recall any pertinent details of that?

Judge **Bork**. No, Senator. I remember that I filed the brief but I do not recall any more details of the matter.

Senator **Humphrey**. Well, the short of it is that your views prevailed; that is, the side on whose behalf you filed the amicus brief prevailed and the Supreme Court announced, for the first time, that Section 1981 did, in fact, apply—first time in who knows how many decades——

Judge **Bork**. Ever, I think.

Senator **Humphrey**. Beg your pardon?

Judge **Bork**. The first time ever.

Senator **Humphrey**. Ever, yes, since the law was passed, which was sometime after the Civil War apparently. Before I got here. For the first time that Section 1981 is a very important remedy in the area of race discrimination and that was, obviously, a significant achievement for civil rights.

Judge **Bork**. I think it is probably worth noting that that position, which the Court accepted, would also bar the racially-restrictive covenant that was involved in *Shelley* v. *Kraemer*.

Senator **Humphrey**. Again, Justice White, President Kennedy's nominee, voted against the decision in the *Runyon* case. He was on the losing side and again, point out that there is no grounds for accusing him of racism or the President who appointed him. The next case was *Lau* v. *Nichols*, a 1974 case, in which a Chinese youngster argued that a public school receiving financial assistance, federal financial assistance apparently, violated title VI of the Civil Rights Act by failing to establish a program to assist non-English speaking students, such as Chinese and Hispanic, to cope with the English curriculum.

You filed a brief on behalf of this young Chinese student, arguing that the schools' failure to help minorities with their language problems in the schools, violated title VI. Do you want to add any details to that?

Judge **Bork**. No, I just recall being told that they had these classes of Chinese children in the school system who were not being assisted to learn English and they were sitting there and the curriculum was going right by them. They did not understand what was being said in the classroom.

Senator **Humphrey**. What is especially interesting about this case is that, in a sense, you were sticking out your neck because this Chinese boy's claim had been rejected by two lower courts that had previously heard the case and so you went, in your amicus brief, beyond the subtle law, at least to the extent that the lower courts had settled it. Is that not right?

Judge **Bork**. That is correct.

Senator HUMPHREY. Nobody put a gun to your head in any of these cases? Nobody said they would call you a racist or a sexist or an ethnicist if you did not do these things?

Judge BORK. No. The Solicitor General is fairly independent. Very rarely does anybody above him, such as the Attorney General, get involved in a case. Occasionally, but very rarely.

Senator HUMPHREY. Other cases, *Albemarle Paper Company* v. *Moody*, 1975. In that case, the court established the important point that certain verbal intelligence tests, which were not validly job-related, could be barred as discriminatory against blacks. Do you remember the details of that case?

Judge BORK. No, I really do not, Senator. I remember there was such a case but I do not remember any details about it.

Senator HUMPHREY. As a matter of fact, in that case, Justice Blackmun and Chief Justice Burger concurred with most of the ruling, but felt that the decision went too far in setting very strict standards than an employer had to meet in validating employment screening tests. In other words, Justices Burger and Blackmun did not want to go as far as you argued in your amicus brief. I have not heard anybody call or allege racism on the part of Blackmun and Burger.

Another important case where you submitted an amicus was *Franks* v. *Bowman Transportation*, 1976. In that case, in your brief, you sided with black class action plaintiffs, seeking to establish that minority victims of employment discrimination could be awarded retroactive seniority relief. That was 11 years ago and I should not keep asking you if you remember the details.

I am putting you in a bad light so do not ask me any questions like that. I do not want to be put in that light myself, even with respect to legislation of last year, because as soon as you dispose of one pressing issue, two more fall on your head around here and it all becomes a blur after just a few months, not to mention years.

To get back to *Franks* v. *Bowman*, a class action suit on behalf of black citizens, Justice Powell, while concurring a part of the majority opinion, dissented against the Court's very broad interpretation of retroactive seniority rights, as did Chief Justice Burger and Justice Rehnquist. Nobody has questioned their commitment to civil rights laws.

Let's look at one more here—this is not an amicus case, but tells the same story, the case *United Jewish Organizations* v. *Carey*—Governor Carey of New York.

Judge BORK. I argued that one personally. I not only filed a brief, I argued it in the Court.

Senator HUMPHREY. Yes, you argued it. The United States, obviously, was a party to the case. Oh, I beg your pardon. That is wrong.

Judge BORK. No, I think we were involved because it was a voting rights case, I think.

Senator HUMPHREY. Yes.

Judge BORK. And constitutional issues got into it.

Senator HUMPHREY. I see. So, in any event, you argued the case. You would not have argued the case if the U.S. were not a party, would you?

Judge Bork. I have argued a case as amicus. I argued the death penalty cases as amicus.

Senator Humphrey. But, either in the case of an amicus or in the case where the United States is a party, those are the only——

Judge Bork. Yes, that is correct.

Senator Humphrey. In any event, *United Jewish Organizations* v. *Governor Carey*, which, as you said, you personally argued before the Supreme Court and you defended a New York State re-apportionment plan designed to assure effective black voting, by creating districts with 65 percent non-white majorities. You also argued that such government action, involving a remedial race-conscious remedy was not, per se, unlawful, under the 14th or the 15th amendment. It goes without saying that many conservatives might take strong issue with the scope of that remedy in that case.

Judge Bork. I think they did.

Senator Humphrey. Can you tell us why you decided to take that case on?

Judge Bork. As a matter of fact, it was purely a legal decision. I thought that was the law and the way the law was intended to go and I did not think that the 14th and 15th amendments, in this kind of a case, prevented a race-conscious remedy in favor of blacks. So, I argued it.

I should say, Senator, when I had an objection to a case I had to take on, but I had to defend it for the Government, I would not argue it personally. I would sign the brief, but I would send somebody else over to do the arguing.

Senator Humphrey. In any event, that case was successful, was it not?

Judge Bork. Oh, yes, we won. Chief Justice Burger dissented from the opinion. He did not agree with you. Well, the point is, of course it is silly to ask if all of these other Justices are racists, or bigots, or narrow-minded. The point is that these cases are complex, and honest men and women of integrity can sometimes differ, honestly, on very fine points of law.

I think that is a point that we sometimes overlook a little bit, that reasonable men and women can differ, and that these issues that we have been discussing are complex, and if they were not difficult they would not be issues, and there would not be arguments about them, and there would not be cases to decide.

Senator Humphrey. Let's turn to criminal law. We have not done much in that area, in the sense of criminal law as it relates to individual citizens.

The President's Working Group on the Family said, in its report on the family last year, "Crime is the cruelest tax of all on the American family, a regressive levy that burdens those least able to bear its exactions." How very true.

And I say this is an issue of importance to individual citizens because the statistics show that nearly every one of us, at sometime in our life, will be a victim of crime, and that is if we are lucky, because lots of people are multiple victims of crime.

That is, they are victims of criminals on multiple occasions, whether it is the breaking and entry of an automobile, or a home, or assault, or fraud, or murder. It is very, very common, and it is a very real threat to every American. I will give you a case.

Just a few doors down from where I live here in the District—I should not say live here. I sleep here. I live in New Hampshire. But anyhow, a few doors down from where I sleep after I totter on home from this institution, there is a lady who is living in the home her father built, many years ago, obviously.

She is a lady, a woman who works outside the home. She is a single person. And her home has been broken into, not once, not twice, three times, to the point where she had to literally put steel bars on her windows. The home her father built, in which she has lived her entire life. She lives behind bars in her own home.

And in some of those robberies, she has lost things of very great personal value, not monetary value, necessarily, I do not know, but things that—you know—heirlooms, family items.

And so that is not an isolated case. We have got lots of elderly people living behind chained doors in fear of their safety. We have got parents all over this country who worry about their kids on the way home, or on the way to school.

Ordinary citizens, able-bodied citizens worry about walking down a dark street at night. So this issue of crime is a very real and practical concern to our citizens.

Now I want to ask you: we have heard a lot about the rights of criminals here so far, and that is not an unimportant thing, because we are only as secure as the least secure member of our society in our rights.

But let's talk about the rights of law-abiding citizens. What responsibility do judges have to protect society and individual citizens from criminals?

Judge **Bork**. Well, judges can do a limited amount, of course, but I think a judge has two responsibilities. One is to ensure that any accused gets a fair, completely fair trial, so that he is not prejudiced in any way.

But the other responsibility is not to elaborate legal doctrine so that the appeal becomes a game, and somebody gets off on a technicality, which has nothing to do with fairness.

That is a very broad statement and I am not an expert on criminal law, but I have participated in reversals of convictions and of reversals of sentencing because the trial had a serious error in it which meant we could not be sure it was fair, or because the double jeopardy clause was violated.

On the other hand, I do not go looking for a new wrinkle that has nothing to do with the basic fairness.

Senator **Humphrey**. You say that the—well, how do we phrase this? Do you think that criminals are adequately protected by the law and the Constitution, and the complex rules that have been, in some cases, invented by judges, and which have become a part of the fabric of our system? Do you think that has gone about far enough, or are you proposing that it should go further?

Judge **Bork**. Senator, I have participated in some criminal cases as a judge, and I have argued some as Solicitor General, but I am by no means an expert on the entire field of criminal law, and I would not want to make a cosmic judgment about the overall state of criminal law and procedure as it now stands. I am just not competent to make that judgment.

Senator **Humphrey**. The majority of cases which come before the Supreme Court are criminal law cases, are they not?

Judge **Bork**. I do not think so, Senator. At least that was not my impression when I was spending time arguing up there. There are very significant criminal law cases that come up, but there are all kinds of cases that come up there.

Senator **Humphrey**. I will give you an example of an outrageous disposition of a suit—well, an outrageous disposition of a criminal case. It is the 1984 case of *Nicks* v. *Williams*. It came out of Iowa.

A 10-year-old little girl disappeared on Christmas Eve. It turned out she had been brutally murdered by a man named Robert Williams.

Williams voluntarily surrendered to the police. He was read his rights. He did not confess, and, on the advice of counsel, he remained silent.

While he was in the custody of the police, one of the officers described how difficult it would be to find the little girl's body. See, he had already confessed, but they had not found the body nor had he revealed its location.

How difficult it would be because snow was falling, and how distressed the parents would be, on top of their loss, if the child's body could not even be given a decent burial.

The officer did not question Williams, just pricked his conscience a little bit, and Williams later, subsequently volunteered the location. The body was found and evidence was used to convict Williams of the murder.

And the court found that in any event, the body would have been found even without Williams' cooperation. He was convicted. The court of appeals reversed the conviction on the theory that the State had to prove that the officer had not acted in bad faith in appealing to Williams' conscience.

Williams had not been interrogated, had not been coerced in any way, he had been read his rights, but that was not good enough for these judges, or, a majority of them anyway.

My time is just about up.

The **Chairman**. Go ahead and finish.

Senator **Humphrey**. I am not asking you to re-hear the case, or to reach a verdict on this, but how far should judges go in protecting criminals at the expense of society? I am coming back to my original question, you did not answer it, and I do not know that you would be able to now. But I hope that you can give us some indication of where you are because I think, rightly, the American people have just about had it with all of these new inventions to protect criminals.

Judge **Bork**. Well, that is a very sensitive subject for me to speak to here, Senator, and therefore, I think I have to confine myself to the remark that a judge has to make sure that the accused person gets an entirely fair trial.

But beyond that, I do not think the scale should be weighted on the side, unfairly weighted on the side of a criminal. But I cannot say any more than that, and that is a very general statement, and I realize it is unsatisfactory.

And now that I am speaking off the cuff about a matter about which I really am not expert in any way, I probably should not have said that much because I am not sure I said it as well as I should have.

Senator HUMPHREY. Have you done any writing? I hate to bring up the issue of articles, but have you written anything on this?

Judge BORK. I have written nothing about criminal law, Senator. It has just never been one of my specialties.

Senator HUMPHREY. Thank you. My time is up. Thank you very much.

The CHAIRMAN. Thank you very much. Judge, we will now take a break for 10 minutes, until 25 after, and then we will begin questioning again. Or would you like a longer break?

Judge BORK. No, no. That is fine.

The CHAIRMAN. The hearing will recess for 10 minutes.

[Recess.]

The CHAIRMAN. Judge Bork, let me discuss how—assuming the ranking member agrees—how we will finish out the morning and then move into the afternoon.

We are now finished with the last round of questioning, and we will begin again. Some members have questions, not all will, and some have questions that will not last a full 30 minutes.

So what I am going to do is to withhold asking my questions at this point.

Senator Metzenbaum is next in line. He tells me he has some questions, maybe not many, and then I will yield to Senator Thurmond who would be next, alternating again.

Well, actually, I guess I should yield, since this is the next round, I will yield to Senator Thurmond for his questions, for about 10 or 15 minutes, and then yield to Senator Metzenbaum, who is in about the same situation.

Then we will break for lunch, and then we will come back and complete the next round of questioning.

So I will yield to Senator Thurmond for his round, and then to Senator Metzenbaum.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Bork, I am sure this is getting old by now, but I would like to ask you one more time to tell the committee how you differentiate between your writings which may be critical of a number of Supreme Court decisions, and what your approach is to the law in your capacity as a judge.

Judge BORK. Well, Senator, I think it is important to have that straight, because I think if one begins to identify a professor's writings with what he, or she will do as a judge, I am afraid there are going to be a lot of young professors watching these hearings, who will decide that being non-controversial is the best approach to a career.

But as a matter of fact, a professor is absolutely free to speculate, to think, to try out arguments. As my good friend Alex Bickel used to say, all writing is an experiment, and that is what it is. You start a debate, and then some of your stuff stands up, some of it does not.

As a judge, you are responsible to the law, and not to some speculative theory you once developed. You are responsible for continuity, you are responsible for justice, you are responsible to be compassionate to individuals, none of which necessarily appears in a professor's writing.

As I have said before in these hearings, and I have said in private to one Senator—Senator Specter—in the classroom nobody gets hurt. In a courtroom, somebody always does. And that is a wholly different function than being a professor.

Senator **Thurmond**. Judge Bork, you have criticized certain Supreme Court decisions in the area of first amendment rights and the equal protection clause, as well as others.

You have also indicated that some of these decisions are accepted law, and should not be disturbed by the Supreme Court.

This has been taken by some as a change in your views, in order to enhance the probability of your confirmation.

I do not believe this is the case. However, would you comment on this criticism.

Judge **Bork**. From the beginning of these hearings, Senator, I have said that I think the ultimate touchstone for a judge is the intention of the lawmaker, and in constitutional law—in fact it is not the intention, it is the original understanding of what that provision meant.

And in constitutional law that means what the ratifiers understood when they ratified the Constitution. But I have also said that the law has developed, and the nation has developed, and decisions have been made around which too much has been built, and around which too many expectations have clustered, for them to be overruled.

Now I might disagree with a lot of decisions, over time, although as I have said, the large majority of Supreme Court decisions I agree with. But I have given examples here, you know, of cases that just are not to be overruled. I am trying to remember the examples.

I have given examples in my speeches. The commerce clause cases cannot be overruled. You cannot cut the commerce clause back.

The legal tender cases authorizing paper money cannot be overruled, no matter what the original understanding was. The equal protection clause cases cannot be overruled. I mean, the extension of the equal protection clause cannot be overruled.

I have mentioned some first amendment cases that cannot be overruled. I have mentioned a lot of cases that I think are now part of our law, and whatever theoretical challenges might be levelled at them, it is simply too late for any judge to try to tear it up, too late for a judge to overrule them.

Incorporation doctrine I mentioned this morning in connection with Senator Heflin's questions, is also something that is now thoroughly established. I do not know that incorporation is contrary to original understanding, because the evidence goes both ways, but if it is, nonetheless, that doctrine is established.

Senator **Thurmond**. Judge Bork, I happen to agree with your philosophy of judicial restraint. However, I think it would be helpful to the committee, and informative for the American people, if you will explain the dangers that occur to our form of government when judicial activism occurs.

Judge **Bork**. Well, if a judge begins to do things, begins to decide things without a warrant in the constitutional text, and its history and its structure, in the line of precedent that has been built up—if he begins to do things, strike down laws, that he has no constitutional warrant, in the sense that I have described, then he encroaches upon democratic processes.

He encroaches upon the proper domain of the legislature. And one of the freedoms of our people is to vote for representatives who will make policy, and a judge should stop that policymaking when it is contrary to the Constitution.

He should allow it when the Constitution allows it. This is basically a democratic country, and a judge should not make it less so, without a warrant in the Constitution.

Senator **Thurmond**. Judge Bork, a great deal of concern has been expressed over your book, "The Antitrust Paradox," which you wrote in 1978.

I think it is interesting to note that, as you stated yesterday, when you wrote this book 9 years ago, you were an amateur economist. The book was premised on the question of what best services the consumer, and as you readily admit, some of the arguments you put forth then might be wrong today.

You did not think so at the time, but as economics advance, ideas change. Isn't that correct, Judge Bork?

Judge **Bork**. That is entirely correct. A desire that judges adopt the Sherman Act to evolving economic understanding appears in the legislative history of the Sherman Act, and also appears in the rule of reason, which is the basic rule of the Sherman Act, laid down by Chief Justice White in 1911 in the great cases involving Standard Oil and American Tobacco.

Senator **Thurmond**. Judge Bork, I would like, however, to clarify some of the concerns raised as a result of your book.

For example, you state that the goal of antitrust is consumer welfare. Some have indicated that you seem to be against lower prices, say, at discount stores.

How can you be for consumers if you do not like discount stores?

Judge **Bork**. Senator, I spend a lot of my time looking for discount stores. I do like discount stores. Typically, in a market, there will be consumers who respond to lower prices, other consumers will respond to the provision of service or information.

One manufacturer might decide to fix the prices of his retailers on his products alone, in order to encourage those retailers to provide service and information, compete through service and information.

Another manufacturer will go for the segment of the market which is responsive to price, and will not fix the prices of his retailers, and in that way, consumers get a choice between a low price or between the provision of service and information.

Sometimes, the same manufacturer will do both. He will have one brand that is price-maintained and one brand that is not, so he can hit both segments of the market.

I certainly would not advocate anything that would result in wiping out discount stores, they are a very valuable institution, and I personally look for them.

Senator **Thurmond**. Thank you, Judge. Thank you, Mr. Chairman. I will reserve any other questions for later.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Judge Bork, in this hearing we have already talked about your views on one sterilization case.

There is another one I want to discuss with you, the *American Cyanamid* case that you decided in 1984.

The Occupational Safety and Health Act, a statute that Congress passed to protect the workers of this country says that, quote: "Each employer shall furnish to each of his employees a place of employment free from recognized hazards that are likely to cause death or serious physical harm to his employees." End of quote.

American Cyanamid operated a department which exposed women to lead, a substance which causes harm to a developing fetus. The company offered the women of the department a horrible choice.

The women could quit their jobs, or, they could keep their jobs and be sterilized.

The company called this a fetus protection policy. It was really a policy of be sterilized or be fired. You wrote the opinion allowing the company to maintain this policy.

Judge Bork, there were 30 women working for the Cyanamid company when the company adopted the be-sterilized-or-fired policy. This policy forced 23 of those women to be sterilized or be fired. Five were actually sterilized before the lawsuit was filed. Cyanamid forced over 75 percent of their women employees to choose between their jobs and the possibility of ever having children.

Judge, I must tell you that it is such a shocking decision, and I cannot understand how you as a jurist could put women to the choice of work or be sterilized, and I would think you are entitled to comment on how you arrived at that decision.

Judge **Bork**. I would be glad to, Senator. I am just trying to recall the case. That was a unanimous decision joined in by Judge Scalia—now Justice Scalia—and Senior District Judge Williams from California. What we did, as I recall, was affirm the decision of the Occupational Safety and Health Administration. That is, OSHA, the agency which is responsible for protecting safety in the workplace had already decided this way and we affirmed it.

Now, as I wrote, it is important to understand the context in which this case arose and the task that is set for this court. American Cyanamid found and the administrative law judge agreed that it could not reduce ambient lead levels in one of its departments sufficiently to eliminate the risk of serious harm to fetuses carried by women employees.

The company was thus confronted with unattractive alternatives. It could remove all women of child bearing age from that department—a decision that would have entailed discharging some of them and giving others reduced pay at other jobs—or the company could attempt to mitigate the severity of this outcome by offering continued employment in the department to women who were sterilized.

The company chose the latter alternative and the women involved were thus faced with a distressing choice. Some chose sterilization. Some did not. The fact is, if they had not offered that choice, these women would have been put in lower paying jobs or would have been discharged. They offered a choice to the women. Some of them, I guess, did not want to have children.

My opinion is not an endorsement of a sterilization policy. As I noted, the policy might—in the opinion—the policy might be an unfair labor practice or a form of employment discrimination under title VII. Indeed, the union and the women employees had sued the employer under title VII and had reached a settlement with that employer.

The basis of the decision was Congress' intent. Since the words of the act, "recognized hazards" were somewhat ambiguous, we looked at legislative history and cases interpreting similar language in other federal laws. My opinion concluded that Congress had been concerned with physical conditions of the workplace, not with policies offering women a choice.

And my opinion was narrow. I said that the case might be different if the employer had offered the choice of sterilization in order to maintain an unlawfully high lead level, but the fact is the company could not get the lead levels down and the company was charged only because it offered women a choice.

I think that is not a pro sterilization opinion. It is not an antiwoman opinion. It is simply upholding a federal agency to which we owe deference in deciding—when you review a federal agency you are supposed to defer to their judgment if it is not outside the bounds of rationality—and the union conceded in oral argument that the company could lawfully have stated that only sterile women would be employed in the department.

So this case is simply about offering women who did not want to be discharged or sent to lower paying jobs a choice. That is all it was about.

Senator METZENBAUM. Judge Bork, as I understand your opinion, you are saying that the Occupational Safety and Health Administration came in with that position. You know, I am sure, that the Labor Secretary said that the policy should be barred. And you cannot tell me, Judge, that any Member of Congress said or thought that a safer workplace could be achieved at the expense of forced sterilization.

Congress said, no hazards in the workplace, but you wrote an opinion which said it was okay for a company to achieve safety at the expense of women by preventing its female employees from ever having children. I have to say to you that that is a distortion of the statute beyond recognition. I think it is unfair. I think it is inhumane, and maybe it somehow explains the concerns that women of this country have and have evidenced about your appointment.

Judge BORK. Senator, may I say a word?

Senator METZENBAUM. Surely.

Judge BORK. There was not a forced sterilization policy at all. The company merely said, if you wish to stay in a place that is dangerous to a fetus, if you do this we will let you stay there. The company did not achieve safety at the expense of women. They could not get the lead levels down. The administrative agency specifically found—OSHA specifically found—that the company had no way of getting the levels down.

Now, if this opinion were not a fair one, I would not have gotten a unanimous panel from Judges Scalia and Williams and I would not have been able to uphold that opinion over a petition for rehearing en banc, to have the full court. I think there were 11 members of our court at this time.

I do not know that there was a petition for rehearing or that even anybody voted for rehearing. If this were the case you described, I would not have gotten the other two judges and I certainly would not have been able to sustain the opinion against our full court of 11 members.

Senator **Metzenbaum**. Let me say to you, Judge Bork, during these several days of hearings you have routinely relied upon the fact that this judge or that judge agreed with you. You have said that certain other legal scholars agreed with you. You have not talked much about the great body of those who have disagreed with you.

You say ignore your academic writings, that you they are merely speculative. You told Senator Thurmond this morning you were trying out arguments. That is part of the process to start a debate as an academician. And you would say, look at your record on the court, it is much more reliable.

You have talked about several occasions, seven out of eight cases that you decided as the circuit court of appeals. I have asked the Justice Department to make those available to me during the recess. I do not have them. I do not know what they say. I do not know whether they are distinguishable. But I cannot tell you strongly enough that the women of this country are terribly, terribly apprehensive about your appointment.

I have traveled throughout Ohio. I have traveled throughout the country, and it is unbelievable to me the kinds of people that come up to me—a clerk, a woman who was from an economically strong social group, you get on an elevator, you walk past somebody in a hallway—and the women's groups, frankly, are afraid. They are afraid of you.

Yesterday you said, women and blacks who know your record on the court need not fear you. But the fact is, Judge Bork, they do fear you. They are concerned. They are frightened. They were not enthused about Sandra Day O'Connor or Rehnquist or Scalia. But they were not frightened by that appointment.

The women of America, in my opinion, have much to be worried about in connection with your appointment; the blacks as well. And it is only fair to say that you have made it quite clear in your appearance before this panel that you are not a frightening man, but you are a man with frightening views.

Judge **Bork**. Well, Senator, if this case——

Senator **Metzenbaum**. May I finish?

Judge **Bork**. I am sorry. I thought you were.

Senator **Metzenbaum**. The basic problem, as I see it, is that to you the Constitution is not a living document; it is not a charter of liberty. And if you cannot find protection for the individual in the fine print, then the people of this country are out of luck.

You have stated views time again that would reverse progress for blacks, that would slam the door on women, that would allow government in the bedroom, that would adversely affect the rights of consumers, that would limit free speech, that would undercut the principle of equality under the law. And before we came to these hearings I had said publicly, and I repeat now, that I think you had the burden of proof on your shoulders to satisfy this committee—and each of us has to speak for himself—that your views are consistent with the Bill of Rights and previous court decisions and the Constitution of the United States.

It is with some sadness, Judge Bork, that I say I really do not think you have done that.

Thank you very much.

Judge **Bork**. Well, thank you, Senator. Let me respond briefly to that.

In the first place, I think your discussion took off from the point of this particular case, and I must say to you that the entire Occupational Safety and Health Administration agreed with me. It was a unanimous panel opinion and you say nobody was afraid of Justice Scalia. Justice Scalia was on this opinion. Our court did not rehear this case en banc.

That means they did not think it was an outrageous case. And it was a matter of statutory interpretation, not a matter of constitutional law, and I suppose the 5 women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them.

But let me go on to your broader charge. I cannot say this enough times. You know, beginning with *Brown* v. *Board of Education* I have supported black equality. And I have done that in print long before I got here.

I have never said anything or decided anything that should be frightening to women. You are undoubtedly correct, Senator, that there are women who are apprehensive. I think it can only be because they do not know my record. I have repeatedly showed you the cases I have decided on the court of appeals in which I have voted for women.

In addition to that, there is no reason for consumers to fear me because in so far as we are talking about the antitrust law, I am guided entirely by my best understanding of what is good for consumers. And if I am persuaded that something else is good for consumers, I will go that way. There is no doubt about it.

If you now turn to the Constitution and my allegedly narrow views of that, if you will look at my first amendment decisions you will see that in cases I have taken a broad view of the first amendment. If you will look at my decision that came down recently—which was assigned to me long before I was nominated and we voted that way long before I was nominated—I have taken a broad view of the double jeopardy clause in favor of a sentenced person.

If you will look at what I have stated about the equal protection clause, you will see it as a better view—I think it is a better view—than one that a lot of people take who exclude groups from equal protection.

In sum, Senator, I think there is no basis for the concern you describe among women and blacks and I regret to say, I think there is no basis for the charges you have leveled at me.

Senator **Metzenbaum**. Thank you, Judge Bork.

Thank you, Mr. Chairman.

The **Chairman**. We will check. Senator Hatch is next. Did he yield to you? Well, Senator Simpson, are you prepared to go? Or we can wait for Senator Hatch to come back. I would like to get one more witness in.

Senator **Simpson**. Mr. Chairman, if you could just wait a moment and see if Orrin is prepared.

The **Chairman**. In the phone booth. Okay. He will be out in just a minute, hopefully with his cape off. [Laughter.]

Senator. You were out. I want to explain the laughter. They said you were in the phone booth, and I said you would be here in a minute, and hopefully with your cape off.

Senator **Hatch**. I heard about that crusty remark.

The **Chairman**. The Senator from Utah. And with your permission, we will recess at least for an hour. We will make a judgment whether it is an hour or an hour and a half after Senator Hatch.

Senator **Hatch**. I would put into the record at this point, with your approval, significant pro minority and pro women appellate court decisions by Judge Bork if I could.

The **Chairman**. Without objection.

[Decisions follow:]

SUBSTANTIVE PRO-MINORITY AND PRO-WOMEN APPELLATE COURT DECISIONS BY JUDGE BORK

1. Ososky v. Wick, 704 F.2d 1264 (1983)
2. Palmer v. Shultz, 815 F.2d 84 (1987)
3. Laffey v. Northwest Airlines, 740 F.2d 1071 (1984)
4. Emory v. Sec'y of the Navy, 819 F.2d 291 (1987)
5. County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (1983)
6. County Council of Sumter County, South Carolina v. United States, 596 F. Supp. 35 (1984)
7. Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405 (1985)

Margaret OSOSKY, Appellant

v.

Charles Z. WICK, Director of U.S. International Communication Agency.

No. 82-1043.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 18, 1982.

Decided April 8, 1983.

Foreign Service employee brought action alleging violations of the Equal Pay Act. The United States District Court for the District of Columbia, Oliver Gasch, J., dismissed the complaint, and employee appealed. The Court of Appeals, Lumbard, Circuit Judge, sitting by designation, held that: (1) the Equal Pay Act, unlike Title VII, provides for immediate judicial review of claims for equal pay, and district court may not dismiss a complaint brought under the Act for failure to exhaust administrative remedies, and (2) the Equal Pay Act is applicable to employment practices of the Foreign Service.

Reversed and remanded.

1. **Labor Relations 🔑1474**

The Equal Pay Act, unlike Title VII, provides for immediate judicial review of claims for equal pay, and district court may not dismiss a complaint brought under the Act for failure to exhaust administrative remedies. Fair Labor Standards Act of 1938, § 1 et seq., as amended, 29 U.S.C.A. § 201 et seq.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. **Labor Relations 🔑1333**

The Equal Pay Act is applicable to employment practices of the Foreign Service. Fair Labor Standards Act of 1938, § 6(d), (d)(1), as amended, 29 U.S.C.A. § 206(d), (d)(1); Foreign Service Act of 1980, § 105(a, e), 22 U.S.C.A. § 3905(a, e).

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 80-02875).

Mark T. Wilson, Washington, D.C., of the Bar of the Court of Appeals for the District of Columbia, pro hac vice by special leave of the Court, with whom Ronda L. Billig, Washington, D.C., was on brief, for appellant.

Diane M. Sullivan, Asst. U.S. Atty., Washington, D.C., with whom Stanley S. Harris, U.S. Atty., Royce C. Lamberth and R. Craig Lawrence, Asst. U.S. Attys., Washington, D.C., were on brief for appellee. Kenneth M. Raisler, Asst. U.S. Atty., Washington, D.C., also entered an appearance for appellee.

Edith Barnett, Washington, D.C., was on brief for Women's Legal Defense Fund, amicus curiae urging reversal.

Before LUMBARD,* Senior Circuit Judge, United States Court of Appeals for the Second Circuit, and EDWARDS and BORK, Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge LUMBARD.

LUMBARD, Circuit Judge:

Plaintiff Margaret Ososky, an employee of the Foreign Service, appeals from an order of Judge Gasch, November 9, 1981, dismissing her claim under the Equal Pay Act, 29 U.S.C. § 206(d) (1976), for failure to exhaust administrative remedies. Although the dismissal was technically without prejudice—Ososky would be permitted to refile after invoking the Foreign Service's own grievance procedures—the district court expressed "grave doubts" that the Equal Pay Act applies to the Foreign Service.

We reverse and remand for further proceedings. We hold that the Foreign Service must comply with the Equal Pay Act and that a claim under the Act may not be dismissed for failure to exhaust administrative remedies.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

I. Facts

Since this appeal arises from a dismissal on the pleadings, we assume the facts to be as stated in the complaint.

Ososky is a Foreign Service Reserve Officer, class 5, with the International Communication Agency (ICA), a branch of the Foreign Service. The defendant is the director of the Agency.

In 1978, after eighteen years in the Service, Ososky became the "Budget Analyst" for the Exhibits Service of the ICA's Programs Directorate, a position she held until late in 1980. She was given sole responsibility for the financial planning and evaluation of the exhibits aspect of the United States' cultural programming under several international agreements. As a budget analyst, Ososky was paid at a rate applicable to United States Civil Service positions of the GS-12 level. During the same years, male budget officers in the Press and Television Sections of the Programs Directorate were paid at the higher GS-14 rate for work substantially equivalent to Ososky's.

In 1979, Ososky made several attempts to have her position upgraded and her pay increased. When these efforts proved unsuccessful, she filed a complaint with the EEOC. She claimed that the ICA was discriminating against her on the basis of gender by paying her less for work substantially equal to that performed by higher-paid male members of the Service. She also complained that she was barred from consideration for the higher-paying GS-14 positions, because she was "being discriminatorily kept at the GS-12 level."

Ososky's complaint was still before the EEOC when she filed this action in November 1980, claiming that the ICA had violated her rights under the Equal Pay Act. The defendant moved to dismiss the complaint on the ground that Ososky had not exhausted administrative remedies available under the Foreign Service Act, 22 U.S.C. §§ 4131-4140 (Supp.1981) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), and on the additional ground that, in any event, the Equal Pay Act does not apply to the Foreign Service. Expressing doubt that the Equal Pay Act could apply to the Foreign Service, the district court dismissed the complaint for failure to exhaust administrative remedies.

II. Exhaustion

[1] We find it unnecessary to determine the adequacy of the administrative remedies available within the Foreign Service Grievance System, 22 U.S.C. §§ 4131-4140. For we hold that the Equal Pay Act, unlike Title VII of the 1964 Civil Rights Act, provides for immediate judicial review of claims for equal pay and that the district court could not dismiss the complaint for failure to exhaust available remedies.

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1976), was enacted as an amendment to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976). By providing that "any amounts owing to any employee which have been withheld in violation of [the EPA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]," 29 U.S.C. § 206(d)(3), Congress required that the EPA be enforced through the then long familiar FLSA procedures for recovering minimum wages and overtime pay. H.Rep. No. 309, *reprinted in* U.S.Code Cong. & Ad.News 687, 688, 88th Cong., 1st Sess. (1963). These procedures do not include an exhaustion requirement. We believe that a comparison of the different remedial provisions and similar histories of the FLSA and of Title VII, shows that the failure expressly to require exhaustion of claims under the former reflects a deliberate Congressional decision. In 1972 when it extended the scope of Title VII to cover federal employees, Congress added language to the statute expressly requiring federal employees to exhaust administrative remedies before filing an action in federal district court. *Brown v. GSA,* 425 U.S. 820, 832, 96 S.Ct. 1961, 1967, 48 L.Ed.2d 402 (1976). *See* Equal Employment Opportunity Act, Pub.L. 92-261, § 11 (March 24, 1972), *codified at* 42 U.S.C. § 2000e-16(c). Against this background, the 1974 amendments extending the FSLA's minimum wage guarantees and discriminatory pay protections to federal employees stand in marked contrast. For, although § 6(b) of the 1974 FLSA amendments, *codified at* 29 U.S.C. § 204(f), authorized the Civil Service Commission (now the Office of Personnel Management) to administer the FLSA, Congress specifically provided that "nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under § 216(b) of this title." *Id.* And § 216(b), as amended in 1974, provides simply that an action to recover liability under the EPA may be maintained "against any employer (including a public agency) in any Federal or State Court of competent jurisdiction." 29 U.S.C. § 216(b) (1976). Section 216(b) makes no reference to the availability of administrative remedies.

These provisions make it clear that "the Equal Pay Act, unlike Title VII, has no requirement for filing administrative complaints and awaiting administrative conciliation efforts." *County of Washington v. Gunther,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). *See also Nitterright v. Claytor,* 454 F.Supp. 130, 24 Fair Emp.Prac. Cases 678, 684 (D.D.C.1978); *Cox v. University of the District of Columbia,* 24 Fair Emp.Prac. Cases 690 (D.D.C.1981). Had Congress intended to require exhaustion when it enacted the 1974 FLSA amendments, it would have done so expressly as it did when it made similar amendments to Title VII. Nothing in the legislative history suggests that the omission was an oversight.

Moreover, permitting the district court to require exhaustion in its discretion would be inconsistent with the statute's remedial scheme. The FLSA provides compensatory relief for victims of wage discrimination. That relief is not unlimited; back pay may be awarded only for the period beginning two years before filing suit. 29 U.S.C. § 255(a). Thus, the right to back pay is continually eroded as the EPA claimant pursues administrative remedies. Had Congress intended to permit courts to require EPA plaintiffs, like the Title VII plaintiffs, to run an administrative gauntlet as a precondition to filing suit, Congress would have provided, as it did when it amended Title VII, that back pay could be received for the period beginning two years before either filing an action in federal court or commencing administrative proceedings.

Finally, we do not believe that, in the ordinary EPA case, the court should stay the proceedings pending administrative hearings. Defendant apparently suggests that EPA plaintiffs should file a complaint in federal court to preserve their back pay awards, then proceed to have the action stayed pending exhaustion of administrative remedies. Then, after those remedies have been exhausted, the plaintiff could return to federal court and pursue her judicial remedies. We see no warrant for such a scheme. The courts have been charged with making the initial factual determinations relevant to the Equal Pay Act. This case does require the resolution of the sort of complex and technical factual issues which might be better resolved by an administrative agency with special competence in the area. *Cf. Ogden v. Zuckert,* 298 F.2d 312 (D.C.Cir.1961) (Air Force major sought declaratory judgment establishing right to be retired rather than discharged because of physical disability); *Sohm v. Fowler,* 365 F.2d 915 (D.C.Cir.1966) (Lieutenant Commander, United States Coast Guard, sought to avoid retirement for having been passed over; the court sought to avoid difficult constitutional issues by staying the case pending the completion of ongoing proceedings before the Board for Correction of Military Records to resolve complex and technical factual issues.) *Douglas v. Hampton,* 512 F.2d 976, 1014–15 (D.C.Cir.1975) (question of validity of entrance examination remanded to Civil Service Commission.) Here, we perceive no reason why judicial factfinding might be improved if the plaintiff first had recourse to administrative grievance procedures. Indeed, defendant's sole argument on the merits seems to be that the Equal Pay Act is incompatible with and therefore inapplicable to the way things have long been done in the Foreign Service. We do not think that the Foreign Service's general grievance committee has any special competence to decide such a question. Similarly, we do not believe that a general grievance committee has any special competence to determine equality of work. And, in any event, the committee's analysis would not add appreciably to the Service's already completed audits of plaintiff's position.

III. APPLICABILITY OF THE EQUAL PAY ACT TO THE FOREIGN SERVICE

[2] The district court apparently accepted the defendant's argument that the EPA is incompatible with and therefore inapplicable to the Foreign Service's merit system. We note our view that the defendant's argument is refuted by the language of the EPA and the FLSA and is unsupported by precedent or policy.

The thrust of the defendant's position is that the "equal pay for equal work" principle is fundamentally at odds with the Service's "rank in person" personnel system. This court recently described this congressionally established system in *Talev v. Reinhardt,* 662 F.2d 888, 895 (D.C.Cir.1981):

> This so-called 'rank in person' system—which statutorily governs the appointment and assignment of all Foreign Service employees . . .—permits the agency to assign and transfer employees from post to post as its organizational interests may require. The rank in person system differs from the rank in position system of the civil service, under which the employee and his position are assigned the same grade. Under the rank in person system, grades are assigned to positions and employees separately, with the grade of the position assessed at its maximum performance level, and the grade of the employee established on the basis of his or her personal qualifications. The result is that Foreign Service employees frequently occupy positions having higher grades than their personal grades. Similarly, it often happens that two employees having substantially different qualifications or experience may be assigned to positions bearing the same rank. That they receive commensurate salaries is amply explained by the differences in qualifications and responsibilities of employees in the two different divisions.

The government argues that since the Foreign Service pays on the basis of personal grade rather than position or work, and since its shifting international staffing needs often require persons of different grades to hold similar jobs, therefore it cannot be held to a standard requiring equal pay for equal work. To apply the EPA, the argument goes, would undermine the Service's ability to maintain the salary of highly qualified, long-time employees when momentary needs require their presence in a geographic area where there are no suitably high ranking positions.

First, the distinction between rank in person and rank in position system is overdrawn. We do not doubt that the Service needs the flexibility to transfer its highly qualified personnel around the globe without adjusting salary to fit the exact nature of the positions employees temporarily hold. Nonetheless, the Service continues to view positions as having a particular grade—as being suitable, other things being equal, to persons having the same grade. In other words, the Service makes some attempt to tie pay to work. Thus, a successful EPA challenge might be based on the claim that the Foreign Service assigned different grades to identical jobs and staffed the lower ranked positions with women and that the resulting gender-based discrimination in pay was not explained by temporary staffing needs and the greater seniority or qualifications of the male employees.

Second, even though the Service does not use work as the sole criteria for setting salaries, the rank in person systems is still not incompatible with the Equal Pay Act. As we noted in *Talev, supra,* the Service bases salary on an employee's qualifications, responsibility and length of time in the Service. Although the Equal Pay Act requires that equal pay be given for work equal in "skill, effort, and responsibility," 29 U.S.C. § 206(d), the Act also provides express exceptions for length of time with the employer ("seniority") and qualifications ("merit"). 29 U.S.C. § 206(d).[1] Since the Equal Pay Act thus incorporates the compensation criteria underlying the Service's rank in person system, the proper place for the government's arguments justifying the pay disparity is in the interpretation of § 206(d) defenses.

The defendant argues that Congress could not have intended that each time the Foreign Service transfers a female employee, it make sure that she is being paid commensurably with equally qualified and equally senior male employees doing equivalent work. We disagree. That is exactly what Congress intended. All employers are to make sure that the wages they pay to female employees are not lower because they are wages paid to female employees. Nor do we believe that this task is especially burdensome. Any employer does all that the Act requires in the course of complying with reasonable procedures for establishing wages based on work, skill, effort, responsibility, qualification, seniority and the like, without regard to gender.

On its face, the EPA applies to the Foreign Service, and because we find nothing in the EPA inconsistent with the personnel system established by the Foreign Service Act, we reject the defendant's suggestion that the Foreign Service be made an exception. The EPA applies to all federal employees "in any executive agency (as defined in § 105 [of Title 5])" 29 U.S.C. § 203(e)(2)(A)(ii) (1976). Section 105 of Title 5 defines an "Executive agency" as including an executive department. The Department of State, which includes the Foreign Service, is an "Executive department." 5 U.S.C. § 101 (1976). Since, the members of the Service fall within the EPA's affirmative definition of covered employees, the Service can be excluded from coverage only if it falls within an exceptions clause. However, in a very specific list of excepted groups, the Service is not mentioned. 29 U.S.C. § 203(e)(2)(C), (3).[2]

The Foreign Service Act of 1980 itself provides the clearest indication that Congress believed that the EPA applied to the Foreign Service. Section 3905(e) of Title 22 provides that nothing in the set of principles and rules governing the Service's merit ranking, employee protections, and minority recruitment

> . . . shall be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service under . . . [the Equal Pay Act], prohibiting discrimination on the basis of sex."[3]

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[1] The Equal Pay Act provides in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

29 U.S.C. § 206(d)(1).

[2] Section 203(e) defines "employee" and lists the following exceptions: any individual employed by the state

> [(2)(C)](i) who is not subject to the civil service laws of the state, political subdivision, or agency which employs him; and (ii) who—
>
> (I) holds a public elective office of that state, political subdivision, or agency,
>
> (II) is selected by the holder of such an office to be a member of his personal staff,
>
> (III) is appointed by such an officeholder to serve on a policy making level, or
>
> (IV) who is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office.
>
> (3) For purposes of subsection (u) of this section, ["employee"] does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediately family.

[3] Defendant argues that the "civil service" referred to in § 3905(a) does not include the Foreign Service, and that § 3905(e) therefore provides only that nothing in the Foreign Ser-

This section gives to members of the Service the same rights available to federal employees generally and reflects Congress' judgment that there was no need to create a distinct body of discrimination law for the Foreign Service. Rather, the Act was to direct the "vigorous implementation" of legislation Congress regarded as "currently applicable to the Foreign Service, such as . . . section 6(d) of the Fair Labor Standard Act [the Equal Pay Act] . . . ." Sen.Rep. No. 96–913, 96th Cong., 2d Sess., 14 (1980), U.S.Code & Ad.News, 4432.

The judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

James D. CROWLEY, et al.

v.

George P. SHULTZ, Secretary of State, et al., Appellants.

James D. CROWLEY, et al.

v.

George P. SHULTZ, et al., Appellants.

James D. CROWLEY, et al., Appellants

v.

George P. SHULTZ, Secretary of State, et al.

Nos. 81–2213, 81–2352 and 82–1007.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 17, 1982.

Decided April 12, 1983.

Suit was brought challenging State Department's "overcomplement" system of personnel practices. The United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., 496 F.Supp. 360, approved special master's finding that attorney fees should be awarded. The District Court subsequently fixed a fee, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) the court did not lack jurisdiction on theory that prior order finding that fee should be available

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vice Act diminishes the rights of persons in the Civil Service who are not members of the Foreign Service.

We believe this reading renders § 3905(e) superfluous. Congress would not add a provision to the Foreign Service Act to the effect that the merit system governing members of the Service does not diminish the rights of persons who are not members of the Service. In the absence of such language, no court would assume that procedures appropriate to the Foreign Service's unique system would be applicable to members of, say, the Postal Service.

Moreover, the legislative history shows that the section was designed to carry its less strained reading. Rather than even hinting at the interpretation suggested by the defendant, the Senate report on the Foreign Service Act of 1980 states simply that this section establishes that the Foreign Service Merit System "does not . . . affect any right or remedy available to any employee or applicant under existing Federal Law prohibiting discrimination." Senate Report 96–913, 96th Cong., 2d Sess. (1980) U.S. Code Cong. & Ad.News, 4419, 4447.

Alison PALMER, et al., Appellants

v.

George P. SHULTZ, as Secretary of State.

Marguerite COOPER, et al., Appellants

v.

George P. SHULTZ, as Secretary of State.

Nos. 85-6101, 85-6102.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 25, 1986.
Decided March 24, 1987.
As Amended March 24, 1987.

Female foreign service officers brought suit against Department of State alleging sex discrimination. The United States District Court, District of Columbia, John Lewis Smith, Jr., J., 616 F.Supp. 1540, entered judgment for defendant, and plaintiffs appealed. The Court of Appeals, Wald, Chief Judge, held that: (1) State Department could not discriminate against female officers in evaluating officers for promotion, regardless of any demonstrated effect that evaluations ultimately had on officers' promotion opportunities; (2) district court's finding, that State Department did not unlawfully discriminate against female foreign service officers with respect to "stretch" and "downstretch" assignments, was clearly erroneous; (3) inclusion of pre-Act data regarding frequency with which female officers received appointments to particular position did not undercut probative value of study in connection with officers' Civil Rights Act claim; and (4) female officers succeeded in demonstrating unlawful discrimination in granting of award, based on statistical discrepancy between number of male and female officers that received award that measured 3.1 standard deviations on two-tailed bell-shaped curve.

Reversed and remanded.

1. Civil Rights ⇐9.10

Disparate treatment claims under Title VII can involve isolated incident of discrimination against single individual or allegations of "pattern or practice" discrimination affecting entire class of individuals. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⇐44(1)

Title VII plaintiffs in pattern or practice case make prima facie showing of discrimination with direct, circumstantial or purely statistical evidence. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐43

Burden shifts to defendant to introduce evidence of legitimate nondiscriminatory explanation for disparity between men and women in selection rates for particular job, where Title VII plaintiffs succeed in showing statistically significant disparity using properly defined pool of eligible candidates. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐43

Courts will infer that disparity between men and women in selection rates for particular job results from unlawful discrimination, based on statistical evidence alone, where disparity measures at least 1.96 standard deviations on two-tailed bell-shaped curve. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐44(5)

Title VII plaintiffs succeed in establishing prima facie case of unlawful discrimination where totality of evidence, including statistical data, demonstrates that employer's disparate treatment of male and female employees, more likely than not, resulted from unlawful discriminatory animus. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6. Civil Rights 🔑42

Title VII plaintiffs need not prove discrimination in personnel actions other than those specifically at issue. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

7. Civil Rights 🔑9.14

Employer may not defend against Title VII plaintiffs' claim that it unlawfully discriminated against them in certain kinds of employment decisions by showing that it did not discriminate against women in other kinds of employment decisions, even though such evidence might be probative of whether any intentional discrimination actually occurred. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

8. Civil Rights 🔑43

When plaintiffs in Title VII case introduce statistical evidence of extreme disparity in selection rates of men and women for certain job, fact that plaintiffs had insufficient evidence to establish inference of discrimination regarding other employment decisions should not block inference of discrimination on specific type of employment decision at issue. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

9. Civil Rights 🔑43

Imperfections in data on which Title VII plaintiffs' statistical analysis depends, or omission of possible explanatory factors from plaintiffs' statistical study, is not necessarily fatal to inference of unlawful discrimination. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

10. Civil Rights 🔑44(1)

As general rule, Title VII defendant cannot rebut statistically significant evidence of unlawful discrimination by mere conjectures or assertions, but must introduce evidence to support contention that missing factor can explain disparities in hiring practices as product of legitimate, nondiscriminatory selection criteria. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

11. Federal Courts 🔑944

Even though eligible male employees within foreign service were not promoted at such a disproportionately higher rate that statistical evidence alone warranted inference of unlawful discrimination, female employees' Title VII case would be remanded to district court for determination of whether such inference was justified, where disparity measured 1.76 standard deviations on two-tailed bell-shaped curve, and female employees presented testimony and documented evidence of general bias against women in State Department. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

12. Civil Rights 🔑9.14

Under Title VII, the State Department could not discriminate against female employees in evaluating them for promotion, regardless of any demonstrated effect that evaluations ultimately had on female employees' opportunities for promotion. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

13. Civil Rights 🔑43

Statistical survey, showing that female foreign service employees were given proportionately fewer out-of-cone assignments to program direction cone and proportionately more out-of-cone assignments to consular cone, was admissible in Title VII case as probative of alleged unlawful discrimination within service; fact that survey did not consider employee preferences as possible explanatory factor did not destroy its probative value, where government submitted no evidence showing that more women than men preferred out-of-cone assignments to consular cone.

14. Civil Rights 🔑9.14

Female members of foreign service were entitled to bring claim of sex discrimination with respect to any discriminatory personnel actions, including any category of assignments, regardless of how these assignments affected their opportunities for promotion. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

15. Evidence 🔑75

Title VII plaintiffs in pattern or practice case could not legitimately be faulted for gaps in statistical analysis, where information necessary to close those gaps was in possession of employer. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

16. **Civil Rights ⇐9.14**

Foreign service unlawfully discriminated against its female employees with respect to "stretch" and "downstretch" assignments, though testimony was presented of isolated instances in which female employees actually preferred "downstretch" assignments, where some of the disparities between men and women with respect to such assignments measured more than four standard deviations on two-tailed bell-shaped curve, and government did not otherwise explain discrepancies. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

17. **Civil Rights ⇐44(5)**

Inclusion of pre-Act data regarding frequency with which female members of foreign service received appointments to particular position did not undercut probative value of study, in connection with female employees' claim of sexual discrimination under the Civil Rights Act, even though any discrimination occurring prior to effective date of Act was not directly actionable. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

18. **Civil Rights ⇐44(5)**

Title VII plaintiffs succeeded in showing that foreign service discriminated against them in granting particular award, even assuming that foreign service did not discriminate against women in connection with any other honor awards, where statistical discrepancy between number of men and women who received award measured 3.1 standard deviations on two-tailed bell-shaped curve, and government did not offer any explanation for disparity. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

19. **Civil Rights ⇐42**

Title VII plaintiff who brings disparate treatment claim must prove both disparity of treatment and discriminatory intent, even if proof of intent is circumstantial and disparity itself raises inference of intent. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

20. **Federal Courts ⇐944**

Disparate impact claim brought by female members of foreign service could be remanded to district court for determination of whether disparate placement of those taking written exams was, more likely than not, caused by disparity in test scores for male and female exam takers or by different assignment preferences between male and female exam takers. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

Appeals from the United States District Court for the District of Columbia, (Civil Action Nos. 77–02006 and 77–01439).

Bruce J. Terris, with whom Ellen Kabcenell Wayne, Washington, D.C., was on brief for appellants.

Stuart Henry Newberger, Asst. U.S. Atty., with whom Joseph E. diGenova, U.S. Atty., Royce C. Lamberth, R. Craig Lawrence and Diane M. Sullivan, Asst. U.S. Attys., Washington, D.C., were on brief for appellee.

Bettina M. Lawton, Washington, D.C., was on brief, for amicus curiae, Women's Bar Association of the District of Columbia, urging reversal.

Before WALD, Chief Judge, BORK, Circuit Judge, and HAROLD GREENE,* District Judge.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

In this action, a class of women plaintiffs allege various forms of unlawful employment discrimination in the Foreign Service from 1976 to 1983. After a trial, the District Court found that no unlawful discrimination had occurred. *See* 616 F.Supp. 1540 (D.D.C.1985). This appeal followed. The record, however, discloses that the District Court's decision was premised on errors of law and that several of its critical findings of fact were clearly erroneous. Consequently, we reverse, and remand for further proceedings in accordance with this opinion.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

I. Background Information

A. *The Foreign Service and Its Employment Practices*

The Foreign Service is our nation's professional diplomatic corps. Members of the Service represent the interests of this nation abroad and assist the Secretary of State in the formulation of foreign policy at home. *See* 22 U.S.C. § 3904(1)–(2). The organization of Foreign Service personnel draws on the model of the United States military as well as the United States civil service. *See* S.Rep. No. 913, 96th Cong., 2d Sess. 2 (1980), U.S.Code Cong. & Admin. News 1980, P. 4419. For example, the Foreign Service is a "rank-in-person" system: members of the Service have an individualized rank which is independent of the rank of the particular job they happen to hold at any given time. H.R.Rep. No. 992, pt. 1, 96th Cong., 2d Sess. 3 (1980).

The Foreign Service also copies the military in its "up or out" personnel system. Individuals must serve a probationary period of up to five years before they can receive a career appointment in the Service. 22 U.S.C. § 3946. If at the end of that period an individual has not received a career appointment, he or she must leave the Service. *Id.* § 3949. (Although according to the Foreign Service Act of 1980, the term "Foreign Service Officer" refers only to members of the Service with career appointments, and those serving under a limited, probationary appointment are called "career candidates," the parties to this lawsuit use the term "Foreign Service Officer," or "FSO," to refer to those serving under both career and limited appointments. To avoid confusion, we will do likewise.)

The Foreign Service assigns its officers to one of four areas of functional specialization, known as "cones": political, economic, administrative, and consular. Officers in the political and economic cones deal with, respectively, political and economic dimensions to foreign relations and foreign policy. Officers in the administrative cone "are responsible for the support operations of U.S. embassies and consulates." 616 F.Supp. at 1544 (¶ 5). Officers in the consular cone "work closely with the public providing assistance to American travelers and residents abroad, issuing visas [and dealing with] other immigration related issues." *Id.* (¶ 6). As the District Court expressly found, the State Department does not encourage FSOs to change cones, and "[o]fficers are expected to serve the major portion of their time in the Service" in the cones to which they were initially assigned. *Id.* (¶¶ 10, 14). Some officers, however, do switch cones. Senior FSOs who have demonstrated leadership ability may transfer into a "prestigious" program direction cone. *Id.* at 1554 (¶ 104). Other FSOs are occasionally given temporary assignments to other cones or to some "inter-functional" positions. *Id.* at 1550 (¶ 70).

Most FSOs applying to the Foreign Service at junior entry levels must take a written examination. Beginning in 1975, the examinations have tested applicants for aptitude in all four functional areas, and the Foreign Service has used the results of these examinations to determine a new FSO's initial cone assignment. *Id.* at 1545 (¶ 15.)[1] A relatively small number of individuals have entered the Service laterally as mid-level FSOs. These lateral entrants bypassed the examination process and "selected, in advance, the functional field in which they wished to compete and were evaluated only for that specific cone." *Id.* (¶ 17).[2]

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[1] Before 1975, the Foreign Service tested each applicant in only one of the four functional areas, and required the applicant to select the cone in which he or she wished to be tested. Defendant's Post-Trial Brief at 40. From 1975 to 1979, applicants were admitted into the Service on the basis of general test scores alone; the results of the functional field cone tests were used to make initial cone assignments. Since 1980, admission has depended upon overall performance on the functional field tests, but applicants must achieve a certain cut-off score on the particular cone test in order to be eligible for appointment to that cone. *Id.* at 43.

Once in the Foreign Service, individuals change specific jobs frequently; the State Department has a policy of assigning individuals to positions for a set period of time, generally two to three years. *See id.* at 1550 (¶ 71); H.Rep. No. 96–992, pt. 1, 96th Cong., 1st Sess. 3 (1980). Since 1975, job assignments in the Foreign Service have been made pursuant to an Open Assignment Policy, in which all members of the Service receive a list of vacant positions and submit "a bid list" indicating their preferences. These bid lists are compiled into a "bid book" from which assignment panels make their selections, after considering the interests and preferences of the bureau in which each position is located. *Id.* at 1550 (¶¶ 73, 74). As previously indicated, some FSOs receive "out-of-cone" assignments pursuant to this process but in the main, job transfers are made inside the cones of initial assignment. In addition, FSOs do not necessarily receive a job position with a rank corresponding to the individual's personal rank. Positions that have a higher rank than the individual are known as "stretch" assignments. Positions with a lower rank than the individual's are "down-stretch" assignments. Pursuant to the Open Assignment Policy, individuals do not receive stretch or down-stretch assignments unless they bid for them, but as with any other assignment, individuals do not receive these assignments simply because they bid for them. *Id.* at 1551 (¶ 77).

The Foreign Service prepares annual written evaluations of its officers' job performance. In addition to rating the actual past performances of FSO's, the evaluations rate the potential of the FSOs future job performance. 616 F.Supp. at 1549. The State Department also gives out Honor Awards in recognition of outstanding achievement. In descending order of prestige are the Distinguished Honor Award, the Superior Honor Award, and the Meritorious Honor Award. *See* Plaintiffs' Post-Trial Brief at 112–13.

Except for Senior members, salaries in the Foreign Service are based on a schedule established by the President which consists of nine salary classes. 22 U.S.C. § 3963. The Secretary of State assigns all Foreign Service Officers to a particular salary class. *Id.* § 3964. By statute, except in limited circumstances, a career candidate for appointment as a Foreign Service Officer may not be initially assigned to a salary class higher than class 4 (class 1 being the highest). *Id.* § 3947. Usually career candidates are placed initially in class 7 or class 8. Promotions from one salary class to another are made by the Secretary of State after receiving recommendations and rankings submitted by selection boards which evaluate the members of each class. Foreign Service Officers do not compete for promotions until the transition from class 6 to class 5; until then, they are promoted at the end of an established time period if they perform their duties satisfactorily. *See* Joint Appendix ("J.A.") at 117–121; Defendant's Post-Trial Brief at 96.[3]

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[2] Another relatively small group have entered the junior ranks of the Foreign Service without going through the examination process. Below 1984, minority applicants who entered the Foreign Service through the Affirmative Action Junior Officer Program were not required to take the entrance examinations. Similarly, the Mustang Program, which allows State Department employees not in the Foreign Service to become members of the Service, has not used the examination. Individuals who have entered the Service pursuant to these programs have received initial cone assignments based on their background and experience.

[3] The decision to grant a career candidate tenure as a Foreign Service Officer is made independently of the promotion process. Tenure decisions are made by the Secretary of State pursuant to 22 U.S.C. § 3946, which provides that the Secretary's decisions shall be based on the recommendations of special tenure boards. *See* Defendant's Post-Trial Brief at 100–02; *see also Daniels v. Wick*, 812 F.2d 729 (D.C.Cir.1987) (holding that § 3946 provides the only means for receiving tenure under the Foreign Service Act of 1980).

B. *The History of This Litigation*

This class action began over ten years ago when appellants filed their complaint alleging that widespread discrimination against women in the Foreign Service violated Title VII of the Civil Rights Act of 1964, as amended in 1972 to cover employment discrimination in the federal government. *See* 42 U.S.C. § 2000e–16. The parties subsequently resolved by consent decree all claims relating to admission into the Foreign Service.[4] The appellants' claims of discriminatory personnel actions against women already in the Foreign Service proceeded to trial in the District Court. The parties agreed to try initially only the issue of liability, leaving appropriate remedies to a subsequent phase of the proceedings, if necessary. After trial on the liability issue, the District Court concluded that appellants "failed to show by a preponderance of the evidence any sexual discrimination by the State Department." 616 F. Supp. at 1561. The court entered a final judgment for the Secretary of State, dismissing the complaint. *Id.*

This appeal followed from the District Court's failure to find sex discrimination in seven different types of personnel practices.[5] First, the appellants claim that from 1976 to 1983, the Foreign Service discriminated against women in the initial cone assignments of entering FSOs; the State Department assigned proportionally fewer women than men to the political cone and proportionately more women than men to the consular cone. This disparity was allegedly caused by the differing scores of women and men on the Foreign Service entrance examinations, producing a disparate impact on women and men candidates in violation of Title VII. Second, women were given proportionally fewer out-of-cone assignments to the program direction cone and proportionally more out-of-cone assignments to the consular cone. Third, women were given proportionally fewer "stretch" assignments and proportionally more "downstretch" assignments than men in the same class. Fourth, women received a disproportionately low number of appointments as Deputy Chief of Mission, the position just below that of Ambassador. Fifth, in its evaluation reports, the State Department gave lower future potential ratings to women than men despite equivalent ratings for their past performance. Sixth, women received a disproportionately low number of Foreign Service Honor Awards. And seventh, the State Department promoted women from class 5 to class 4 at a lower rate than it promoted men.

With respect to each of these seven personnel practices, the appellants offered data showing a disparity between men and women, along with a statistical analysis designed to demonstrate the improbability that a disparity of that scale could result from chance. The data and analysis, they allege, provide a strong basis for inferring that this disparity was the product of unlawful discrimination. In addition, the appellants introduced nonstatistical evidence pertaining generally to the existence of a prejudicial attitude towards women in the Foreign Service from 1976 to 1983. The District Court, however, rejected the inference of unlawful discrimination in each of the seven areas.

In discounting the probative force of appellants' statistics, the District Court said that their statistical studies rested on faulty data, or flawed methodology, or omitted a crucial variable that would explain the disparity between men and women in a nondiscriminatory way. The District Court also said that some of the statistical evidence focused on too narrow a segment of Foreign Service personnel practices. As we shall explain, the District Court's treatment of the appellants' evidence was in some instances contrary to law and in other respects clearly erroneous as a matter of fact.

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[4] The Junior Applicant Consent Decree settled all claims involving entry-level decisions into the junior ranks of the Foreign Service. The Mid-Level Applicant Consent Decree settled all issues of lateral entry into the Foreign Service.

[5] The appellants have not appealed all issues raised at trial.

II. TITLE VII CLAIMS: TWO DIFFERENT THEORIES

[1] Under Title VII a plaintiff can rely on either of two different theories to support a claim of unlawful sex discrimination. A "disparate treatment" claim alleges that the defendant intentionally based an employment decision on the sex of the plaintiffs. *See, e.g., International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 & n. 15, 97 S.Ct. 1843, 1854 & n. 15, 52 L.Ed.2d 396 (1977). Disparate treatment claims can involve an isolated incident of discrimination against a single individual, or, as in this case, allegations of a "pattern or practice" of discrimination affecting an entire class of individuals. *Id.* A "disparate impact" claim alleges that the defendant based an employment decision on a criterion that although "facially neutral" nevertheless impermissibly disadvantaged individuals of one sex more than the other. *Id.* at 336 n. 15, 97 S.Ct. at 1854 n. 15. This case is a "classic" example of a disparate impact claim in which plaintiffs allege that the defendant based employment decisions on the results of a test for which members of one sex on average received lower scores than members of the other sex. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* at 13 (1983–84 Supp.); *see also Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (the original disparate impact case).

Because these two theories are distinct, we must consider them separately. Appellants' only disparate impact claim concerns the initial cone assignments; the other six claims involve disparate treatment and we will consider them first.

III. LEGAL PRINCIPLES APPLYING TO PATTERN OR PRACTICE DISPARATE TREATMENT CLAIMS

In a typical sex discrimination pattern or practice disparate treatment case, plaintiffs allege the existence of a disparity between men and women in selection rates for a particular job or job benefit and further allege that this disparity was caused by an unlawful bias against members of the disadvantaged sex, usually women. To prevail in their claim, plaintiffs must prove, by a preponderance of the evidence, that these allegations are true. Proof of the disparity itself is based upon a comparison of the proportion of those women eligible for selection who were actually selected with the corresponding proportion of eligible men who were actually selected. Plaintiffs establish a disparity disfavoring women if the evidence demonstrates that the selection rate for eligible women was less than the selection rate for eligible men. Sometimes, the disparity is expressed as the difference between the number of women actually selected and the number of women one would expect to have been selected, assuming equality in the selection rates for men and women. (If one knows the number of women eligible and the selection rate for men, one can determine, using algebra, the expected number of successful women.)

[2] Proof that the observed disparity was caused by an unlawful bias against women need not be direct. Circumstantial evidence that the disparity, more likely than not, was a product of unlawful discrimination will suffice to prove a pattern or practice disparate treatment case. *See Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15. Indeed, this circumstantial evidence may itself be entirely statistical in nature. *See, e.g., Segar v. Smith,* 738 F.2d 1249, 1278–79 (D.C.Cir.1984), *cert. denied sub. nom. Meese v. Segar,* 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). In this case, appellants rely to a great extent on statistical evidence to prove their claims of disparate treatment. We find it necessary, therefore, to discuss how statistical analysis of an observed disparity can raise an inference of unlawful discrimination.

A. *Raising An Inference of Discrimination With Statistical Evidence*

A disparity between the selection rates of men and women for a particular job or job benefit has one of three possible causes. *See* D. Baldus & J. Cole, *Statistical Proof of Discrimination* 291 (1980). First, the disparity may be a product of an unlawful discriminatory animus; this is what plaintiffs are attempting to prove. Second, the disparity may have a legitimate and nondiscriminatory cause. For example, prior experience of a certain type may be an important factor in making certain employment decisions, and if it happened to be true that women on the average have less of this experience than men, one would expect that women could be selected less frequently. Third, the disparity may simply be a product of chance. Even if we may properly assume that, as a general rule, women and men on average are equally qualified to be selected for a particular job or job benefit, for any particular group of men and women who happen to constitute the actual pool of eligible candidates at the time the selections are made, there may be some deviation from this general rule because the actual qualifications of men and women differ from individual to individual and any particular pool of eligible candidates constitutes an inherently random collection of individuals. Thus, even if selections were made entirely on the basis of qualification, without a trace of discriminatory bias, random deviations in the selection rates for men and women may result.

A statistical analysis of a disparity in selection rates can reveal the *probability* that the disparity is merely a random deviation from perfectly equal selection rates. Statistics, however, cannot entirely rule out the *possibility* that chance caused the disparity. Nor can statistics determine, if chance is an unlikely explanation, whether the more probable cause was intentional discrimination or a legitimate nondiscriminatory factor in the selection process. *See id.* at 290–92.

[3] Title VII nevertheless provides that if the disparity between selection rates for men and women is sufficiently large so that the probability that the disparities resulted from chance is sufficiently small, then a court will infer from the numbers alone that, more likely than not, the disparity was a product of unlawful discrimination—unless the defendant can introduce evidence of a nondiscriminatory explanation for the disparity or can rebut the inference of discrimination in some other way. *See Hazelwood School District v. United States*, 433 U.S. 299, 307–08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977) ("Where gross statistical disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination."); *see also Segar*, 738 F.2d at 1278 ("[W]hen a plaintiff's methodology focuses on the appropriate labor pool and generates evidence of [a disparity] at a statistically significant level," this evidence alone will be "sufficient to support an inference of discrimination.").[6]

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[6] As the quotation from *Segar* reflects, the statistical analysis must focus "on the appropriate labor pool" in order to properly establish a prima facie case of discrimination. If a statistical analysis of selection rates is premised on a faulty calculation of the number of men and women who are eligible for selection, as a result, for example, of a misunderstanding of the eligibility criteria, the statistical conclusions lose much of their probative force. If, for instance, to be eligible for a promotion from assistant professor to professor at a particular university a person must have seven years experience and a Ph.D. degree, a statistical study which defines the number of women and men eligible for this promotion as those with seven years experience, overlooking the requirement of a Ph.D. degree, might lead to skewed results, for there might well be some reason why more female than male assistant professors had not achieved a Ph.D. degree after seven years of teaching. "In order to ensure that a plaintiff's methodology has eliminated the common nondiscriminatory explanation of a lack of qualifications, this circuit has developed a requirement that statistical evidence of disparities account for the *minimum objective qualifications* for the position at issue." *Segar v. Smith*, 738 F.2d 1249, 1274 (1984), *cert. denied sub. nom. Meese v. Segar*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (emphasis in original) (citations omitted). Conversely, as long as a plaintiff's statistical analysis has properly defined the pool of eligible candidates, by accounting for "minimum objective qualifications," the burden then shifts to the defendant to introduce evidence of a legitimate, nondiscriminatory explanation if the analysis reveals a statistically significant disparity. *Id.* at 1276. In this case, there is no dispute that appellants properly accounted for the minimum objective qualifications for the various positions and benefits that are the subject of their disparate treatment claim. Instead, this case involves disputes about whether the government succeeded in demonstrating the existence of other, legitimate factors that would explain the apparent disparities in selection rates, or whether it demonstrat-

[4] The preliminary question for a court, then, is at what point is the disparity in selection rates is sufficiently large, or the probability that chance was the cause sufficiently low, for the numbers alone to establish a legitimate inference of discrimination. Although this question is crucial in Title VII litigation, the answers given by courts have been regrettably imprecise. The Supreme Court has twice stated that "[a]s a general rule for ... large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that [the disparity] was random would be suspect to a social scientist." *Castaneda v. Partida*, 430 U.S. 482, 497 n. 17, 97 S.Ct. 1272, 1281, n. 17, 51 L.Ed.2d 498 (1977); *see also Hazelwood*, 433 U.S. at 309 n. 14, 97 S.Ct. at 2742 n. 14 (quoting *Castaneda*). But many lower courts and commentators have noted that the difference between two and three standard deviations is considerable and that, therefore, the Supreme Court's statement falls short of establishing an exact legal threshold at which statistical evidence, standing alone, establishes an inference of discrimination. *See, e.g., Segar*, 738 F.2d at 1283 n. 28.[7]

This court, using different terminology, has stated that statistical evidence meeting "the .05 level of significance ... [is] certainly sufficient to support an inference of discrimination." *Segar*, 738 F.2d at 1283. "[T]he .05 level," the *Segar* opinion explained, "indicates that the odds are one in 20 that the result could have occurred by chance." *Id.* at 1282. (This statement is somewhat imprecise and has predictably led to confusion, as we discuss *infra.*) The *Segar* court justified the consistency of its statement with the statements of the Supreme Court by observing that "[a] level of two standard deviations corresponds to statistical significance at the .05 level." *Id.* at 1283 n. 28. In this case, the District Court cited *Segar* in its Conclusions of Law, stating: "The Court adopts the .05 level for establishing that a [statistical] study is statistically significant." 616 F.Supp. at 1559 (¶ 14). But the District Court then went on to say that "[t]he .05 level generally corresponds to 1.65 standard deviations." *Id.*

How can a 5% probability of randomness correspond both to a measurement of two standard deviations and a measurement of 1.65 standard deviations, one may reasonably ask? There is a legitimate answer: it depends on whether one is using a "one-tailed" or a "two-tailed" test of statistical significance. A disparity measuring 1.65 standard deviations corresponds to a 5% probability of randomness under a one-tailed test. A disparity measuring two standard deviations (to be more precise, 1.96 standard deviations) corresponds to a 5% probability of randomness under a two-tailed test.

This difference between one-tailed and two-tailed tests obviously requires further explanation. It also presages the obvious question, given the substantial differences in result, of which test is the more appropriate one to use in Title VII cases. Neither this court's opinion in *Segar* nor the District Court's opinion in this case discusses the difference between "one-tailed" or "two-tailed" approaches. The Supreme Court has given us no explicit guidance on this issue. And, unfortunately, neither side to this litigation has devoted more than a single footnote each to this difficult but important issue. *See* Appellants' Reply Brief at 32 n. 38; Appellee's Brief at 62 n. 73. For obvious reasons we, too, confront this issue with some trepidation. But appellants' and appellee's evidence on the un-

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ed other methodological flaws or inadequacies in appellants' statistics. For a discussion of the legal principles involved in evaluating attempts to rebut plaintiffs' statistics, *see, infra,* Part III. B.

[7] The "standard deviation" is a unit of measurement that allows statisticians to measure all types of disparities in common terms. Technically, a "standard deviation" is defined as "a measure of spread, dispersion, or variability of a group of numbers equal to the square root of the *variance* of that group of numbers." D. Baldus & J. Cole, *Statistical Proof of Discrimination* 359 (1980) (emphasis in original). The "variance" of the group of numbers is computed by subtracting the "mean," or average, of all the numbers, "squaring the resulting difference, and computing the mean of these squared differences." *Id.* at 361.

derpromotion of women from FSO class 5 to class 4 measures 1.88 and 1.76 standard deviations, respectively. (The difference results from the use of some different data. *See* 616 F.Supp. at 1557 (¶ 130).) Whether one adopts the appellants' or the appellees' number as the better evidence, it falls between 1.65 and 1.95 standard deviations. Therefore, if one tests the statistical significance of this number using the *Segar* standard of a 5% probability of randomness, the outcome turns on whether one uses a one-tailed or two-tailed test. Under a one-tailed test, the number is statistically significant (because it is larger than 1.65 standard deviations, which correspondents to a 5% probability of randomness under a one-tailed test) and therefore by itself establishes a prima facie case of disparate treatment. Under a two-tailed test, the number does not quite reach the statistically significant threshold (because it is smaller than 1.96 standard deviations, which corresponds to a 5% probability of randomness using a two-tailed test) and therefore by itself does not raise an inference of discrimination.

Given the unavoidability of embarking upon a journey into the statistical maze, we begin with the terms "one-tailed" and "two-tailed";[8] they refer to the "tails" or ends of the bell-shape curve, which represents in graph form a "random normal distribution." *E.g.*, W. Curtis, ***Statistical Concepts for Attorneys*** 72–73 (1983); *see* Diagram 1 copied from *id.* In these random distributions, the area under any segment of the bell curve measures the probability of that range of results occurring randomly. *Id.* Furthermore, the percentage area underneath the bell curve within one standard deviation (σ) distance from the mean (μ) of a normal distribution is always the same for all normal distributions (regardless of the specific value of σ or μ, or the units in which these terms are measured). Thus, the probability of a result randomly occurring that measures within one standard deviation of the mean of the distribution (either greater or lesser than the mean) is the same for all normal distributions: 68.26%. *Id.* Indeed, this relationship holds true for any distance from the mean, measured in numbers of standard deviations. For example, the probability of a result occurring within two standard deviations from the mean is 95.44% and the probability of a result occurring within three standard deviations is 99.73%. *See* Diagram 1. Thus, for all normal distributions, the probability of randomness is directly associated with a measurement in numbers of standard deviations.

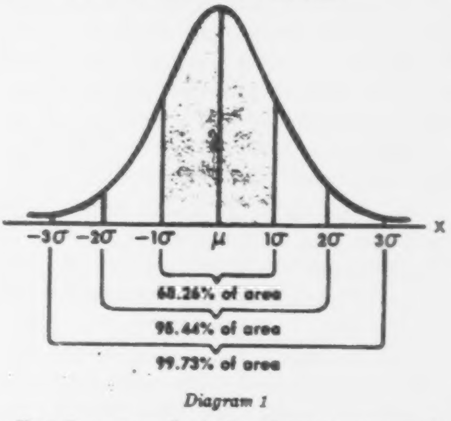

Diagram 1

But for every deviation from the mean of a normal distribution, measured in a certain number of standard deviations, there are two distinct ways of referring to the probability of that result occurring randomly. For example, if fewer women than expected were selected for a particular job, and this disparity measured 2.17 standard deviations, we can ascertain the probability that women by chance would be underselected to this extent or greater. This probability corresponds to the area between 2.17 standard deviations and the end of the bell curve representing the most extreme underselection of women. Standard statistical tables reveal that this probability is only 1.5%. *See* B. Lindgren & D. Berry, *Elementary Statistics* 479 (1981).

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[8] The discussion of statistics in this portion of the opinion relies on the following sources: D. Baldus & J. Cole, *Statistical Proof of Discrimination* (1980 & 1986 Supp.); W. Curtis, *Statistical Concepts for Attorneys* (1983); W. Dixon & F. Massey, Jr., *Introduction to Statistical Analysis* (4th ed. 1983); B. Lindgren & D. Berry, *Elementary Statistics* (1981) [hereinafter cited as *Elementary Statistics*]; R. Wehmhoefer, *Statistics in Litigation* (1985).

We are not expert statisticians and we discuss statistics only insofar as necessary to give a comprehensible explanation of our view of the proper application of Title VII law to the facts of this case. Nor do we pretend to cover all of the issues that relate to the use of statistics in a Title VII case. For example, we note that there are various methods for deriving a "test statistic" measured in numbers of "standard deviations": the z-test, the t-test, etc. We have no opinion on the choice of these methodologies as this case does not call them into question. Similarly, we are aware that our discussion of statistics requires sufficiently "large" samples in order to be accurate; we have avoided the "small sample problem" because apparently none of the claims on appeal here involves small samples.

We can speak of the probability measurement associated with 2.17 standard deviations in another way, however. Although the observed disparity between the actual and expected number of women in this example was an underselection of women, there is a corresponding possibility that women might randomly be overselected such that the difference between the expected number of women selected and the number of women selected due to this random overselection also measures 2.17 standard deviations. The probability of a random deviation from the expected number of women selected with a magnitude of 2.17 standard deviations or larger, resulting from *either* an underselection *or* overselection of women, corresponds to the area under the bell curve between 2.17 standard deviations and *both* extremes of the curves: 3%.

The difference between "one-tailed" and "two-tailed" tests of statistical significance stem from these two different ways of measuring probability. If one decides (as the *Segar* court did) to reject the hypothesis that an observed disparity from an expected result occurred randomly only if the observed disparity falls within the range of the 5% most extreme possible disparities, one must still decide whether the 5% range should be entirely within only one of the tails of the bell curve, or instead should be divided with half of the range in each tail. Five percent of the total bell curve can be found *either* in the range from 1.65 standard deviations from the mean to one extreme end of the bell curve *or* in the area from 1.96 standard deviations to both extreme ends of the bell curve. *Compare* Diagrams 2 and 3, copied from V. Cangelosi, P. Taylor & P. Rice, *Basic Statistics* 173–74 (1979). For this reason, a 5% probability of randomness corresponds to 1.65 or 1.96 standard deviations, depending upon whether one uses a one-tailed or a two-tailed test. (Similarly, 1.65 standard deviations correspond to a 10% probability of randomness under a two-tailed test; and 1.96 standard deviations correspond to a 2.5% probability of randomness under a one-tailed test.)

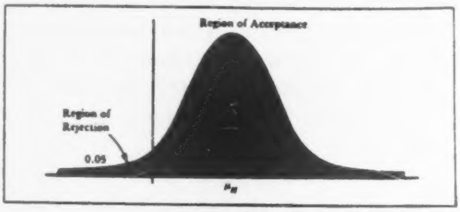

Diagram 2

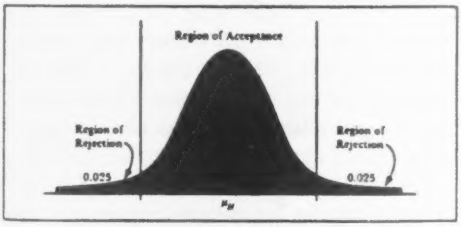

Diagram 3

We are now, hopefully, in a position to address whether in a Title VII case, a court should use a one-tailed or two-tailed test to determine whether statistical evidence alone should raise an inference of unlawful discrimination, recognizing that there is a difference of opinion among courts and commentators on the issue. *Compare, e.g., EEOC v. Federal Reserve Bank of Richmond,* 698 F.2d 633 (4th Cir.1983), *rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), *with Little v. Master-Bilt Products, Inc.,* 506 F.Supp. 319 (N.D.Miss.1980). Indeed, one leading treatise on the role of statistical evidence in Title VII litigation has shifted its position between the publication of the main text and the publication of a supplement. In the main text of their book, Baldus and Cole write:

> [S]tatistical texts frequently recommend the use of a one-tailed test when the only question of interest is the likelihood of a difference in one direction, e.g., when only a positive disparity between two numbers is of interest. This practice supports the use of a one-tailed test in discrimination cases, since the issue is always whether one group is favored over another. A defendant will argue, however, that both minority and majority groups [or men and women] are protected from discrimination and it is therefore inequitable to disregard the probability of outcomes that may favor either group. Since there is no clear answer to this question, the most desirable approach is an awareness of the conceptual and practical differences between the two types of tests and a consistent use of the same type of test in similar cases whenever practical. We have used two-tailed tests throughout this book.

D. Baldus & J. Cole, *Statistical Proof of Discrimination* 307–08 (1980) (footnote omitted). In the most recent supplement, however, the authors criticize as "unnecessarily strict" the Fourth Circuit's decision in *EEOC v. Federal Reserve Bank of Richmond* to require a two-tailed approach unless "independent evidence indicates the presence of discrimination of the type being challenged." D. Baldus & J. Cole, *Statistical Proof of Discrimination* 129 (1986 Cumulative Supp.) (footnote omitted). Baldus and Cole then state a preference for a legal rule that would allow a one-tailed test "if the possibility of intentional discrimination favoring the protected group represented by plaintiff [*e.g.*, women in this case] can be ruled out as defying logic, i.e., the available evidence excluding the statistic in question gives strong support to the conclusion that the system is either nondiscriminatory or disadvantageous to the plaintiff's group." *Id.* at 129–30. In a footnote to this passage, the authors continue:

> The logic underlying this statement is that if one can be certain that there was no discrimination in favor of plaintiff's group, then any disproportionate impact would simply be interpreted as being a chance outcome in an equitable process.

Id. at 130 n. 38.

Although the latest position adopted by Baldus and Cole makes some sense, we reject its applicability to the present case. We note that some of appellants' claims of unlawful discrimination involved complaints that women were *overselected* for particular kinds of jobs, *e.g.*, consular cone and downstretch assignments. Appellants undoubtedly have the right under Title VII to object to the State Department's selection of FSOs for these positions on the basis of sex. Such claims of discriminatory overselection, however, require a two-tailed statistical analysis. Appellants may view consular assignments as inferior to political assignments, but another class of women plaintiffs could certainly bring a Title VII claim if women were intentionally underassigned to the consular cone. Consequently, statistically significant deviations in either direction from an equality in selection rates would constitute a prima facie case of unlawful discrimination. Indeed, appellants' own statistical expert testified that a two-tailed test was necessary in evaluating the disparity between men and women in assignments to the consular cone because the hypothesis to be tested is whether cone assignments are made without regard to sex. *See* Transcript (Tr.) at 1081.

We also think a two-tailed test of statistical significance should be applied to *all* of appellants' discrimination claims in this case. First, Baldus and Cole originally noted the importance of consistency in evaluating statistical evidence. Second, although we by no means intend entirely to foreclose the use of one-tailed tests, we think that generally two-tailed tests are more appropriate in Title VII cases. After all, the hypothesis to be tested in any disparate treatment claim should generally be that the selection process treated men and women equally, *not* that the selection process treated women at least as well as or better than men. Two-tailed tests are used where the hypothesis to be rejected is that certain proportions are equal and not that one proportion is equal to or greater than the other proportion. *See* Curtis, *supra*, at 119–22, 133–37.

Moreover, even if a disparity in only one direction is at issue in a particular Title VII case (*e.g.*, only the underpromotion and not the overpromotion of women), we think that the more appropriate assessment of the probability that the contested disparity resulted from chance requires a recognition that a random disparity of equal magnitude, but in the opposite direction, is equally as likely. For example, if plaintiffs in a Title VII case come into court simply with evidence that women were underselected for a particular job, and that this disparity measured 1.75 standard deviations, it is perfectly true that the probability of women being underselected to this extent or more by chance is only 4%. Under a one-tailed test of statistical significance, employing the 5% level, as this court did in *Segar*, this evidence alone would establish a prima facie case of disparate treatment.

But for a disparity measuring 1.75 standard deviations it is equally true that the probability of a random deviation of this magnitude or larger, either underselecting or overselecting women, is 8%. In other words, disparities of this magnitude will be consistent with the hypothesis that the selection process did not treat men and women differently in 8% of the cases. Even if in the case before the court the disparity disfavors women and not men, how can the court ignore the possibility that the case might still be one of the 8% cases in which a fair selection process would by chance produce disparities in this magnitude or greater? Thus, we think a court should generally adopt a two-tailed approach to evaluating the probability that the contested disparity resulted by chance. Furthermore, although an 8% probability is pretty low, we do not think that it is low enough to establish by itself an inference of unlawful discriminatory animus. We think that statistical evidence must meet the 5% level referred to in *Segar* for it alone to establish a prima facie case under Title VII. Taken together, as we have said, a two-tailed test and a 5% probability of randomness require statistical evidence measuring 1.96 standard deviations. Consequently, if plaintiffs come into court relying *only* on evidence that the underselection of women for a particular job measured 1.75 standard deviations, it seems improper for a court to establish an inference of disparate treatment on the basis of this evidence alone.[9]

[5] Of course, plaintiffs in Title VII pattern and practice cases need not rely on statistical evidence alone. Because the ultimate issue in a disparate treatment case is whether the disparity resulted from unlawful discriminatory animus, plaintiffs may introduce any additional evidence which is probative on this issue. Thus, plaintiffs are in no way foreclosed from establishing an inference of discrimination simply because the contested disparity falls short of the 1.96 standard deviations mark when analyzed statistically. Obviously, to use an extreme example, if an employer admits under cross-examination that assignments for a certain position were based in large part on sex, it matters not that the observed underselection of women measures only 1.75 standard deviations. When plaintiffs in a Title VII pattern or practice case rely on evidence in addition to the evidence of the disparity itself, the issue for the trier of fact in determining whether the plaintiffs have established a prima facie case must be whether the totality of plaintiffs' evidence (again including the evidence of the disparity itself) demonstrates that,

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[9] In any event, given the language of the Supreme Court in *Castenada* and *Hazelwood*, we do not believe that we can allow the threshold at which statistical evidence alone raises an inference of discrimination to be lower than 1.96 standard deviations, whether one views this number as signifying a 5% probability of randomness using a two-tailed approach or a 2.5% probability of randomness using a one-tailed approach. If plaintiffs in Title VII cases are ever to be allowed to establish a prima facie case by evidence of disparity measuring lower than 1.96 standard deviations, this decision under the current law must be made by the Supreme Court (or Congress). *Cf.* Meier, Sacks & Zabell, "What Happened in *Hazelwood*," *reprinted in*, M. DeGroot, S. Fienberg & J. Kadane, *Statistics and the Law* 15 (1986) (adopting 1.96 standard deviations as the threshold for Title VII cases even under the assumption that one should use a one-tailed test in Title VII litigation).

more likely than not, the disparity resulted from an unlawful discriminatory animus—just as the issue after all the relevant evidence has been introduced by both sides remains whether in light of the totality of the evidence, plaintiffs have shown that, more likely than not, the disparity resulted from discrimination.[10]

B. *The Applicability of Title VII to Any Personnel Action*

A plaintiff may bring a Title VII claim for alleged discrimination with respect to any employment decision by an agency of the federal government. The statute itself states that "all personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on ... sex." 42 U.S.C. § 2000e–16. In the Foreign Service Act of 1980, Congress reiterated this requirement specifically for Foreign Service employment practices. 22 U.S.C. § 3905.[11] Moreover, in the 1980 Act, Congress specifically defined a "personnel action," which must be free from sex discrimination, to encompass "(A) any appointment, promotion, assignment (including assignment to any position or salary class), award of performance pay or special differential, within-class salary increase, separation, or performance evaluation and (B) any decision, recommendation, examination, or ranking provided for under this chapter which relates to any action referred to in subparagraph (A)." *Id.* This language could hardly be more inclusive.

[6] From this statutory language, two legal principles necessarily follow. First, appellants in this case may bring a disparate treatment claim regarding discrimination in any type of personnel decision regardless of whether or not that discrimination has an effect on other, arguably more important, personnel decisions. Thus, if the State Department has intentionally discriminated against women in certain types of assignment decisions, the State Department has violated 42 U.S.C. § 2000e–16 even if the State Department can prove that the unlawful discrimination in assignments did not adversely affect the opportunities of women for promotion in the Foreign Service.

It is beyond dispute that the State Department may not discriminate against women in making any kind of employment decision, and if the State Department breaches this requirement, appellants have a cause of action to vindicate their statutory rights. We note, as further support of our interpretation of 42 U.S.C. § 2000e–16, that the Supreme Court last Term interpreted an analogous Title VII provision applying to private employers to encompass a claim of sex discrimination for sexual harassment even if the sexual harassment caused no tangible or economic loss. *Meritor Savings Bank, FSB v. Vinson,* — U.S. ——, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The provision of Title VII involved in *Vinson* makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e–2(a)(1). The language of 42 U.S.C. § 2000e–16, involved here, is even broader, covering "all personnel actions" based on sex, regardless of whether the personnel action affects promotions or causes other tangible or economic loss.

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[10] In this respect, we follow the approach to statistical evidence adopted in *Craik v. Minnesota State University Bd.,* 731 F.2d 465, 476 n. 13 (8th Cir.1984):

> Statistical evidence showing less marked discrepancies [than two standard deviations] will not alone establish something other than chance is causing the result, but we shall consider it in conjunction with all the other relevant evidence in determining whether the discrepancies were due to unlawful discrimination.

This approach follows Baldus and Cole in viewing disparities between 1.65 and 1.96 standard deviations as falling into an "intermediate" zone. *See* Baldus & Cole (Supp.) at 131–32. Numbers in this intermediate range go some of the way toward establishing a prima facie case of discrimination, but they cannot make the distance on their own. *But cf.,* Meier, Sacks & Zabell, *supra* n. 9, at 12 (the appropriate intermediate zone falls between 1.96 and 2.33 standard deviations).

[11] 22 U.S.C. § 3905 states explicitly that "all personnel actions ... shall be made in accordance with merit principles," which excludes sex or race as a permissible criterion for a job action. *See* H.R.Rep. No. 992, pt. 1, 96th Cong., 2d Sess. 8 (1980). Furthermore, this section goes on to direct the Secretary of State to "prescribe such rules as may be necessary to ensure that members of the Service, as well as applicants for appointments in the Service ... are free from discrimination on the basis of ... sex." 22 U.S.C. § 3905(b). The statute also states that this section does not extinguish any rights under Title VII. *Id.* § 3905(e).

[7] Second, and relatedly, if plaintiffs in a Title VII case claim discrimination in certain kinds of employment decisions, it is no defense that the government did not discriminate against women in other kinds of employment decisions. For example, if the State Department intentionally underselected women for appointment as Deputy Chiefs of Mission (DCM), the State Department has violated 42 U.S.C. § 2000e–16 even if the State Department can prove that it did not discriminate against women in assignments to five other "high visibility" positions. Appellants need not allege or prove discrimination in assignments to other "high visibility" positions in order to maintain a cause of action with respect to discrimination in DCM assignments. As the Supreme Court has stated: "Of course, Title VII provides for equal opportunity to compete for *any* job." *Teamsters*, 431 U.S. at 338 n. 18, 97 S.Ct. at 1856 n. 18 (emphasis in original).

Although under 42 U.S.C. § 2000e–16 appellants must not be required to prove discrimination in employment decisions other than the ones they are specifically contesting, the government is correct in arguing that evidence of nondiscrimination in those other employment decisions may be probative of whether intentional discrimination actually occurred in the contested employment decisions. For example, if an employer can demonstrate that it did not discriminate against women at several steps of a promotional ladder, that evidence, in some circumstances, may reasonably suggest that the employer did not discriminate in the step at issue either.

But courts must be especially careful in judging the relevance of this kind of evidence lest they contravene the legal rule that under 42 U.S.C. § 2000e–16 plaintiffs need not prove discrimination in personnel actions other than those specifically at issue. The evidence supporting an inference of unlawful discrimination in certain employment decisions may be sufficiently strong that evidence of nondiscrimination in other employment decisions cannot rebut this inference. Thus, in some cases the strength of appellants' prima facie case is so great that even if they were to agree to a stipulation that sex discrimination did not occur in other employment decisions, their evidence as to the employment decisions specifically at issue would still prove that, more likely than not, unlawful discrimination occurred.

When all the evidence raising and rebutting the inference of discrimination is statistical, according the proper deference to each legal principle is a delicate task indeed. If Title VII plaintiffs are able to muster only the most marginal inference of discrimination in only one type of job decision (*e.g.*, the underselection of women in one promotional class measures only 1.98 standard deviations), then an inference of discrimination may be undercut by the fact that women are demonstrably not underselected in other similar job decisions. But even here courts must be wary. Evidence that the underselection of women in another similar job decision measures just below the 1.96 threshold, while not sufficient to prove discrimination, is not compelling evidence that the employer did *not* discriminate in this other employment decision.

[8] Thus, when plaintiffs in a Title VII case introduce statistical evidence of an extreme disparity in the selection rates for men and women for a certain type of job, the fact that these plaintiffs have insufficient evidence to establish an inference of discrimination regarding other employment decisions should not block an inference of discrimination on the specific type of employment decision at issue. For example, if Title VII plaintiffs present evidence that the underselection of women for a particular type of job assignment measures above 3.0 standard deviations, this evidence necessarily raises an inference of discrimina-

tion in these assignments regardless of the statistical evidence concerning other assignments. The likelihood that this disparity in the selection rate for men and women is merely a random deviation in a selection process that treated men and women equally is simply too low (1-in-500 using a two-tailed approach) for statistical evidence regarding *other* assignment decisions to rebut this evidence. In these circumstances, the Title VII defendant must present evidence directly relating to the type of assignment at issue to explain the evident disparity in a legitimate, nondiscriminatory fashion. For a district court to reject plaintiffs' claim of discrimination in such a case on the grounds that plaintiffs failed to raise an inference of discrimination in other job assignments would effectively amount to a requirement that plaintiffs prove discrimination in employment decisions other than those specifically at issue. And, as we have said, such a requirement would directly conflict with the express provisions of 42 U.S.C. § 2000e–16.

C. *Rebutting the Inference of Disparate Treatment*

As we have discussed, under Title VII courts will initially infer that a disparity between men and women in selection rates for a particular job or job assignment results from unlawful discrimination if the disparity is large enough: *i.e.*, measures at least 1.96 standard deviations. But defendants in Title VII cases must be offered an opportunity to rebut this inference by showing that the disparity, albeit nonrandom in cause, resulted from some legitimate, nondiscriminatory factor. Similarly, defendants must be allowed to rebut the inference of discrimination by, alternatively, challenging the statistical calculations upon which the inference of discrimination is based. For example, the statistics may rely on faulty data, flawed computations, or improper methodologies. A recent Supreme Court opinion provides courts with some guidance on how to treat attempts to attack an inference of discrimination based on statistical evidence alone. *See Bazemore v. Friday*, — U.S. —, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

In *Bazemore*, the United States District Court for the Eastern District of North Carolina was presented with statistical evidence that black employees of the North Carolina Agricultural Extension Service received substantially lower salaries than white employees working in the same job positions. The District Court determined that "the statistical evidence of plaintiffs standing alone and without further explanation probably suffices to make out a prima facie showing of discrimination in salaries." Civil Action No. 2879, Mem. Op. at 47 (August 22, 1982). The defendants in *Bazemore*, however, argued that plaintiffs' statistics failed to account for several factors, any of which would provide a legitimate, nondiscriminatory explanation for the salary disparities. *Id.* at 48. The District Court agreed with the defendants, holding that because defendants had demonstrated that these other factors might have caused the salary disparities, defendants successfully rebutted plaintiffs' inference of disparate treatment:

> Having thoroughly considered all of the evidence bearing on the salary issue and the contentions of the parties based thereon, the court has concluded that if it be assumed that plaintiffs made out a prima facie case on this issue, it has only been by virtue of the plaintiffs' statistical evidence ...; that because of their failure to include many of the vital factors necessary to be considered in fixing salaries the probative force of these statistics has been so substantially undermined that they cannot sustain a finding of purposeful discrimination in salaries ...; that the defendants have not only "articulated" plausible reasons for the seeming salary disparities, but have satisfied the court of the validity of their explanations.... It follows that plaintiffs have failed to establish by a preponderance of the evidence that the Extension Service has discriminated against black employees in the matter of salaries.

Id. at 54–55 (citation and footnotes omitted).

The Fourth Circuit affirmed this determination by the District Court in *Bazemore*. *See* 751 F.2d 662 (1984). The appellate court referred specifically to two flaws in the plaintiffs' statistics as grounds on which the District Court could legitimately rely in ruling for the defendant. "In the first place," the Fourth Circuit stated, the plaintiffs' statistics "contained salary figures which reflect the effect of pre-Act discrimination, a consideration not actionable under Title VII but permissible [only] to show the general background of the case, or intent, or to support an inference that such discrimination continued." 751 F.2d at 672 (footnote omitted). Second, the appellate court noted that plaintiffs' statistical study of salaries did not take into account "across-the-board and percentage pay increases which varied from county to county." *Id.* The court stated that "[t]he across-the-board and percentage pay increases granted by the various counties in varying amounts, as well as simply paying higher salaries, are bound to have an effect on the salaries of the agents in the various counties." Thus, the appellate court held that "the district court was not required to accept [the plaintiffs' statistics] as proof [of discrimination] by a preponderance of the evidence." *Id.* The court went on to say that "appropriate" statistics "should ... include all measurable variables thought to have an effect on salary level." *Id.*

[9] The Supreme Court reversed. In a unanimous opinion for the Court, Justice Brennan responded to the Fourth Circuit's "plainly incorrect" approach to statistical evidence:

> Importantly, it is clear that a [statistical] analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence.

106 S.Ct. at 3009.[12] Thus, imperfections in the data on which the analysis depends, or the omission of possible explanatory factors from a plaintiff's statistical study, is not necessarily fatal to an inference of discrimination. "While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be," the Justices held, "as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail." *Id.*

Elsewhere in the opinion, Justice Brennan makes plain that the determination by the District Court whether discrimination exists or not "is subject to the clearly erroneous standard of appellate review." *Id.* at 3008. While the Supreme Court remanded the case to the Fourth Circuit to definitely determine whether "based on the entire evidence in the record," the District Court's decision had been clearly erroneous, the Justices did declare, "we think that consideration of the evidence makes a strong case for finding the District Court clearly erroneous." *Id.* at 3010–11 (footnote omitted). Rather than viewing the inclusion of "pre-Act" salaries in the statistical study as rendering the study fatally flawed, the Supreme Court stated that "evidence of pre-Act discrimination is quite probative." 106 S.Ct. at 3010 n. 13. Similarly, the Supreme Court rejected the assumption made by both the District Court and the Fourth Circuit that county-to-county variations in certain pay increases undermined plaintiffs' statistical conclusions: "Absent a disproportionate concentration of blacks in such counties, it is difficult, if not impossible, to understand how the fact that some counties contribute less to salaries than others could explain disparities between black and white salaries." *Id.* at 3010.

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[12] Because the Supreme Court was sharply divided on a separate issue in the *Bazemore* case, the Supreme Court's unanimous opinion on this issue comes in the unusual form of a concurring opinion. The Court issued a short per curiam opinion stating:

> We hold, for the reasons stated in the opinion of Justice BRENNAN, ... the Court of Appeals erred in disregarding petitioners' statistical analysis because it reflected pre-Title VII salary disparities, and in holding that petitioners' regressions were unacceptable as evidence of discrimination.

106 S.Ct. at 3002. As Justice Brennan's opinion reflects the reasoning of the unanimous Court, we have dispensed with the conventional practice of citing to it as a concurring opinion.

[10] Thus, *Bazemore* instructs lower courts to be cautious about dismissing plaintiffs' statistical studies as not probative simply because defendant offers some nondiscriminatory explanation for the disparities shown. Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by plaintiffs' statistics. To be sure, as the Supreme Court acknowledged in *Bazemore*, there may be a few instances in which the relevance of a factor to the selection process is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics. *See* 106 S.Ct. at 3009 n. 10. The logic of *Bazemore*, however, dictates that in most cases a defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.[13]

This court, even before *Bazemore*, had explicitly endorsed the same principle, most recently in a situation where the government attempted to rebut the inference of discrimination arising from evidence that blacks in the Drug Enforcement Agency were paid less and promoted less rapidly than whites. The government argued that blacks were less likely than whites to have an extra year of "specialized experience" over and above minimal qualifications. We rejected the argument because the DEA failed to introduce any evidence to substantiate its assertion:

> **Since DEA has presented no admissible evidence that black agents are more likely than white agents to lack a second year of requisite experience, plaintiffs' failure to account for this variable does not dilute the force of their statistical analysis; ... absent any reason to conclude that the omitted factor correlates with race, the omission of this variable will not affect the validity of the race coefficient in the plaintiffs' regression analysis.**

Segar, 738 F.2d at 1277.[14] We think the lessons of both *Bazemore* and *Segar* apply to this case.

IV. A Review of the Disparate Treatment Claims in This Case

Having discussed the applicable legal principles, we now address the specific disparate treatment claims at issue in this case. Supreme Court precedent has made plain the appropriate standard for reviewing a district court's determination that employment decisions were not the product of an unlawful discriminatory animus. We can reverse this factual finding only if it is clearly erroneous in light of all the evidence in the record or if it rests on legal error. *See Bazemore v. Friday*, — U.S. —, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986); *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Pullman-Standard v. Swint*, 456

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[13] As the Supreme Court said in *Bazemore*, "[w]hether, in fact, [plaintiffs' statistics will] carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." This statement contemplates that defendants generally must introduce evidence to support their attack on plaintiffs' statistics. Mere conjectures and assertions usually will not suffice.

We note also that leading commentators support this corollary to the *Bazemore* rule. Baldus and Cole emphasize that "when otherwise relevant evidence is challenged on methodological grounds, the burden should normally be on the challenger (a) to present credible evidence that the statistical proof is defective and (b) to present a plausible explanation of how the asserted flaw is likely to bias the results against his or her position." D. Baldus & J. Cole, *Statistical Proof of Discrimination* at vii (1986 Supp.).

[14] Other opinions of this court are in accord. *See Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir.1983), *vacated on other grounds*, 465 U.S. 1056, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984); *DeMedina v. Reinhart*, 686 F.2d 997, 1008 (D.C. Cir.1982).

U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

A. *Promotions and Evaluations*

[11] The Secretary of State argues that appellants' claim of "class-wide promotion discrimination lie[s] at the heart of this case." Appellee's Brief at 58. We agree.

Appellants claim that the State Department discriminated against women in promoting FSOs from class 5 to class 4 from 1976 to 1983. According to the government's own evidence, fewer women than expected were actually promoted to class 4 during that time period, given the number of promotion-eligible women in class 5. The government's own statistical analysis, whose methodology the District Court found to be more accurate than appellants', concluded that the discrepancy between the actual and expected number of women promoted measured 1.76 standard deviations. *See* 616 F.Supp. at 1557; Defendant's Exhibit 8A at 14 (Table 1, Model 2). As the District Court noted, this measurement means that the probability of an underpromotion of women this large or larger (a one-tailed inquiry) occurring randomly measures slightly less than 4%. 616 F.Supp. at 1557. As we have discussed, under a one-tailed test this number meets the 5% level set forth in *Segar*. But the corresponding probability of a random deviation from the expected number of women, either favoring or disfavoring women (a two-tailed inquiry), with a magnitude this large or larger is slightly less than 8%. *See* Defendant's Exhibit 8A at 14 (Table 1, Model 2). Thus under a two-tailed test, this number fails to meet the 5% level.

For the reasons set forth in Part III. A., we do not think this evidence alone is sufficient to prove an intent to discriminate against women. Appellants at trial, however, relied on additional evidence to prove a discriminatory motive. Appellants first point to evidence in the record of a general prejudicial attitude against women within the Foreign Service during this time period and argue that this evidence supports the proposition that the discrepancy between the actual and expected number of women promoted to class 4 results from a prejudicial attitude against women that violates Title VII.

This evidence includes statements made upon cross-examination by the defense witness, Benjamin Reid, who was Undersecretary of State for Management from 1977–1981. Reid testified that the Foreign Service, as a result of traditionally being "white, male, and Ivy League," had "set ways of doing things" and that although during his tenure the Foreign Service "had come a long way," it nevertheless "still had a long way to go" at the time he left in correcting these biased attitudes. Tr. at 3279–80. Similarly, the appellants introduced into evidence a report written in 1977 by a committee within the State Department asserting that "both attitudinal resistance to equal employment opportunity and discriminatory behavior are still widespread in the Department." Plaintiffs' Exhibit 29 at 6. The appellants also introduced into evidence a report published in 1984 by the Women's Research and Education Institute of the Congressional Caucus for Women's Issues, which stated that " 'what some identify as traditional elitist attitudes have [worked] to limit severely employment opportunities for women and minorities [in the Foreign Service].' " Plaintiffs' Exhibit 88 at 10 (quoting a 1981 report prepared by the U.S. Commission on Civil Rights).

More specifically, as proof that the underpromotion of women FSOs from class 5 to class 4 resulted from a prejudicial attitude against women, the appellants relied upon evidence that the State Department believed that women FSOs had less potential for advancement than men FSOs even though men and women FSOs performed their duties with the same skill. A random sample of the evaluation reports for over 400 FSOs in classes 5 and 6 revealed that although "there was no significant difference in the *performance* ratings of men and women, ... the disparity between men and women [in their *potential* ratings] measured 2.49 standard deviations." 616 F.Supp. at 1549 (¶ 62) (emphasis added). As the District Court noted, this measurement means the likelihood of women being randomly underrated to this degree or greater (a one-tailed inquiry) is only about 7 times in 1,000. *Id.* Correspondingly, the likelihood of women randomly being either underrated or overrated to this degree or greater is 14 times in 1,000. Either way the odds are very small indeed.[15]

The relevance of this evidence to whether the underpromotion of women from class 5 to class 4 resulted from a discriminatory attitude against women is obvious. As the State Department itself asserted and the District Court expressly found, competitive promotion decisions in the Foreign Service were based primarily on an "assessment of the officer's potential to perform at the next higher level." 616 F.Supp. at 1555 (¶ 114); Defendant's Post-Trial Brief at 92. If a biased attitude towards women was causing the State Department to underrate the potential of class 5 women FSOs in their evaluation reports, even though these women were on average performing equally as well as their male counterparts, one might well expect that this same biased attitude would be at work in the promotion decision itself.

The District Court, however, never considered the evidence of a discriminatory attitude about the potential of women derived from the evaluations in deciding whether appellants had proved, by a preponderance of *all* the evidence, discriminatory intent in the decisions pertaining to promotions from class 5 to class 4. Rather, the District Court offered the following grounds for rejecting the evidence relating to the evaluation reports:

> In view of the finding that female FSO's are promoted equally with male and given the same job opportunities, the Court finds that plaintiffs' analysis of the disparity on potential ratings does not establish that the [evaluation reports] of female FSO's are discriminatory in any fashion.

616 F.Supp. at 1560 (¶ 25).

In our view this reasoning puts the cart before the horse. The District Court cannot determine that the State Department did not discriminate against women in promotions from class 5 to class 4 *until* it considers whether or not all the evidence demonstrates a biased attitude towards women and their capabilities. It cannot reject relevant evidence of discriminatory intent on the basis of a conclusion that no discrimination occurred without reference to the relevant evidence. To rule otherwise would convert Title VII into a Catch-22: in order to establish a promotional disparate treatment claim, a plaintiff must prove discriminatory intent; but she cannot offer proof of discriminatory intent in the form of disparate ratings between men and women as to their potential unless she has already established a promotional disparate treatment claim. We hold that appellants were entitled, as a matter of law, to have the District Court consider evidence in the ratings of a discriminatory attitude about the potential of women when evaluating appellants' disparate treatment claim concerning promotions from class 5 to class 4. Conversely, it was an error of law for the District Court to "reason" backwards and dismiss appellants' claim that the disparity in potential ratings was a violation of Title VII on the grounds that the court had already determined that the State Department did not discriminate against women in promoting FSOs from class 5 to class 4.

Thus, we reverse both the District Court's decision that the State Department did not discriminate against women in evaluating the potential of FSOs and its decision that there was no discrimination shown in promoting FSOs from class 5 to class 4. Following the command of *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92, 102 S.Ct. 1781, 1791–92, 72 L.Ed.2d 66 (1982), we remand the case for further factfinding where the record permits more than one resolution of a factual issue. With respect to the question of whether the

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[15] This statistical evidence was further supported by additional statistics demonstrating a disparity in the potential ratings between men and women who achieved *exactly the same performance rating*. For example, men with performance ratings of "6" received, on average, higher potential ratings than the women who received performance ratings of "6." This disparity measured 2.55 standard deviations. 616 F.Supp. at 1549 (¶ 63).

State Department discriminatorily under-promoted women from class 5 to class 4 from 1976 to 1983, we cannot say that the totality of the evidence compels an affirmative or a negative answer.

Upon remand the District Court must consider whether, on the basis of the existing record, the evidence pertaining to the disparity in potential ratings, together with the nonstatistical evidence of a generally hostile attitude against women in the Foreign Service and the statistical evidence of the disparity in class 5 to class 4 promotions, is sufficient proof that, more likely than not, the underpromotion of women from class 5 to class 4 was based on discrimination. The evidence in the record cutting the other way is the failure of the appellants' statistical evidence to make out even a prima facie case that the State Department discriminated against women at other grades of the promotional process. Of course, as we have pointed out, appellants need not prove discrimination in these other promotion decisions in order to prevail in their disparate treatment claim concerning promotions from class 5 to class 4. Indeed, it is quite plausible that a discriminatory attitude about women and their potential for further advancement might affect promotions only at a mid-level step—like the transition from class 5 to class 4. First of all, as we discussed in Part I. A, *supra*, the promotions in the junior ranks (classes 7 and 8) were noncompetitive. Second, the Secretary's own statistical analysis showed that fewer women than one would expect were actually promoted from class 6 to class 5, although his study indicated that this disparity was just as likely to be a random deviation in a nondiscriminatory system as a symptom of discrimination. *See* Defendant's Exhibit 8A, Table 1, Model 2. Finally, one might surmise that those women who survive a discriminatory bias in critical mid-level promotion decisions have demonstrated such superior skill and aptitude that they would encounter less resistance to advancement in upper level positions. Despite all these considerations, the District Court is entitled to determine for itself on remand whether the government's evidence of nondiscrimination at other promotional levels is sufficient to outweigh the appellants' evidence, which as we have said includes three distinct elements: the disparity itself measuring 1.76 standard deviations, testimony and documented evidence of a general bias against women in the State Department, and the specific evidence as to discriminatory attitudes about the potential of women FSOs for future advancement, revealed in the evaluation reports of class 5 and 6 FSOs.

[12] With respect to the evaluation reports, we note that the District Court committed a further error of law. In discussing the appellants' statistical analysis of the potential ratings for men and women, the court stated that:

> The methodology utilized by plaintiffs' expert ... fails to allow for one vital characteristic, that being female FSO's have less time in class than males. This inexperience would account for the lower potential ratings when compared with males who have more time in class.... While the actual performance of males and females may not be reflected by this inexperience, a subjective judgment on the potential capacity of an FSO may certainly be affected by such inexperience resulting from less time in class.

616 F.Supp. at 1549 (¶ 65).

There was, in fact, no evidence whatsoever introduced at trial on which the District Court could rely to base its assumption that despite equivalence in actual performance officers with less experience would be viewed as having lower potential than those with more experience. *See* Appellants' Brief at 42. Moreover, the District Court's assumption is counterintuitive: if officers with less experience managed to perform at the same level as officers with more experience, one would expect that the less experienced officers would be seen as quick learners with more, not less, potential. In any event, the District Court was not entitled to rely on mere conjecture to undercut the probative force of appellants' statistics. *See, supra*, Part III.C. On remand, in deciding whether appellants' evidence concerning the evaluation reports demonstrated a bias against women, the

District Court shall not rely upon any unsupported hypotheses, such as the relatively lower number of years experience of women in grade.

We note further that, even if the rating evidence proves insufficient to prove a discriminatory motive in promotions, appellants are entitled, as a matter of law, to bring an independent claim of disparate treatment with respect to the evaluation reports themselves. As we have seen, the Foreign Service Act of 1980 specifically includes any "evaluation" as a "personnel action" that must be free from discrimination. In light of this express statutory language, we cannot but read the words "all personnel actions" in 42 U.S.C. § 2000e–16 as encompassing such a claim. Thus, under Title VII, the State Department may not discriminate against women in their evaluations regardless of any demonstrated effect the evaluations ultimately can be shown to have on promotion opportunities. We need not now consider what remedy might be appropriate for discriminatory evaluations; the parties bifurcated the issues of liability and remedies.

To recapitulate, insofar as the District Court required appellants to prove discrimination in promotions in order to prove discrimination in evaluation reports, the District Court erred as a matter of law in two significant respects. First, the District Court unreasonably rejected a major portion of appellants' evidence that the promotion decisions at issue were infected with a discriminatory motive. Second, the District Court deprived appellants of their right under Title VII to bring a disparate treatment claim as to evaluations, regardless of how those evaluations might affect other employment decisions. Consequently, we remand to the District Court both the issue of whether the State Department discriminated against women in its decisions concerning promotions from class 5 to class 4 and the issue of whether it discriminated in its evaluations of the future "potential" of women FSOs.

B. *Assignments*

Appellants brought disparate treatment claims with respect to various types of Foreign Service assignment decisions. We consider first appellants' claim that the State Department discriminated against women in "out-of-cone" assignments by overassigning women to positions in the consular cone and by underassigning women to the "prestigious" program direction cone. 616 F.Supp. at 1553–54.

1. *Out-of-cone assignments*

[13] The District Court found that appellants' evidence disclosed the following facts about out-of-cone assignments to the consular cone:

> a) Between 1976 and 1983, 40.4 percent of all out-of-cone assignments received by women in the political cone were to consular positions, while only 15.5 percent of the out-of-cone assignments received by men in the political cone were to consular positions. This difference [measures 5.84 standard deviations and therefore the probability of a disparity of this *magnitude* or greater (either overselecting or underselecting women) resulting by chance is less than one in one hundred million].[16]
>
> b) For the same time period, the plaintiffs' statistics show 22.9 percent of all out-of-cone assignments received by women in the economic cone were to consular positions, while only 11.6 percent of all out-of-cone assignments received by men in that cone were to con-

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[16] The District Court actually said, "This difference produces a standard deviation of 5.84, and therefore is likely to be the product of chance less than once in 1,000,000." 616 F.Supp. at 1553. While it is true that a disparity measuring 5.84 standard deviations corresponds to a probability value of less than one in a million, whether using a one-tailed or a two-tailed test, our reading of the standard statistical tables tells us that the probability of a random disparity measuring 5.84 standard deviations is much smaller than even the District Court indicated. The one-tailed probability value associated with a statistic measuring 5.8 standard deviations is 3.3157×10^{-9}, or about 3 in one billion. The corresponding two-tailed probability value is twice that or about 6 in one billion, which is less than one in one hundred million. *See* Plaintiffs' Exhibit 168 at 13.

> sular positions. This difference measures 2.68 standard deviations [which means the probability of women being randomly overassigned or underassigned to this degree or greater is 0.74 percent].[17]
>
> c) During the same time period, plaintiffs' analysis indicated that 50.8 percent of all out-of-cone assignments received by women in the administrative cone were to the consular cone while only 33.2 percent of all out-of-cone assignments received by men were to the consular cone. This difference measures 2.62 standard deviations [which means that the probability of a disparity of this magniude or greater resulting by chance is 0.88 percent].[18]

616 F.Supp. at 1553–54 (¶ 101). Appellants contended that these extreme disparities resulted from the prevalent belief in the Foreign Service that women were especially suited for consular work. The government, in contrast, argued that the disparities resulted from the fact that women on the whole preferred consular assignments, and the Foreign Service merely honored these preferences. The District Court accepted the government's explanation of the disparities:

> The [plaintiffs' statistical] analysis does not account for the unique feature of the FSO's bidding, or requesting, their assignments pursuant to the Open Assignment Policy. A more accurate analysis would measure the requests by the FSO's, as the observations made by plaintiffs' expert may result as much from the function of requesting different assignments as the assignment of FSO's.

Id. at 1554 (¶ 101). On this basis, the District Court found appellants' statistical evidence "unconvincing" and concluded that appellants had failed to prove sex discrimination in out-of-cone assignments to the consular cone. *Id.* at 1560 (¶ 22).

It is true, as the District Court pointed out, that assignments are made in part pursuant to the bid lists submitted by members of the Foreign Service. But as the District Court acknowledged, bid lists were only one element of the assignment process, and the selection boards based their assignment decisions in larger measure on the perceived needs of the bureaus to which the assignments were made. *See, supra,* Part I.A. Moreover, the Secretary submitted no evidence showing that more women than men preferred out-of-cone assignments to the consular cone. Appellants' Brief at 55. The Secretary, on appeal, concedes as much.

The Secretary, however, would have us affirm the District Court's decision on the grounds that "an analysis which ignores 'preference' ... is simply not probative on this issue." Appellee's Brief at 55. This argument, however, is precluded by the Supreme Court's *Bazemore* decision. According to *Bazemore,* appellants' statistical evidence concerning out-of-cone assignments to the consular cone is probative of discrimination despite the fact that it did not include individual preferences as a possible explanatory factor. There was no basis in the record on which the District Court could assume that women indicated preferences for consular work more frequently than men did. Consequently, the District Court contravened the dictates of *Bazemore* by refusing to credit the appellants' statistical evidence. Under *Bazemore* and *Segar,* the District Court is not entitled to dismiss plaintiffs' statistical evidence on mere conjecture.[19]

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[17] The 0.74% probability mentioned in text reflects a two-tailed approach. The District Court, again, apparently used a one-tailed approach. The District Court stated that the (one-tailed) probability was 5 in 1000, or 0.5%, but our reading of the standard tables reveals a slightly lower one-tailed probability of 0.37%. *See Elementary Statistics, supra* n. 8, at 479.

[18] Again, the 0.88% probability reflects a two-tailed approach. A one-tailed probability value for 2.62 standard deviations is 0.44%. *Elementary Statistics, supra* n. 8, at 479.

[19] The State Department's approach here is remarkably similar to the defendant's rejected approach in *Bazemore:*

> Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and account-

As a result of this legal error, "unless the record permits only one resolution of the factual issue," we must remand the issue of out-of-cone assignments to the District Court. *Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792. Given the strength of appellants' statistics on this issue, and given the fact that the Secretary offered only an unsupported hypothesis to rebut the inference of discrimination generated by the statistics, we might legitimately conclude that the evidence permits only one answer to the question whether the overassignment of women to the consular cone resulted from an unlawful prejudice towards women. Nevertheless, because we have already determined that the District Court must conduct further factfinding on other issues in this case, and ever mindful of the Supreme Court's injunction that appellate courts not usurp the factfinding function of district courts, we conclude the better course is to allow the District Court to reconsider, on the basis of the existing record, its determination of this issue in light of *Bazemore*.

With respect to out-of-cone assignments to the program direction cone, the District Court found that appellants' evidence showed that "38.5 percent of all out-of-cone assignments received by men in the political cone were to senior program direction cone positions, while only 14.6 percent of the out-of-cone assignments received by women in the political cone were to program direction cone positions." 616 F.Supp. at 1554 (¶ 105a). The District Court further found that this underselection of women measured 4.46 standard deviations, *id.*, which means that either an underselection or an overselection of women of this magnitude or larger has a probability of occurring randomly in less than one in 100,000 times.

Appellants' evidence also demonstrated that "12.4 percent of the out-of-cone assignments received by men in the consular cone were to program direction positions, while only 6.6 percent of the out-of-cone assignments received by women in the consular cone were to program direction positions." 616 F.Supp. at 1554 (¶ 105b). This underselection of women measured 2.23 standard deviations, *id.*, which means that the probability of women being randomly either underselected or overselected to this degree or greater is about 2.6%.

The appellants argued that this underassignment of women to program direction cone positions from the political and consular cones resulted from the discriminatory belief within the Foreign Service that women were unsuitable for prestigious leadership-track positions. It is unclear from the District Court's opinion why the District Court rejected this argument, and found, to the contrary, that the State Department did not discriminate against women in assignments from the political and consular cones to the program direction cone. The District Court did observe that "Defendant's expert produced an analysis indicating that, as to those men and women who did attain transfer to the Program Direction cone, there was no disparity in the amount of time spent in class before attaining the transfer." 616 F.Supp. at 1554 (¶ 106). Although the District Court found this evidence to "indicate[ ] that females are not discriminated against in their attainment of conversion to the Program Direction cone," it concluded, accurately, that this evidence could not be "dispositive" because "it measures the time in class and service of those who actually attain the Program Direction cone, and plaintiffs complain of a disparity in the number of men and women who are given out-of-cone assignments to positions which carry the program direction skill code and would thus qualify them for transfer to the Program Direction cone itself." *Id.* (¶ 107). The issue was not whether those women who were able to transfer to the program direction cone did so with the same speed as their male counterparts; rather, the issue was whether proportionally fewer women than men

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> ed for there was no significant disparity between the salaries of blacks and whites.

106 S.Ct. at 3010–11 n. 14. Similarly, here the State Department presented no evidence *at all* that *preference* would *explain* the disparities related to sex.

were able to transfer to program direction positions at all.

Despite the District Court's concession that appellee's rebuttal evidence could not be "dispositive," it offered no other basis for rejecting appellants' claim of discrimination in out-of-cone assignments to the program direction cone positions. Specifically, it did not mention individual preference as a possible nondiscriminatory explanation for the disparity between men and women in their selection rates for these positions, probably because there was absolutely no evidence in the record indicating that women preferred assignment to the "prestigious" program direction cone less than men.

Thus, we conclude that the District Court failed to articulate any sufficient grounds for rejecting appellants' proof of discrimination in out-of-cone assignments to the program direction cone. The sole basis offered by the government was properly found by the court to be insufficient. It cited no other basis in the record for its decision, and we can find none. Therefore, we reverse and remand the issue for reconsideration, on the basis of the existing record. The inference of discrimination raised by the significant disparities between men and women given out-of-cone assignments to these "prestigious" positions is thus far unrebutted. Unless the District Court can find valid basis supported in the record for rejecting the inference of discrimination, it must rule in favor of the appellants on this claim.

2. *Stretch and Downstretch Assignments*

The appellants also claim that the State Department discriminated against women in "stretch" and "down-stretch" assignments. The evidence that appellants introduced at trial in support of this claim included the following statistics. First, between 1976 and 1981, "32.2% of the women in Class 4 were given downstretch assignments, while only 17.6% of the men in that class were given down-stretch assignments." 616 F.Supp. at 1552 (¶ 92). As the District Court noted, this disparity measures 6.72 standard deviations, *id.*, and the chances of women being randomly overassigned or underassigned to this degree or greater is less than one in ten billion. *See* D.B. Owens, *Handbook of Statistical Tables* 13 (1962) (Plaintiffs' Exhibit 168).

Second, "20.8% of the women in Class 5 received down-stretch assignments, while only 14.2% of the men received them. This difference measures 4.04 standard deviations." 616 F.Supp. at 1552–53 (¶ 92). The probability of a random overselection or underselection of women of this magnitude or larger is about 1 in 20,000. *See* Plaintiffs' Exhibit 168 at 13.

Third, 19.9% of the women in class 7 received down-stretch assignments, whereas only 14.3% of the men in class 7 did. This disparity measured 2.39 standard deviations, which corresponds to a (two-tailed) probability value of about 1.6%. *See* Plaintiffs' Exhibit 57; *Elementary Statistics, supra* n. 8, at 479.

Fourth, with respect to stretch assignments, only 19.1% of women in class 4 received stretches, whereas 28.4% of the men in class 4 did. This underselection of women measured 3.74 standard deviations, which means that the probability of either an underselection or overselection of women of this magnitude or larger resulting from chance is about one in 5,000. *See* Plaintiffs' Exhibits 57, 168.

Fifth, only 31.6% of women in class 5 received stretch assignments, whereas 37.7% of the men in class 5 did. This disparity measured 2.79 standard deviations, which corresponds to a (two-tailed) probability value of 0.52%. *See* Plaintiffs' Exhibit 57; *Elementary Statistics, supra,* n. 8, at 479.

The appellants argued that this overassignment of women to downstretch positions and underassignment of women to stretch positions resulted from unlawful sexist attitudes in the Foreign Service. As additional evidence to support their contention, the appellants pointed to a 1977 report prepared within the State Department, which stated that stretch assignments "are not commonly given to those in EEO categories," meaning women and minorities.

Plaintiffs' Exhibit 29 at 6. The District Court nonetheless rejected the appellants' claim, offering several reasons for its decision. These reasons, however, do not support the District Court's decision. All but one are erroneous as a matter of law, and the other is a clearly erroneous finding of fact.

[14] First, the District Court stated that appellants had failed to show that the overassignment of women to downstretch positions and underassignment of women to stretch positions adversely affected the opportunities of these women for promotion. *See* 616 F.Supp. at 1553 (¶ 94). Once again, we repeat that appellants are entitled under 42 U.S.C. § 2000e–16 to bring a claim of sex discrimination with respect to "all personnel actions," including any category of assignments, regardless of how these assignments relate to other personnel actions, like promotion decisions. By relying on this determination, the District Court contravened the express provisions of Title VII.

Second, the District Court concluded that appellants' statistical evidence was "of little value in persuading that discrimination existed in assigning stretch and downstretches" because, in part:

> Plaintiffs' expert, by analyzing the situation class by class, appears to ignore cross-class competition for any given assignment. For example, an officer vying for a Class 4 stretch position may compete against officers from at least Classes 6, 5, 4, and 3.

616 F.Supp. at 1553 (¶¶ 96, 98).

While it is absolutely true that officers in any given class will be competing against officers from other classes, it is also absolutely irrelevant to the point of appellants' evidence. Appellants are trying to demonstrate, for example, that women in class 5 are less likely than men in class 5 to stretch into assignments labelled class 4 or higher, and that this disparity results from a widespread prejudice within the Foreign Service that women are less able than men despite their equivalent rank. Given this purpose, it is entirely irrelevant that officers from other classes may compete with men and women in class 5 for those assignments that are stretches for officers in class 5. Appellants are not interested in comparing how well the men and women in class 5 compete against officers in another class. They are only interested, and properly so, in how similarly situated men and women compete against each other.

It was an error of law for the District Court to reject the probative value of appellants' statistical evidence because of this irrelevant factor of "cross-class competition." Certainly, the Supreme Court's decision in *Bazemore* stands for the proposition that the "missing factor" identified by the District Court as a reason for discounting statistical proof of disparate treatment must at least be relevant to the point of the statistics. In *Bazemore* itself, the Supreme Court noted that "certain conclusions of the District Court are inexplicable in light of the record." 106 S.Ct. 3011 n. 15. For instance,

> the District Court complained about the inclusion of the County Chairman in the petitioners' regression analysis, fearing that the fact that they were disproportionately white would skew the salary statistics to show whites earning more than blacks. Yet, because the regressions controlled for job title, adding County Chairman as a variable in the regression would simply mean that the salaries of white County Chairmen would be compared with those of nonwhite County Chairmen.

Id. In this case, the District Court's reliance on the omission of "cross-class competition" as a basis for rejecting appellants' evidence of discrimination in stretch and downstretch assignments is similarly "inexplicable."

[15] Third, the District Court found appellants' statistics concerning stretch and downstretches to be "flawed" in another respect. The data from which the statistical analysis was made was tabulated in terms of the total number of years each FSO served in a stretch or a downstretch assignment rather than in terms of the number of such assignments. The District Court found that this methodology "does not accurately reflect the number of assignments given out by the Foreign Service." 616 F.Supp. at 1553 (¶ 95). The appellants contend, however, that the data they used were the only available data, and the Secretary does not dispute this contention. *See* Appellants' Brief at 49; Appellee's Brief at 53. Moreover, the Secretary has introduced no evidence tending to show that the imperfections of the data caused the disparities produced by the statistical analysis. *See* Appellants' Brief at 50. Thus, the government once again relies on mere conjecture to rebut appellants' statistics. Finally, and perhaps most important, the appellants received their data from the State Department's employment records, and the reason why the data were tabulated in terms of number-of-years rather than number-of-assignments was that the State Department's employment records were tabulated in this form. *Id.* In these circumstances, as this court has previously stated, "plaintiffs cannot be legitimately faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendant[ ]." *Trout v. Lehman,* 702 F.2d 1094, 1102 (D.C.Cir.1983) (quoting 517 F.Supp. 873, 883 (D.C.1981)), *vacated on other grounds,* 465 U.S. 1056, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984); *see also Segar,* 738 F.2d at 1276 ("Both the policies underlying Title VII and general principles of evidence suggest that the burden of production of such evidence must rest with the defendant."). Therefore, insofar as the District Court relied on this reason to reject the probative value of appellants' statistics, we find its decision in conflict with the precedents of this circuit.

[16] Finally, the District Court found that "Plaintiffs' analysis did not allow for the preference of the individual FSO." 616 F.Supp. at 1553 (¶ 97). The District Court's reliance on this "preference" argument in the context of stretch and downstretch assignments differs significantly from its role in the context of out-of-cone assignments. To recall, the District Court had no evidence for believing that women more than men would prefer out-of-cone assignments to the consular cone and that this preference—rather than a discriminatory treatment of women—best explained the disparities in out-of-cone assignments. Here, in contrast, there is some evidence that women preferred downstretch assignments more than men did. As the District Court states, the record contains "testimony that down-stretch assignments are requested for various reasons, including the desire to gain an assignment with a spouse who is also a State Department employee." *Id.* If this testimony were indeed "extensive," as the District Court characterized it, we would conclude that the District Court's decision that the State Department did not discriminate in stretch and downstretches was not clearly erroneous. But we can find in the record only two instances in which a woman FSO subordinated her own career in favor of her husband's Foreign Service career—and in one of these instances, the witness testified that her decision in this instance was part of an alternating practice she and her husband agreed to of trading-off less desirable assignments. *Compare* Appellee's Brief at 53–54 n. 58 *with* Tr. 876, 1765, 2150. These two (or more accurately, one and a half) isolated instances do not amount to "extensive" testimony. Alone they do not establish a sufficient basis for undermining the probative weight of appellants' statistics. We must recall that some of the disparities between men and women in downstretch assignments were especially extreme, measuring 6.72 and 4.04 standard deviations. Given these kinds of numbers, it takes more than a few isolated examples of individual decisions by women to seek downstretches for the District Court not to conclude, that more likely than not, the disparities resulted from unlawful discrimination. Therefore, from our review of the totality of the evidence presented on the issue of discrimination in stretch and downstretch assignments, we must conclude that the District Court's finding of no discrimination was clearly erroneous. We reverse the District Court's decision on this issue of liability and remand for appropriate proceedings on the question of remedies.

3. *Deputy Chief of Mission Assignments*

[17] Appellants also claim that the State Department discriminated against women in selecting Deputy Chiefs of Mission. The Deputy Chief of Mission (DCM) is the second in command, directly below the Ambassador, at each American embassy. As the District Court found, appellants introduced evidence showing that only "nine women were appointed DCM between 1972 and 1983, out of a total of 586 appointments." 616 F.Supp. at 1552 (¶ 88). The District Court then noted:

> Plaintiffs' expert calculated that the expected number of women appointed during that period, based on the number of women in the grade levels from which DCM's were chosen, is 26.8. The difference between the actual and expected number of women measures 3.54 standard deviations.

Id. The probability of a disparity this large or larger, either favoring or disfavoring women for the DCM position, resulting by chance in a selection process that did not differentiate between men and women, is about one in 2,500 times. Given this extremely low probability, this evidence, standing alone, raises a strong inference of disparate treatment.

The District Court offered several reasons for concluding that the State Department did not discriminate against women in DCM assignments. All of these reasons are erroneous as a matter of law. First, the District Court found this evidence "unconvincing" because appellants were unable to show "statistically significant disparit[ies]" in the selection rates for five other "high visibility positions." 616 F.Supp. at 1560 (¶ 20). (The other "high visibility" positions were: Deputy Assistant Secretary, Office Director, Country Director, Principal Officer, and Executive Director.)

Once more, we remind that under 42 U.S.C. § 2000e–16 appellants are not required to prove sex discrimination in assignments to six different types of jobs in order to establish discrimination in assignments to a single position. We have, however, also said that evidence of nondiscrimination in some jobs may be probative of whether discrimination occurred in selections for another kind of job. Adherence to both these legal rules may be difficult at times. But in this case it is clear that the District Court contravened the first of these two legal rules. Here, appellants introduced evidence showing that the underselection of women for DCM positions was so extreme that the chance of women being randomly underselected or overselected to this degree or greater was only one in 2,500 times. Not even a stipulation that the State Department did not discriminate against women in assignments to five other kinds of "high visibility" positions could defeat the inference of disparate treatment raised by this evidence. A defendant must produce other evidence directly relating to the job at issue to rebut this inference of discrimination. In this case, the District Court rejected appellants' strong inference of disparate treatment in part because appellants did not generate an inference of discrimination in five other types of assignments. This was legal error.

Second, the District Court stated:

> Plaintiffs' analysis of the number of women ... in DCM positions failed to adequately consider the bottom-entry nature of the Foreign Service. It failed to allow for the time necessary for the large number of female FSO's presently in the service to advance to the higher ranks.

616 F.Supp. at 1560 (¶ 19). It is not clear what the District Court meant by this statement. As we have seen, the District Court elsewhere acknowledged that appellants' statistical analysis was "based on the number of women in the grade levels from which DCM's were chosen." *Id.* at 1552 (¶ 88). Thus, according to the District Court itself, the appellants properly limited their study to the relevant applicant pool and therefore controlled for the fact not many women in the Foreign Service had reached a position in which they were eligible for appointment as Deputy Chief of Mission. What else, then, could the Dis-

trict Court have meant by saying that appellants "failed to allow for the time necessary for the large number of female FSO's presently in the Service to advance to the higher ranks"? We can only surmise that the District Court meant that when more women reached these higher ranks, more women would be appointed to DCM positions. But even if that is what the District Court meant, then it once again committed legal error. The fact that in absolute numbers, more women will be appointed to DCM positions is irrelevant to the present discrimination claim at issue. Appellants claim that even after accounting for the small number of women eligible for selection to a DCM position, women have been proportionally underselected when compared to the number of eligible men selected and that this underselection has no legitimate, nondiscriminatory explanation. Appellants are entitled to a consideration of this claim regardless of whether the reason for the currently small number of eligible women is the "bottom-entry nature of the Foreign Service." It seems as if the District Court lost sight of the relevant legal question under Title VII, and the issue must be remanded for reconsideration in accordance with a proper conception of the law.

Third, the District Court found that "[plaintiffs'] statistical analysis is of little significance in that it encompasses the period 1972 through 1983, while the relevant time period for this case is 1976 to 1983." 616 F.Supp. at 1552 (¶ 89). This determination is directly contrary to the precise holding of the *Bazemore* decision. As discussed in Part III. B., the Supreme Court found that the inclusion of pre-Act data in a statistical study did not undercut the probative value of that study.[20] Previously, the Supreme Court has held that evidence of discrimination by the defendant for years that are time-barred is equivalent to evidence of pre-Act discrimination. *United States v. Evans,* 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). In this case, evidence of discrimination from the years 1972–1976 is not directly actionable because it is time-barred, but its inclusion in appellants' study certainly cannot render the entire study of "little significance." *See Rossini v. Olgivy & Mather, Inc.,* 798 F.2d 590, 604 n. 5 (2d Cir.1986). Moreover, in this case, the State Department does not contend that reviewing the data from 1972–1976 would reveal disparities of a different magnitude. *See* Appellants' Brief at 57; Appellee's Brief at 58 n. 68.

Thus, the three reasons the District Court gave for rejecting appellants' strong inference of disparate treatment in DCM assignments are inadequate as a matter of law. On appeal, the Secretary suggests an alternative nondiscriminatory explanation for the underselection of women to this position: more women might have been appointed Ambassador instead. Appellee's Brief at 57. We note that the District Court made no such finding and the only evidence in the record to which the Secretary directs us is a statement by a single witness that perhaps this fact might explain the underselection of women for DCM positions. Tr. at 1766. We think that the proper course under *Pullman-Standard* is to remand the issue to the District Court for further factfinding, on the basis of the existing record.

C. *The Superior Honor Award*

[18] The appellants also claim that the State Department discriminated against women in granting the Superior Honor Award to Foreign Service Officers. As the District Court found, appellants presented the following evidence:

> 4.8% of the award recipients were females, although 10.1% of the Class 1 through 5 FSO's during the time period were females. These results indicate that twice as many women would be expected to receive the Superior Honor Award as actually received it. The difference measures 3.1 standard deviations.

616 F.Supp. at 1548 (¶ 48). The chances are only one in 500 that a deviation of this magnitude or larger, either favoring or dis-

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[20] On the contrary, the Supreme Court found this evidence "quite probative."

favoring women, would occur randomly if the process of granting Superior Honor Awards treated men and women equally. *Elementary Statistics, supra* n. 8, at 481.

Once again, the reasons that the District Court gave for rejecting appellants' discrimination claim are contrary to law. First, the District Court stated that appellants failed to show how "the failure of women to receive the Superior Honor Award affected the opportunity for promotion." *Id.* (¶ 49). Appellants, however, are entitled to bring a sex discrimination claim under 42 U.S.C. § 2000e–16 with respect to personnel decisions involving awards regardless of how these decisions affect promotions. As we have seen, the Foreign Service Act of 1980 specifically includes "any ... award of performance pay or special differential" as among the personnel actions that must be free from sex discrimination, and we do not construe "all personnel actions" in 42 U.S.C. § 2000e–16 to have a lesser scope.

Second, the District Court rejected appellants' claim involving the Superior Honor Award as "unconvincing" because the appellants were unable to produce equivalent evidence with respect to other State Department Honor Awards. But as with the evidence concerning the DCM assignments, appellants' evidence concerning the Superior Honor Award is sufficiently strong to withstand even a stipulation that the State Department did not discriminate against women in granting other types of Honor Awards. To rebut the inference of discrimination here, the State Department was required to present evidence explaining the extreme disparity between the numbers of men and women receiving the Superior Honor Award.

Third, the District Court discredited appellants' evidence because the District Court thought that appellants' statistical "analysis was based on a faulty assumption that all female FSO's were equally qualified for the Superior Honor Award." 616 F.Supp. at 1548 (¶ 50). But appellants' evidence assumes nothing of the sort. The District Court apparently thought that appellants made this "faulty assumption" because, in the court's own words, appellants made "no showing ... of what portion of female FSO's were qualified for the Superior Honor Award." *Id.* But the statement reveals a fundamental misunderstanding of the role of relevant statistical evidence in a Title VII case. Appellants do not suggest that one FSO is as equally qualified to receive an award as another. These awards are obviously based on merit and are supposed to be given to only the outstanding FSOs. Appellants merely assume that the ranks of men and women FSOs would produce these outstanding individuals at (roughly) equal rates, and the State Department offered no reason for rejecting this assumption. Appellants' statistical analysis is based on the contention that if the State Department awarded this prize without bias against women, the percentage of eligible women receiving the award would be the same as the percentage of eligible men receiving the award (and thus the male/female ratio among award recipients would be the same as the male/female ratio in the pool of eligible candidates). Appellants properly limited their analysis to only FSOs in classes 1 through 5, because only FSOs in those classes received this award. Given that appellants limited their statistical analysis to the relevant pool, and the analysis revealed an underselection of women measuring 3.1 standard deviations, the inference of disparate treatment generated by this evidence is entitled to stand unless and until the government presents a credible nondiscriminatory explanation of why men in classes 1 through 5 more frequently received the Superior Honor Award than women in the same classes. *See, supra,* n. 6. By stating that appellants had established no basis for comparing actual awards with expected awards, and in believing that appellants assumed all female FSOs equally qualified for the award, the District Court revealed failure to understand the way in which statistics can prove discrimination in a Title VII case. Therefore, we reverse for legal error.

Moreover, because the State Department did not offer any explanation for the disparity between men and women in receiving the Superior Honor Award, we must order the District Court to uphold appellants' claim of discrimination on this issue. We need not address what kind of remedy might be appropriate, as only issues of liability are properly before the court at this time.

V. Initial Cone Assignments: The Claim Involving the Disparate Impact Theory

Appellants characterize their claim concerning initial cone assignments as both a disparate treatment and a disparate impact claim. This characterization, unfortunately, lacks a certain degree of clarity and may indicate some confusion on the appellants' part. Perhaps this confusion stems from the fact that the initial cone assignments involve two distinct groups of FSOs: those that took entrance exams and those that did not. *See, supra,* Part I & n. 2. It appears that appellants wish to bring a disparate *treatment* claim on behalf of both these groups and a disparate *impact* claim on behalf of the exam-takers. The appellants introduced statistical evidence of a disparity in initial cone assignments for which the pool was both the exam-takers and the nonexam-takers. Appellants' Brief at 22. This study was based on data supplied by the State Department. *Id.* The appellants also introduced statistical evidence of a disparity in the initial cone assignments for the exam-takers alone. *Id.* at 24. This study, by contrast, was based on data supplied by the Educational Testing Service (ETS) which administers the Foreign Service entrance exams and monitored the test results. *Id.* (The appellants apparently did not introduce any evidence regarding the nonexam-takers alone.) We do not believe, however, that *in this case* the appellants can pursue *both* a disparate *treatment* and a disparate *impact* claim with respect to the *exam-taker's* initial cone assignments. We will explain our reasons for this conclusion.

To apply the disparate *treatment* theory to the evidence concerning exam-takers, the appellants must allege and prove that the observed, nonrandom disparities were caused by intentional discrimination against women. To apply the disparate *impact* theory, the appellant must allege and prove that the disparities were caused by a "facially neutral" selection criterion that disadvantaged women more than men. Here, the appellants point to the political functional field portion of the Foreign Service Entrance Examinations. They have introduced evidence that from 1975 to 1980 men received higher scores than women on this test and that statistical analysis rejects the hypothesis that this disparity was a random sample of the deviation that would normally occur if men and women tested equally. *See* 616 F.Supp. at 1546 (¶ 27).

[19] Of course, the appellants might have presented alternative claims: *e.g.,* the disparity in initial cone assignments was caused either by discriminatory intent, or by the results of the entrance examinations. Nothing in Title VII or the Federal Rules of Civil Procedure prevents appellants from pursuing alternative claims or theories, even if they are mutually inconsistent.[21] But in this case appellants seem to argue only that the results of the entrance examinations caused the disparity in initial cone assignments; they make no explicit charge of discriminatory intent. Indeed, appellants introduced an additional regression analysis study (also based on the ETS data) which showed that the test scores were the one and only factor that explained the disparity in initial cone assignments.[22] At trial, appellants' expert witness, who had conducted the statistical study, testified that with respect to "the exam takers, the reason you see this pattern [of disparity in initial cone assignments] is because of their test scores." Tr. at 3402. The appellants argued to the District Court that this evidence demonstrates that "[t]he adverse impact of the functional field test causes the disparities in cone assignment observed by Dr. Siskin [the expert witness].... [T]est scores on the functional field test were determinative of cone assignments." Plaintiffs' Post-Trial Brief at 33. They repeat this argument on appeal. Appellants' Brief at 35. Because appellants have specifically identified the examinations, and not intent, as causing the disparity in initial cone assignments of the exam-takers, we will treat their claim concerning this disparity as relying solely on the disparate impact theory.[23]

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[21] We have no occasion to rule today that with respect to a particular disparity (like initial cone assignments) a disparate treatment claim and a disparate impact claim are mutually inconsistent. As this court has previously recognized, a disparate treatment claim can turn into a disparate impact claim if a defendant rebuts an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections. *See Segar,* 738 F.2d at 1270. Indeed, it may even be possible to claim that both discriminatory intent and a facially neutral, although disadvantageous, selection criterion simultaneously caused a particular disparity, each contributing to the end result. Fortunately, we need not decide any of these complex questions about partial causality, since appellants themselves state that after accounting for the difference between men and women in their test scores, there is no statistically significant disparity between men and women in their initial cone assignments. *See* Plaintiffs' Post-Trial Brief at 22; *infra,* n. 22.

Once over that initial hurdle, the resolution of appellants' disparate impact claim seems straightforward. The only basis which the District Court gave for rejecting appellants' statistical evidence that correlated test scores with initial cone assignments was that these statistics were "flawed and inconclusive." 616 F.Supp. at 1561 (¶ 28).

> Plaintiffs' analysis of exam takers is flawed and inconclusive in establishing disparate impact in cone assignments. It was established that the expert's determination of total FSO hires for the year 1981 was incorrect. Plaintiffs' expert at times had difficulty identifying the cone at hire of the FSO's and chose to delete those officers from the analysis, along with any FSO's not assigned to the four major cones. Though the expert disclaimed the significance of those actions, the Court is not persuaded.

Id. at 1546 (¶ 29). Unfortunately, this finding of fact is itself flawed. Although the District Court is correct in saying that there was some confusion about the correct data for 1981 in some of appellants' statistics, this confusion *did not involve* the specific statistical studies relevant to the disparate impact claim involving the entrance examination: the data which were supplied by ETS. There was no dispute about the accuracy of this data. The confusion over the 1981 numbers arises from data supplied by the State Department's employment records. The State Department data were used in appellants' statistical studies involving both exam-takers and nonexam-takers and this evidence was unnecessary for the disparate *impact* claim involving exam-takers only.[24]

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[22] This study considered the effect of the following variables on initial cone assignments: level of educational attainment, major field of study, functional test scores, and sex. *See* 616 F.Supp. at 1546 (¶ 28). The study found that neither level of educational attainment nor major field of study explained disparities in initial cone assignments, and that when controlling for functional test scores, women were not underassigned to the political cone or overassigned to the consular cone to a statistically significant degree. *See* Tr. at 1076–82.

[23] Appellants' confusion over the difference between a disparate treatment and a disparate impact claim is illustrated by the following assertion in their brief: "[Plaintiffs' expert] found that test scores substantially correlate with or explain cone assignments.... Thus, there can be no doubt that plaintiffs have established a disparate treatment [claim] in cone assignment." Plaintiffs' Post-Trial Brief at 22. As discussed in text, this evidence supports a disparate *impact*, and not a disparate *treatment*, claim. Appellants at times, incorrectly, suggest that they can maintain a disparate treatment claim simply by demonstrating a disparity in initial cone assignments. *See, e.g.*, Appellants' Brief at 22. But, as discussed in text, a disparate treatment claim must prove both a disparity and discriminatory intent—even if proof of intent is circumstantial and the disparity itself raises an inference of intent. *See, e.g.*, *Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15.

[24] Because we have concluded that appellants have properly presented only a disparate *impact* claim regarding the initial cone assignments of the *exam-takers*, the only remaining disparate treatment claim involves the initial cone assignments of those who did not take the entrance examinations. As we have mentioned, however, the appellants presented no independent statistical evidence to show that the State Department intentionally discriminated against women in this group of nonexam-takers. The data which included this group also included the exam-takers, but as any study based on this data is drastically overinclusive with respect to the nonexam-takers, we do not believe this evidence

[20] Because the ETS data on which the disparate impact claim relies do not include the "flaw" referred to by the District Court, this finding of fact must be reversed as clearly erroneous. Indeed, the State Department makes no attempt to support this finding of fact. Instead, the State Department suggests that preference, and not the results from the functional field portions of the entrance examinations, explains the disparity in the initial cone assignments of male and female exam-takers. It is not at all clear from the opinion that the District Court adopted this argument. The District Court refers to the existence of a study that the State Department introduced in support of this argument, but makes no evaluation of the study. 616 F.Supp. at 1546 (¶ 30). We think it appropriate that the District Court, rather than an appellate court, evaluate this evidence in the first instance. We note that the government's study involves only the years 1973 and 1974, when exam-takers were tested in only one functional field and were allowed to select the field in which they wished to be tested.[25] But we are not prepared to say that the results of that study, whatever they might be, are entirely irrelevant for the years 1975 and after, when all exam-takers were tested in all four functional fields. Apparently, preference played some role in initial cone assignments for some FSOs in the period after 1975. *See* 616 F.Supp. at 1545 (¶ 16). On remand, therefore, the District Court must determine whether, on the basis of the existing record, the apparent disparity in initial cone assignments for the exam-takers was, more likely than not, caused by the disparity in test scores for male and female FSOs—or, as the State Department contends, by different assignment preferences between male and female FSOs.

Notably, the one obvious defense that the State Department never raised was that there was a legitimate "business" necessity for the test. Indeed, the District Court specifically found that "[d]efendant did not rely on a showing that the political functional field test was job related." 616 F.Supp. at 1546 (¶ 31). Thus, if the District Court concludes that the examination caused the disparity in initial cone assignments, the District Court must conclude that the test violated Title VII. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).[26] Consequently, we reverse the decision of the District Court and remand for the appropriate factfinding.

CONCLUSION

We have reviewed the District Court's decision in this case in detail and have concluded that it committed a number of legal errors and made several clearly erroneous errors of fact. Consequently, we reverse the judgment of the District Court and remand this action for further proceedings not inconsistent with this opinion. With respect to a number of the appellants' claims, we have held that the determination of liability under Title VII requires further factfinding by the District Court, to be conducted on the basis of the existing record. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2577 (1971). We offer no views at this point on any issues relating to the remedies phase of this litigation.

It is so ordered.

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can create even a prima facie case of discrimination. Consequently, we affirm the District Court's decision insofar as appellants failed to prove disparate *treatment* in the initial cone assignments of the nonexam-taker group.

[25] *See, supra,* n. 1.

[26] We note, however, that the statistical analysis on which the appellants' disparate impact claim was based covered only those applicants who took the examinations between 1975 and 1980 and were subsequently hired between 1976 and 1983. Apparently, there was not sufficient data from those who took the entrance examinations after 1980 and who were thereafter hired in the relevant time period, for a meaningful statistical analysis to be conducted about the effect of these examinations. Therefore, the determination of liability under the disparate impact theory can extend only to those who took the examinations between 1975 and 1980.

public procedure); *Small Refiner Lead Phase-Down Task Force,* 705 F.2d at 554; *American Federation of Government Employees v. Block,* 655 F.2d 1153, 1156 (D.C.Cir.1981). Such rules of course must avoid the problems we have identified in this opinion of large carriers abusing their power over small carrier co-participants in through routes. *ILGWU v. Donovan,* 733 F.2d 920 at 922 (D.C.Cir.1984) (court's "unambiguous mandate [may not be] blatantly disregarded by [agency issuing interim emergency orders]"). Other than this limitation, it is for the Commission, and not this court, to decide if interim rules are needed and if so what those rules should provide. *Small Refiner Lead Phase-Down Task Force,* 705 F.2d at 554; *cf. Action on Smoking and Health v. Civil Aeronautics Board,* 713 F.2d 795, 800 (D.C.Cir.1983) (promulgation of order without notice and comment procedures under 5 U.S.C. § 553(b)(B) is proper only if the agency concludes there is an "emergency situation ... [where] delay would do real harm").

We have also concluded that the ICC car hire decision was a promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a) and therefore must be vacated. In addition, we find that the ICC relied on an improper view of its role in assuring that the Alaska Railroad's rates be "equal and uniform" and therefore vacate and remand for further consideration the rate exemption as applied to the Alaska Railroad. We find unpersuasive, however, petitioners' arguments that the general maximum rate exemption must be vacated as applied to Canadian-United States boxcar traffic, or that the valid portions of the order will allow undue discrimination against ports. Finally, we have considered other arguments raised by the parties, not explicitly addressed in this opinion, and find them without merit. For the reasons set forth above, this case is remanded to the Commission for proceedings consistent with this opinion.

It is so ordered.

Mary Pat LAFFEY, et al.,

v.

NORTHWEST AIRLINES, INC.,
Appellant,

Air Line Pilots Association, Non-Aligned Party. (Two Cases)

Mary Pat LAFFEY, et al., Appellants,

v.

NORTHWEST AIRLINES, INC.,

Air Line Pilots Association, Non-Aligned Party. (Two Cases)

Nos. 83-1033, 83-1034, 83-1167 and 83-1168.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 8, 1983.
Decided July 20, 1984.

In Title VII and Equal Pay Act case, in which an airline was found to have violated the latter Act by paying its stewardesses less than its pursers, the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, 582 F.Supp. 280, resolved disputed matters. Appeal and cross appeal were taken. The Court of Appeals held that: (1) there was no basis for overturning the determination that the airline's purser/stewardess pay differential was based on sex or that a uniform cleaning allowance for men, but not for women, discriminated impermissibly on the basis of sex; (2) in view of the full and fair opportunity the airline had to litigate the issues of whether stewardesses and pursers performed "equal work," the measurement of back pay, oversights in the delineation of the Title VII class, and error in characterizing the Equal Pay Act violations as willful, the strong policy of repose precluded reconsideration; (3) the time frame for back pay accrual was Minnesota's two-year limitation on the recovery of wages under any federal or state law; (4) the stewardesses were entitled to pre-Act longevity in calculating back pay for the relevant, post-Act time periods; (5) the district court properly declined to revisit the 1974 remedial order provision on the rate of prejudgment interest; and (6) stewardesses were entitled to postjudgment interest on the liquidated damages.

Affirmed in part, reversed in part and remanded with instructions.

1. **Labor Relations ⇐1333**

Employer's actual but erroneous belief that two jobs are in fact different does not wholly shelter employer from equal pay for equal work liability in that judges have discretion only to limit, not to eliminate, damages when employer, in "good faith," erroneously but reasonably believed that his conduct conformed to legal requirements. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), (d)(1)(iv), as amended, 29 U.S.C.A. § 206(d), (d)(1)(iv); Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

2. **Labor Relations ⇐1333**

Amendment providing that compensation differentiation "authorized by" Equal Pay Act shall not be unlawful employment practice under Title VII did not change governing law "equal pay for equal work regardless of sex" so as to exonerate employers who in fact failed to reward equal work with equal pay, so long as they honestly believed that jobs in question were in fact different. Fair Labor Standards Act of 1938, § 6(d)(1)(iv), as amended, 29 U.S.C.A. § 206(d)(1)(iv); Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e–2(h).

3. **Labor Relations ⇐1333**

Basing wages on "a bona fide job rating system," a sex-neutral objective measure, exemplifies legitimate employer conduct Congress envisioned as permissible use of other factors other than sex, but employer's mere belief, untested by any objective job rating system, that men and women are not engaging in equal work does not fall within what Congress envisioned as bona fide "other factor." Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

4. **Labor Relations ⇐1333**

Airline discriminated on basis of sex by providing male-only uniform cleaning allowance for cabin attendants and there was no need to consider average monetary value of overall benefit package in question to male and female employees because cleaning allowance was simply another supplement to male salaries. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

5. **Federal Courts ⇐917**

Airline could not relitigate issues of whether "equal work" was performed by its female stewardesses and male pursers and whether it could, as a matter of law, have "willfully violated" Equal Pay Act notwithstanding absence of iniquitous state of mind, based on argument that prior holdings were "clearly erroneous" and that adherence to law of the case would work manifest injustice where there were no truly "exceptional circumstances." Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

6. **Labor Relations ⇐1333**

Difference in supervisory responsibility between airline's male pursers and female stewardesses was not sufficient to justify unequal pay. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

7. **Labor Relations ⇐1527**

District court's finding that positions of male purser and female stewardess at airline were substantially equal for Equal Pay Act purposes was not contradicted by findings of fact. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

8. **Labor Relations ⇐1535**

District court's determination that airline's violation of Equal Pay Act was willful because employer consciously and voluntarily charted a course which turned out to be wrong was not clearly erroneous, thus rendering airline liable for a third year of back pay. Portal-to-Portal Pay Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

9. Labor Relations ⇐1550

Airline, on third appeal in employment discrimination action, failed to establish any basis for abandoning district court's original back pay formula based on its claim that back pay for stewardesses should have been computed on basis of single "cabin attendant" classification, rather than based on actual "premium pay level" airline established for its male pursers. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

10. Federal Courts ⇐916

Airline waived any argument available with respect to its claim that formula for calculating back pay awards for stewardesses should have been based on average rates of pay of stewardesses and pursers, rather than higher rate of pay for male pursers, by not raising that issue on its first appeal of adverse judgment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

11. Federal Courts ⇐917

Airline failed to establish any basis for overturning law of the case with regard to Title VII and Equal Pay Act back pay awards to stewardesses based on its claim that purser pay included compensation directly traceable to "foreign flying" and that component should be excluded as "factor other than sex." Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

12. Federal Courts ⇐916, 917

Airline's attack on 1980 order and definition of Title VII class was barred by doctrines of waiver and law of the case where 1974 remedial order, issued long after cutoff date urged by airline, contained essentially the same open-ended class definition as 1971 certification order, but airline did not test meaning of 1974 order as to stewardesses who had not received notice of class action in its appeal from that order. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

13. Federal Courts ⇐916

Airline waived its claim that district court erroneously expanded class of stewardesses who could recover back pay under Title VII by failing to raise that issue on its first appeal. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Federal Courts ⇐916, 917

Where airline had opportunity on its first appeal of adverse judgment in Title VII class action to raise issue of status of two groups of class members, but failed to do so, its failure to raise argument constituted waiver and airline's subsequent attack on ruling denying airline's requested exclusions from class was barred by principles of waiver and law of the case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

15. Labor Relations ⇐1479

Minnesota's two-year limitation on recovery of wages under any federal or state law was applicable as limitation on back pay recovery by airline stewardesses employed by Minnesota airline in that three-year District of Columbia statutes relied on by district court were not designed to prevent sex discrimination or did not evince particular interest in preventing sex discrimination. D.C.Code 1981, §§ 12-301, 36-216; M.S.A. § 541.07(5); Civil Rights Act of 1964, § 706(d, e, g), as amended, 42 U.S.C.A. § 2000e-5(e), (f)(1), (g).

16. Labor Relations ⇐1535, 1545

District court's determination that airline did not have reasonable foundation for positive belief that in fact its policies of compensating stewardesses and male pursers complied with Equal Pay Act was not clearly erroneous and, therefore, stewardesses were entitled to liquidated damages. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

17. **Labor Relations ⇐1542**

Although stewardesses employed by airline received retroactive adjustment of their wages when collective bargaining agreement and negotiation for two years equalized stewardess and purser pay rates, airline was not relieved of its liquidated damages liability for period of negotiations during which pursers received, but stewardesses continued to await, higher pay to which they were entitled under Equal Pay Act. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

18. **Labor Relations ⇐393**

Railway Labor Act section requiring airline to maintain status quo during two-year pendency of contract negotiations did not preclude airline from immediately equalizing wages upward in accordance with judicial determination that existing wage disparity between pay of stewardesses and pursers violated Equal Pay Act. Fair Labor Standards Act of 1938, § 6(d)(2), as amended, 29 U.S.C.A. § 206(d)(2); Railway Labor Act, § 6, 45 U.S.C.A. § 156.

19. **Labor Relations ⇐1535**

In calculating amount of back pay due to stewardesses under Equal Pay Act and Title VII, stewardesses were entitled to longevity credit for their pre-Act service in that denying longevity credit for that service, when men were given such credit for doing the same work, would differentiate between similarly situated males and females on basis of sex. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

20. **Federal Courts ⇐917**

Under law of the case doctrine, district court properly declined to revise its prior ruling with respect to rate of prejudgment interest after it had been determined that 1974 remedial order in employment discrimination action was not final, which had effect of extending prejudgment period from 1974 through entry of final judgment in 1982.

21. **Federal Courts ⇐953**

Law of the case doctrine did not preclude district court from awarding postjudgment interest on liquidated damages under Equal Pay Act based on district court's 1974 ruling refusing to award postjudgment interest on prejudgment interest where liquidated damages were not awarded until 1980 and those damages were compensatory, rather than a substitute for prejudgment interest. 28 U.S.C.A. § 1961; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

22. **Interest ⇐39(3)**

Stewardesses who obtained awards of liquidated damages under Equal Pay Act were entitled to postjudgment interest on all elements of the judgment, including liquidated damages. 28 U.S.C.A. § 1961; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

Appeals from the United States District Court for the District of Columbia (Civil Action No. 70–2111).

Phillip A. Lacovara, Washington, D.C., with whom William R. Stein, Washington, D.C., was on the brief for Northwest Airlines, Inc., appellant in Nos. 83–1033 and 83–1167 and appellee in Nos. 83–1034 and 83–1168.

Michael H. Gottesman, Washington, D.C., with whom Robert M. Weinberg and Jeremiah A. Collins, Washington, D.C., were on the brief for Laffey, et al., appellees in Nos. 83–1033 and 83–1167 and appellants in Nos. 83–1034 and 83–1168. Julia Penny Clark, Washington, D.C., also entered an appearance for Laffey, et al.

Before GINSBURG, BORK and STARR, Circuit Judges.

OPINION PER CURIAM

PER CURIAM:

This Equal Pay Act-Title VII class action concerns the former practices of Northwest Airlines (NWA) with regard to the employment of cabin attendants. Women employed by NWA in the all-female category "stewardess" received less pay than men in the all-male "purser" category. In addition, NWA required female cabin attendants to share double rooms on layovers while providing single rooms to male cabin attendants; it paid male attendants, but not females, a cleaning allowance for uniforms; and it imposed weight restrictions upon females only.[1]

The lawsuit challenging these practices commenced in the summer of 1970 and has been intensely litigated since its inception. District court adjudications were twice appealed at interlocutory stages; in response, panels of this court meticulously reviewed an extensive record. On November 30, 1982, the district court concluded all tasks within its charge and entered final judgment. NWA appealed and plaintiffs cross-appealed.

We affirm the challenged rulings in principal part. On the few points on which we do not uphold the district court's determinations, we specify, precisely, the required modification so that adjustments to the final judgment can be calculated without further adversarial contest. Our opinion thus serves as the court's closing chapter in this nearly fourteen-year-old controversy.

I. BACKGROUND

A. *Prior Proceedings*

Trial of plaintiffs' multiple charges of NWA violations of the Equal Pay Act, 29 U.S.C. § 206(d) (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e–17 (1976 & Supp. V 1981) (Title VII), commenced in late 1972 and concluded in early 1973. In November 1973 findings and conclusions, *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D.D.C.1973) [hereafter, *1973 Findings*], the district court determined that NWA had violated the law in each of the respects alleged in the complaint. Of dominant importance to the monetary relief awarded plaintiffs, the district court found that stewardesses and men serving as pursers performed substantially equal work. The purser/stewardess salary differential, the less desirable layover accommodations for women, and the cleaning allowance limited to men, were held impermissible under both the Equal Pay Act and Title VII; the weight limits for women were declared unlawful under Title VII. In an April 1974 remedial order, *Laffey v. Northwest Airlines, Inc.*, 374 F.Supp. 1382 (D.D.C.1974) [hereafter, *1974 Remedial Order*], the district court decreed injunctive relief and specified backpay computation formulas. Judgment pursuant to the April order was entered May 20, 1974.

Both sides appealed. In a painstaking opinion, released October 20, 1976, a panel of this court affirmed the district court "on all substantive questions of statutory infringement" and "uph[e]ld most but not all the [district] court's specifications on relief." *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 437 (D.C.Cir.1976) [hereafter, *Laffey I*]. NWA's petition for rehearing and suggestion for rehearing en banc were denied September 8, 1977; its petition for certiorari was denied February 21, 1978, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792.

When the case returned to the district court, in March 1978, NWA moved for relief from 1974 injunctive provisions, which had been stayed pending appeal and petition for certiorari, requiring it to furnish female cabin attendants single rooms on layovers and cleaning allowances for uniforms. The district court denied NWA's motion, and NWA appealed.

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[1] The practices cited in text were the predicate for monetary relief. Several other challenged practices were redressed solely by injunctive relief: restricting "purser" jobs to men alone; permitting male cabin attendants, but not females, to wear eyeglasses; permitting male attendants, but not females, to carry luggage of their own choice aboard flights; imposing flight arrangements under which male attendants, without regard to length of service, ranked as superior to female attendants aboard a plane; maintaining a shorter maximum height requirement for female cabin attendants than for males.

Again after careful review, on October 1, 1980, we affirmed the district court's order. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578 (D.C.Cir.1980) [hereafter, *Laffey II*]. In the process, we observed that the 1974 order, reviewed in *Laffey I*, did not qualify as a final judgment because the district court had not at that point completed its work and disassociated itself from the case. *Id.* at 583–84. We noted, however, that the 1974 adjudication, awarding extensive injunctive relief, was appealable of right under 28 U.S.C. § 1292(a)(1) (1982), and that "the permanence and pervasiveness of the order's injunctive provisions enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication." *Id.* at 584 n. 49.

While clarifying that the 1974 district court adjudication was not a "final decision" within the meaning of 28 U.S.C. § 1291 (1982), we hastened to declare the district court "entirely right," *Laffey II*, 642 F.2d at 584, in declining NWA's request to modify the injunction; modification would have involved reopening issues already decided by that court and "laid to rest" when we affirmed the district court's directives in *Laffey I*. *Id.* at 584–85. We then stated with emphasis impossible to obscure that even if we were convinced of the error of a decision made on an earlier appeal in this litigation, we would adhere to the established "law of the case" absent extraordinary cause to depart from our precedent. *Id.* at 585–86. Pointedly, we cited the First Circuit's admonition against reconsideration "after denial of petitions for rehearing and certiorari." *Id.* at 585 & n. 58 (citing *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir.1965)).

The district court has now resolved all disputed matters in this protracted case. We approach the multiple issues raised by NWA and the three raised by plaintiffs mindful that "[i]f justice is to be served," *Laffey II*, 642 F.2d at 585, "[t]here must be an end to dispute." *Id.* (quoting *Legate v. Maloney*, 348 F.2d at 164, 166 (1st Cir. 1965)).

B. *Issues on Appeal*

We indicate here the order in which this opinion discusses the issues raised by the cross-appeals, and state, summarily, our disposition as to each issue.

1. NWA's Appeal

a. Alleging supervening Supreme Court decisions, NWA asks us to overturn i) the root determination that the purser/stewardess pay differential was based on sex, and ii) the already twice-reviewed determination that the cleaning allowance for men but not women discriminated impermissibly on the basis of sex. Discerning no clear change—indeed no change at all—in the governing law, we adhere to the law of the case on both issues.

b. Asserting a flaw in the determination that stewardesses and pursers performed "equal work," double faults in the measurement of backpay, oversights in the delineation of the Title VII class, and error in characterizing the Equal Pay Act violations as "willful," NWA urges alteration of prior dispositions on these questions. In view of the full and fair opportunity NWA had to litigate these issues in the district court and on appeal in *Laffey I*, we hold that "the strong policy of repose," *Laffey II*, 642 F.2d at 585, precludes consideration of NWA's earlier rehearsed arguments and more recent afterthoughts.

c. As to the Title VII back-pay accrual period, we adhere to the law of the case on the nonretroactivity of that statute's current two-year limitation. However, we modify the district court's specification of a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. Instead, we hold that, in the unique circumstances presented here, the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages ... under any federal or state law." Minn. Stat.Ann. § 541.09(5) (West Supp.1982–1983).

d. Reviewing the district court's award of liquidated damages under the Equal Pay Act, we conclude that guidance supplied in *Laffey I* was properly followed and sustain the determination in all respects.

2. Plaintiffs' Cross-Appeal

a. As to credit for service prior to the passage of the Equal Pay Act and Title VII, *Laffey I* instructed only a "look at the collective bargaining agreement" on remand to determine whether "longevity" rather than "seniority" controlled. 567 F.2d at 476. Our opinion did not contemplate stripping plaintiffs of the pre-Act experience credits that the district court initially allowed them for the limited purpose of calculating the backpay NWA owed for post-Act service. Failure to accord plaintiffs longevity credit for all their days of service to NWA as stewardesses, in determining their post-Act pay level, would impermissibly project into the post-Act period a sex-based differential. We therefore reverse the district court's post-*Laffey I* ruling on this point and instruct that court to recognize plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act, time periods.

b. As to interest, the district court properly declined plaintiffs' invitation to revisit the 1974 remedial order provision on the rate of pre-judgment interest. However, no "law of the case" settled the question of post-judgment interest on liquidated damages. That issue ripened on remand after our *Laffey I* decision. Reviewing the district court's ruling on the merits, we reverse the determination and hold plaintiffs entitled to post-judgment interest on liquidated damages.

In sum, we instruct the district court on remand to 1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC charge; 2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service; and 3) allow post-judgment interest on liquidated damages. In all other respects, we affirm the district court's dispositions.

II. Alleged Supervening Supreme Court Precedent

Laffey I affirmed district court determinations that the purser/stewardess pay differential, and the cleaning allowance for men's uniforms but not women's, violated the Equal Pay Act and Title VII. Supervening Supreme Court decisions, NWA maintains, reveal that those affirmations were wrong. NWA cites *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), as supervening precedent establishing that the purser/stewardess pay differential was lawful, and relies on *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), with regard to the cleaning allowance. Neither High Court decision, we conclude, alters the law earlier applied in this case. We therefore reaffirm *Laffey I* as the law of the case and of the circuit.[2]

A. *The Purser/Stewardess Pay Differential*

The alleged supervening decision, *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), resolved this "sole issue": whether female jail guards who did not prove their work equal in skill, effort, and responsibility to the work of male jail guards, and therefore failed to establish an Equal Pay Act violation, could nonetheless challenge their rate of pay as discriminatory under Title VII. 452 U.S. at 166 n. 8, 101 S.Ct. at 2246 n. 8. The Supreme Court answered "yes"; it held that despite complainants failure to satisfy the equal work standard, they could remain in court under Title VII on their charge that the County had set "the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted." *Id.* at 166, 101 S.Ct. at 2246. Title VII, the Court explained, in contrast to the Equal Pay Act, does not bar "claims of discriminatory undercompensation ... merely because [the female complainants] do not perform work equal to that of male [employees]." *Id.* at 181, 101 S.Ct. at 2254.

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[2] A decision of one panel of this court may not be overruled by another panel; a panel's decision may be rejected only by the court en banc. *See Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979); *United States v. Caldwell*, 543 F.2d 1333, 1369 n. 19 (D.C.Cir.1974) (citing cases), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

In imaginative argument, NWA asks us to spy a silver lining for employers in *Gunther*. NWA urges that the Supreme Court, in the process of rejecting a proffered restricted reading of Title VII, enlarged the scope of the Equal Pay Act's residuary affirmative defense, which permits payment of different wages if "made pursuant to ... a differential based on any other factor other than sex." [3] For purposes of this argument, NWA concedes that pursers and stewardesses in fact performed "equal work" within the meaning of the Equal Pay Act.[4] But *grace à Gunther*, NWA contends, an employer "who premises a wage differential on his determination that two jobs are different" escapes Equal Pay Act and Title VII liability, "even if that conclusion is later found to be mistaken." Brief for Northwest Airlines, Inc. [hereafter, NWA Brief] at 33.

[1] For two reasons we cannot indulge NWA's endeavor to persuade us that *Gunther* widened the Equal Pay Act's exception for pay differentials "based on a bona fide use of 'other factors other than sex.'" *Gunther*, 452 U.S. at 170, 101 S.Ct. at 2248 (quoting 29 U.S.C. § 206(d)(1)(iv) (1982). First, NWA's position is incompatible with the statutory design. Under the Fair Labor Standards Act, which Congress adopted as the procedural and remedial framework for Equal Pay Act claims, a court has discretion to disallow, in whole or in part, liquidated (double) damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of t[he Act]." 29 U.S.C. § 260 (1982). NWA contends that an employer's actual but erroneous belief that two jobs are in fact different wholly shelters the employer from equal pay for equal work liability, NWA Brief at 14, 33; that contention is not synchronous with a congressional direction giving judges discretion only to limit, not to eliminate, damages when an employer, in "good faith," erroneously but reasonably believed his conduct conformed to legal requirements.[5]

[2] Second, NWA's inflation of the Equal Pay Act's residuary defense to exonerate employers who in fact failed to reward equal work with equal pay, so long as they honestly believed the jobs in question in fact were different, Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 3–4, 19, is not sensibly extracted from Justice Brennan's opinion for the Court in *Gunther*. That decision interpreted Title VII to accommodate sex-

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[3] The Act specifies four affirmative defenses; they permit payment of different wages for equal work if "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1) (1982).

[4] Specifically, in presenting its *Gunther* supervening law position, NWA acknowledges "the district judge's determination of the objective equality of the [purser and stewardess] jobs and the amount and nature of the pay differential." *See* Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 17.

[5] We note, moreover, that *Laffey I* remanded the question of NWA's "good faith" for reconsideration by the district court, and supplied this instruction:

> Nor is it enough that it appear that the employer probably did not act in bad faith: he must affirmatively establish that he acted both in good faith and on reasonable grounds [the former involving a "subjective inquiry," the latter, "an objective standard"]. That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition [reserving pursers' jobs and pay for men], the industry custom nor the employees' silence was a reliable indicium of the demands of the law.

Laffey I, 567 F.2d at 465 (footnotes omitted; quotations in brackets from *id.* at 464).

based discrimination in compensation claims that did not fit within the equal pay for equal work principle. Specifically, *Gunther* rejected the argument that the "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e–2(h) (1982),[6] confined Title VII sex-based wage discrimination complaints to claims that could also be brought under the Equal Pay Act. *Gunther* held that the Bennett Amendment had a more modest design: it simply incorporated into Title VII the Equal Pay Act's four affirmative defenses.[7] The *Gunther* opinion left untouched governing law on "equal pay for equal work regardless of sex." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 190, 94 S.Ct. 2223, 2226, 41 L.Ed.2d 1 (1974).

NWA features most prominently, *see* NWA Brief at 28–29, lines clipped from a passage in *Gunther* in which Justice Brennan focused on the Equal Pay Act's fourth affirmative defense, applicable to differentials "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1982). In this passage, Justice Brennan stated that genuinely non-sex-based factors, for example, "a bona fide job rating system," might be used by an employer in setting compensation, without offense to federal law, even when such factors have a disparate impact on one sex. *Gunther*, 452 U.S. at 170–71 & n. 11, 101 S.Ct. at 2248–2249 & n. 11.

[3] Basing wages on "a bona fide job rating system"—a sex-neutral, objective measure—exemplifies the legitimate employer conduct Congress envisioned as a permissible "use of 'other factors other than sex,'" *Gunther* explained. *Id.* NWA, however, employed no "bona fide job rating system" or other sex-neutral, objective standard[8] in setting wage rates for pursers and stewardesses. The passage NWA clips, read in its entirety, contains no suggestion that Congress also envisioned as a bona fide "other factor" an employer's mere belief, untested by any objective job rating system, that men and women are not engaging in equal work. Indeed, a fair reading of the passage indicates just the opposite.[9]

Gunther, in the portion featured by NWA, addressed only the impact Equal Pay Act affirmative defenses might have on "the outcome of some Title VII sex-based wage discrimination cases." *Gunther*, 452 U.S. at 170, 175 n. 14, 101 S.Ct. at 2248, 2250 n. 14. NWA, however, maintains that the Court's discussion should be read to augur incorporation of a line of Title VII "disparate treatment" decisions into Equal Pay Act law.[10] Even if we could find in *Gunther* the between-the-lines dictum NWA ascribes to the Court, NWA's argument for exoneration from equal pay liability would not succeed.

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[6] The Bennett Amendment provides that compensation differentiation "authorized by" the Equal Pay Act "shall not be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e–2(h) (1982).

[7] *See supra* note 3.

[8] *See, e.g., Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136–37 (5th Cir.1983) (indicating that experience, if in fact the basis for a pay differential, qualifies as a "factor other than sex," but holding that even when the employer introduces evidence demonstrating a male employee's greater experience, plaintiff must be accorded a full and fair opportunity to rebut proof that the pay differential was in fact attributable to a demonstrated objective, non-sex-based factor). *Plemer* reversed a district court judgment for defendant, and emphasized that "once [an Equal Pay Act] plaintiff shows that she was paid less than a male who was performing substantially the same job," "the burden both of production and of [ultimate] persuasion" shifts to the employer. *Id.* at 1136. Cited to us by NWA as a supplemental authority, *see* Fed.R.App. P. 28(j); D.C. Cir.R. 8(k), *Plemer* offers not a shred of support for NWA's thesis that no liability for an Equal Pay Act violation is incurred by an employer who sincerely believed jobs a court finds equal were in fact different.

[9] NWA constantly tenders cropped snippets that convey less than comprehensively the Court's statements in *Gunther*. As a further example, NWA quotes the Court as "observ[ing] that a prohibition against discrimination against women 'because of their sex' strikes [only] at '*disparate treatment* of men and women.'" NWA Brief at 29 (NWA's emphasis). The Court's opinion places the emphasis elsewhere: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Gunther*, 452 U.S. at 180, 101 S.Ct. at 2253 (quoting and adding emphasis to the Court's footnote in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 1375 n. 13, 55 L.Ed.2d 657 (1978), in turn quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971)). It is remarkable that NWA has selected and adjusted to suit its purpose words that originated with the Seventh Circuit in *Sprogis*, a decision holding an airline's no-marriage rule for stewardesses unlawful under Title VII.

The Title VII decisions NWA cites unexceptionally involve situations in which the employer did not classify jobs overtly by sex (or race). *E.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In that setting, where sex-based categorization, if it exists, is covert, the Court has elaborated rules for establishing discriminatory intent or the lack thereof. This case, however, involves overt sex classification—explicitly disparate treatment. Purser jobs were reserved for men only; the stewardess class was all-female.[11] NWA has cited no case, nor do we know of any, suggesting that a Title VII or Equal Pay Act plaintiff must demonstrate, beyond sex-segregated job classifications and unequal pay for equal work, the employer's evil mind—in NWA's words, "disparate treatment" that proceeds from "discriminatory animus" or a "bad-faith attempt to evade the law." NWA Brief at 14, 39.

In sum, so far as we can tell, neither Congress nor the Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different. *But see* NWA Brief at 33; NWA Reply Brief at 3–4, 19. Justice Brennan's opinion in *Gunther*, it is certain, establishes no such novel law. Where, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, all precedent in point indicates that disparate treatment is solidly established.[12]

In *Goodrich v. International Brotherhood of Electrical Workers*, 712 F.2d 1488, 1493 n. 11 (D.C.Cir.1983), we noted that the Equal Pay Act's residuary defense covering "factors other than sex" affords no "convenient escape from the Act's basic command." Unless and until Congress or the Supreme Court declares otherwise, our dominant guides remain the command that

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[10] The Court indicated in *Gunther* that the Equal Pay Act's fourth affirmative defense might shelter a pay standard otherwise vulnerable under Title VII as "fair in form, but discriminatory in operation." 452 U.S. at 170, 101 S.Ct. at 2248 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). NWA seizes on this acknowledgment that Equal Pay Act law may limit some Title VII neutral rule "disparate impact" claims, and insists that the Court somehow meant to infuse into Equal Pay Act law Title VII "disparate treatment" analysis developed in cases of alleged nonovert sex classification not even cited *en passant* in *Gunther*.

[11] From 1947, when the purser classification was established, until June 15, 1967, NWA confined the purser position to males. Between 1949 and 1957, NWA hired men for a second cabin attendant position. Men engaged for these posts were called "flight service attendants" (FSAs). FSAs performed essentially the same duties and received the same pay as female cabin attendants. Unlike the all-female stewardess class, however, FSAs had a contractual right to fill purser vacancies and were deemed qualified for purser posts upon completion of the FSA probationary period. By May 1965, all but three of the FSAs who remained with NWA had been elevated to purser positions. The three men who had not advanced to the purser category were voluntarily based in Hawaii. *See 1973 Findings*, 366 F.Supp. at 766–67, 772–73 (Findings of Fact (FOF) 11–17, 37–38).

[12] An employer's "discriminatory motive" or "desire to pay men—because they were men—more than [women received]," far from ranking as an "essential element" of a plaintiff's claim, as NWA maintains, *see* NWA Brief at 14, 34, is not even relevant, under the Supreme Court's decisions, to the determination whether explicitly sex-based classification violates Title VII. *See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, — U.S. —, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). *See also infra* note 15.

"equal work will be rewarded by equal wages," S.Rep. No. 176, 88th Cong., 1st Sess. 1 (1963), and the instruction that the Equal Pay Act is a "broadly remedial" statute targeting an "endemic problem of employment discrimination," by firmly establishing as federal law the "principle of equal pay for equal work regardless of sex." *Corning Glass Works,* 417 U.S. at 190, 195, 208, 94 S.Ct. at 2226, 2228, 2234. NWA's argument, attributing to *Gunther* a meaning that would substantially reduce the force of the federal equal pay requirement, is artful but unavailing; it fails to elevate from the untenable to the plausible the claim that in *Laffey I* we incorrectly stated the law governing the purser/stewardess pay differential.

B. *The Uniform Cleaning Allowance*

[4] *Laffey I* affirmed the district court's determination that NWA discriminated on the basis of sex by providing a male-only uniform cleaning allowance. 567 F.2d at 456. *Laffey II* held a second challenge to the district court's ruling on the cleaning allowance unwarranted by any "circumstance capable of generating injustice from adherence to the law of the case." 642 F.2d at 586. Despite the stern "law of the case" analysis and admonition in *Laffey II, id.* at 585–86, and the court's further statement that it considered *Laffey I*'s cleaning allowance holding "fully accurate," *id.* at 586,[13] NWA seeks to continue the fray. It cites *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), and describes that case as an "intervening decision," NWA Brief at 17, although *Gilbert* issued over two years before *Laffey II* was argued.[14]

Gilbert was a Title VII challenge that turned on the Court's conclusion that the disability program in question did not group persons by "gender as such." *Gilbert,* 429 U.S. at 134–35, 97 S.Ct. at 407–408 (quoting *Geduldig v. Aiello,* 417 U.S. 484, 496 & n. 20, 94 S.Ct. 2485, 2492 & n. 20, 41 L.Ed.2d 256 (1974)). The issue was an employer's exclusion of women unable to work due to pregnancy or childbirth from disability benefits. The program did not divide potential recipients by "gender as such," the Court reasoned, because one of the two groups comprised "nonpregnant persons," and thus "include[d] members of both sexes." *Gilbert,* 429 U.S. at 134–35, 97 S.Ct. at 407–408. In the absence of classification based upon "gender as such," the Court inquired whether there was any "gender-based discriminatory effect." *Id.* at 137–39, 97 S.Ct. at 408–410. NWA relies on the "discriminatory effect" portion of the *Gilbert* analysis. NWA Brief at 53.

Even in *Gilbert* itself, however, the Court indicated that "discriminatory effect" analysis should not come into play when the program at issue divides recipients into groups classified by "gender as such." 429 U.S. at 136–37 & n. 15, 97 S.Ct. at 408–409 & n. 15.[15] That is the situation here—all male cabin attendants received a uniform benefit package with a cleaning allowance, all female attendants received a different package without a cleaning allowance.[16]

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[13] The court reviewed its prior holding, not for NWA's benefit, but "in the interest of soundness of the law for the future." *Laffey II,* 642 F.2d at 586. It acknowledged that outlays for uniforms and their maintenance, when made primarily for the employer's benefit, do not count as wages under the Fair Labor Standards Act. *Id.* at 588. Allowances that primarily serve the interest of the employee, however, do qualify as wages, the court stated. The male-only cleaning allowance, the court concluded, was a wage supplement, a benefit to the employee rather than a "boon to the employer." *Id.* at 589. Had the allowance primarily benefited the employer rather than the employee, the court observed, "NWA obviously would have extended it to female cabin attendants as well." *Id.*

[14] Moreover, the precedential force of *Gilbert* had become clouded before presentation of the *Laffey II* appeal. *See Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 723–25, 98 S.Ct. 1370, 1382–1384, 55 L.Ed.2d 657 (1978) (Blackmun, J., concurring).

[15] NWA, in its *Gilbert* argument, manifests a blindspot similar to the one evident in its failure to perceive, in presenting its *Gunther* argument, that when an employer intentionally classifies jobs or job benefits by sex, one need not search further to find differential treatment based upon gender. *Compare, e.g., Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) *with Personnel Administrator v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

Congress has overruled *Gilbert* prospectively "to prohibit sex discrimination on the basis of pregnancy,"[17] and the Supreme Court believes Congress "also rejected the test of discrimination [*Gilbert*] employed." *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, ——, ——, 103 S.Ct. 2622, 2627, 2631, 77 L.Ed.2d 89 (1983). In its most recent expression in point, the Court left no doubt that, when classification by sex is undisguised, there is no need to consider, as *Gilbert* did, "the average monetary value of the [overall benefit package in question] to male and female employees." *Id.* 103 S.Ct. at 2632 n. 26. Further, the Court quoted with apparent approval the EEOC's position that it is not "a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." *Id.* (quoting 29 C.F.R. § 1604.9(e) (1983)).

In *Laffey II,* the court described the cleaning allowance "as simply another supplement to male salaries." 642 F.2d at 589. *Gilbert* presents no occasion for us to study again that twice-studied issue. *See id.* at 586.

III. Additional Law of the Case and Waiver Issues

A. *Laffey I Holdings Challenged as "Clearly Erroneous"*

[5] NWA does not dispute that *Laffey I* "actually decided" two issues which it now seeks to relitigate: first, that "equal work" was performed by NWA stewardesses and pursers, and second, that NWA, as a matter of law, could have "willfully" violated the Equal Pay Act notwithstanding the absence of an "iniquitous ... state-of-mind." *Laffey I,* 567 F.2d at 461; NWA Brief at 11 n. 1, 13. NWA seeks to reopen these two issues, not by positing the existence of supervening case law, but by arguing that our prior holdings were "clearly erroneous" and that adherence to law of the case in these instances "would work a manifest injustice." *Melong v. Micronesian Claims Commission,* 643 F.2d 10, 17 (D.C.Cir.1980) (quoting *White v. Murtha,* 377 F.2d 428, 432 (5th Cir.1967)).[18] Because we perceive no error whatever in *Laffey I* 's disposition of these two issues, let alone the "clear" error and "manifest injustice" that would warrant departure from the law of the case, we reject NWA's arguments and reaffirm the holdings of *Laffey I* with respect to the issues of equal work and willfulness.

Moreover, we take this opportunity to emphasize that this court will not, absent truly "exceptional circumstances," *Laffey II,* 642 F.2d at 585, look favorably on arguments against the law of the case which fall only under the "manifest injustice" rubric.[19] We do not intend to allow this avenue of attack on the law of the case to become an auxiliary vehicle for the repetition of arguments previously advanced, without success, in appellate briefs, petitions for rehearing, and petitions for certiorari.

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[16] NWA, in its Reply Brief at 27–28, suggests that we view uniform-related benefits as a "grooming" issue with no discriminatory implications because of the "conventional distinction" in apparel men and women wear. While it is too late for NWA to dress the matter in new garb, we note that the question here is not whether men can be required to wear pants, and avoid kilts. *Cf. Willingham v. Macon Tel. Publishing Co.,* 507 F.2d 1084 (5th Cir.1975) (en banc) (holding that Title VII is not violated by an employer's refusal to hire men (but not women) with long hair). Women's clothes require cleaning just as men's do; and prescribing more costly uniforms for stewardesses was NWA's decision, not a benefit women sought or an action impelled by the market or convention.

[17] *See* Pub.L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

[18] The Supreme Court recently noted approvingly the dual elements of "clear error" and "manifest injustice" in law of the case doctrine, citing the *White v. Murtha* decision on which this court relied in its *Melong* analysis. *Arizona v. California,* 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 1391 n. 8, 75 L.Ed.2d 318 (1983).

[19] *Laffey II,* 642 F.2d at 585–86, set out the following situations, drawn from *Greater Boston Television Corp. v. FCC,* 463 F.2d 268, 278–79 (D.C.Cir.1971), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972), in which a court may recall its mandate, to illustrate circumstances justifying a deviation from the law of the case:

> [T]o correct clerical mistakes, to clarify [the] opinion or mandate, to remedy fraud on the court or other misconduct, to avoid divergent results in cases pending simultaneously, or to minister to other similar aberrations.

1. *Equal Work*

In its *1973 Findings*, the district court concluded that the jobs of purser and stewardess at NWA "require equal skill, effort and responsibility and are performed under similar working conditions." 366 F.Supp. at 788, 789 (Findings of Fact (FOF) 78; Conclusions of Law 2, 4). In *Laffey I*, this court explicitly affirmed this finding and conclusion, 567 F.2d at 453, thus establishing the equal work prerequisite to Equal Pay Act liability as the law of the case.

NWA's challenge to this holding hinges on its interpretation of two of the district court's findings of fact in 1973. In one pivotal finding, FOF 65, the district court described the "chain of command" for an NWA flight:

> If one purser is aboard, he is denominated the Senior Cabin Attendant irrespective of his relative length of service as compared to the other attendants. If two or more pursers are aboard the flight, the most senior purser is the Senior Cabin Attendant. If no purser is aboard the flight, the most senior stewardess or FSA is the Senior Cabin Attendant.

1973 Findings, 366 F.Supp. at 785. The nature and scope of a Senior Cabin Attendant's supervisory responsibilities is described in another critical finding, FOF 67:

> Stewardesses who serve as Senior Cabin Attendant are subject to discipline if they fail to carry out their "supervisory" responsibilities, and are held just as accountable as pursers who fail to carry out their "supervisory" responsibilities.

Id. The district court also noted in this latter finding that NWA had no merit pay adjustment whereby either pursers or stewardesses who "supervise" effectively were paid more than less capable or effective supervisors.

Seizing upon the district court's recognition in FOF 65, above, that pursers supervised stewardesses, but not *vice versa*, NWA argues vehemently that the two jobs cannot be deemed "equal" because "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. Next, relying upon the court's description in FOF 67, above, of the cabin attendants' "accountability" for the discharge of their supervisory duties, NWA maintains that the district court's findings "compel the conclusion that the supervisory responsibility had real content" and that *Laffey I*'s conclusion that the pursers' supervisory function was "insignificant" thus "actually contradicted the trial judge's findings." *Id.* at 42.

We cannot accept either branch of NWA's argument. It is, of course, elementary that "jobs need not be identical in every respect before the Equal Pay Act is applicable ...." *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n. 24, 94 S.Ct. 2223, 2232 n. 24, 41 L.Ed.2d 1 (1974). In *Laffey I*, this court explained:

> [T]he phrase "equal work" does not mean that the jobs must be identical, but merely that they must be "substantially equal." A wage differential is justified only if it compensates for an appreciable variation in skill, effort or responsibility between otherwise comparable job work activities.

567 F.2d at 449 (citations omitted). This "substantially equal" test, which has been adopted by no fewer than nine other circuits, *Thompson v. Sawyer*, 678 F.2d 257, 272 n. 12 (D.C.Cir.1982), necessarily implies that there can be job responsibilities—including supervisory duties—so " 'insubstantial or minor' " as not to " 'render the equal pay standard inapplicable.' " *Laffey I*, 567 F.2d at 449 (quoting 29 C.F.R. § 800.122 (1975)).

[6] Therefore, to the extent that NWA's argument suggests that *any* differ-

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No such aberrations are present in the instant case.

ence in supervisory responsibility renders jobs unequal, it is manifestly incorrect as a matter of law. Critically, the authority NWA cites as support for this proposition is not, in fact, inconsistent with the "substantially equal" test.[20] Indeed, NWA itself acknowledges several other cases in which supervisory responsibilities were found to be too minor to warrant a finding of unequal responsibility. *See Hill v. J.C. Penney Co.*, 688 F.2d 370, 373–74 (5th Cir. 1982); *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 422 (5th Cir. 1971).

[7] NWA's claim that *Laffey I*'s finding of equal work "actually contradicted" the district court's findings is also patently incorrect. As we understand NWA's argument, FOF 67, when read together with FOF 65, "compels" the conclusion that the district court viewed the supervisory responsibilities as not insubstantial. This contention, however, plainly overlooks the district court's express finding that the pursers' supervisory functions "require no greater skill, effort or responsibility than the other functions assigned to all cabin attendants," *1973 Findings*, 366 F.Supp. at 786 (FOF 69), and its further explicit finding of equal "skill, effort and responsibility" on the part of stewardesses and pursers, *id.* at 788–89 (FOF 78; Conclusions of Law 2, 4). It follows as ineluctably as night follows day that the district court found that the pursers' supervisory duties did not alter the equivalence of the two jobs under scrutiny in this case.[21]

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[20] NWA cites *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir.1977); *Noles v. Concord Lace Corp.*, 25 FEP Cas. (BNA) 367, 370 (M.D.N.C. 1980), and 29 C.F.R. §§ 800.122, 800.130 (1983), as authority for its assertion that "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. None of these authorities conflict with the view of the court in *Laffey I* that supervisory responsibilities can be so minor as not to render two jobs unequal.

Indeed, NWA grossly misreads *Usery's* holding. In *Usery*, the court explicitly followed the Eighth Circuit's use of the "substantially equal" standard of comparison in evaluating the work of a male cook and four female cooks. 558 F.2d at 1320. That case in no wise stands for the proposition that any difference in supervisory responsibilities, without more, automatically works a cognizable legal difference in jobs. To the contrary, NWA conveniently and inexplicably overlooks the clear statements in *Usery* that the male employee had different responsibilities than female employees, worked during the cafe's busiest hours, was given greater duties of heavy lifting, was responsible for training other employees, and "had authority to make effective recommendations with regard to discipline." All this was sufficient for the Eighth Circuit to conclude, in affirming the district court's factual findings, that the job of the male employee had "[e]nough substantial distinctions [as to both] effort and responsibility ..." to render it legally different from the jobs of the four female employees. That case is a far cry from the instant situation.

Similarly, in *Noles* the district court employed a "substantially equal" analysis in finding that the work of one male employee, who was "in charge of" an entire shift in one department of a textile mill, was not equal to that of the plaintiffs. Since the *Noles* opinion does not describe the nature of the male worker's supervisory responsibilities, NWA cannot plausibly maintain that the case stands for the proposition that any difference in supervisory duties renders jobs unequal. Moreover, another male worker had heavy lifting functions and was one of only a few employees trained in the operations of a particular kind of plant machinery.

Finally, NWA can find no support in the cited Wage and Hour Division of the Department of Labor regulations. On the contrary, 29 C.F.R. § 800.122 clearly states that "[i]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." Far from offering support to NWA at this late stage of the litigation, this section, as noted in the text above, was invoked by the *Laffey I* court in its discussion of equal work. Nor does § 800.130 provide any comfort to NWA. That section states, *inter alia*, the common-sense proposition that if an employee assumes supervisory responsibilities during the absence of the regular supervisor, higher wage rates to such a "relief" supervisor may be appropriate. But to embrace this proposition scarely means that we should read out of the regulations the bedrock principle that "insubstantial or minor differences" in skill or responsibility do not constitute a legally significant distinction between jobs. The issue is not, as NWA would have it, whether there are "different degrees of supervisory responsibility" but whether the differences are insubstantial and minor. As to that issue, NWA's arguments fail completely.

[21] NWA claims that FOF 69 reflects an "erroneous assumption" by the district court that "the issue under the Equal Pay Act is whether the

There is, in cutting through the prolific underbrush planted in our way by NWA, upon analysis no conflict whatever between the district court and this court as to the importance of the supervisory duties assigned to pursers. *Laffey I* affirmed the district court's finding that "NWA purser and stewardess positions are substantially equal within the intent of the Equal Pay Act…." 567 F.2d at 453. NWA has come forward with nothing to suggest that this affirmance of the district court's conclusion with respect to the importance of supervisory duties was in error. NWA's argument, based ultimately on a tortured reading of the district court's findings and an inaccurate portrayal of the applicable law, fails.

2. *Willfulness*

[8] Under 29 U.S.C. § 255(a) (1976), a "willful" violation of the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, triggers a three-year, as opposed to the Act's ordinary, two-year statute of limitations. In *Laffey I,* this court determined that NWA's violation of the Equal Pay Act had been "willful" within the meaning of section 255(a), 567 F.2d at 463, thus rendering NWA liable for a third year of backpay. In reaching this conclusion, the court canvassed the legislative history of section 255(a) and rejected NWA's suggestion that a violation must be animated by a bad purpose or evil intent to be deemed willful. *Id.* at 461. Instead, the court determined that employer noncompliance with the Equal Pay Act is "willful" in at least two other instances: where the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt," and where "an equally aware employer consciously and voluntarily charts a course which turns out to be wrong." *Id.* at 462.

NWA was held to have failed the second branch of this test:

> NWA not only knew of the Equal Pay Act and its content but also correctly understood its prohibition on different salary levels for men and women performing substantially similar work. With little or nothing beyond internal consideration by laymen—even after the present legal challenge got under way—the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfulness; in the District Court's words, "[t]he conduct of the Company in the exercise of that judgment was willful."

Id. at 463 (citation omitted).[22]

In this appeal, NWA argues that the law of the case established in *Laffey I* is "clearly erroneous" and the source of "manifest injustice," once again urging upon us a contrary analysis of the legislative intent undergirding section 255(a). NWA contends that a proper reading of the legislative history of the 1966 FLSA amendments "confirms that Congress meant [the willfulness standard] to encompass only intentional disregard for the law, rather than the deliberate-but-erroneous test adopted" in *Laffey I.* NWA Brief at 23. For the reasons stated below, we disagree with NWA as to the proper test of willfulness under the Equal Pay Act. Accordingly, we reaffirm *Laffey I*'s finding that NWA willfully violated the Act within the meaning of section 255(a).

In recasting its version of the relevant legislative intent, NWA argues that the *Laffey I* court was erroneously of the view

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jobs are more alike than they are different…." NWA Brief at 42. This argument falls before the express language and plain meaning of FOF 69—that the supervisory functions "require no greater … effort or responsibility." NWA is conveniently seeing ghosts in conjuring up the image of a district court—eleven years and two appeals ago—having fallen into error by embracing allegedly erroneous assumptions.

[22] Similar considerations regarding NWA's meager efforts to ascertain its obligations under the Equal Pay Act were central to the district court's award of liquidated damages, on remand from the decision in *Laffey I,* as discussed *infra* in section V.

that there was no relevant legislative history to shed light on the pivotal word, "willful." NWA Brief at 85. NWA accordingly invites us to focus on three unadopted 1965 bills which were the predecessors of the 1966 amendments. NWA deems "crucial" certain portions of the hearings on one of those bills, H.R. 8259, 89th Cong., 1st Sess. (1965), and the report of the House Education and Labor Committee on a second bill, H.R. 10518. H.R.Rep. No. 871, 89th Cong., 1st Sess. (1965). The importance of the latter is touted on the basis that it represents the "first appear[ance] [of section 255(a)] in its present form." NWA Reply Brief at 42.[23]

The original administration-sponsored bill, H.R. 8259, sought, *inter alia*, to increase the limitations period to three years for all FLSA claims, and accordingly did not prescribe willfulness as a precondition to liability for the third year. NWA attempts to fashion a favorable interpretation of the willfulness provision ultimately incorporated into section 255(a) in the following manner: first, NWA summarizes a few snippets of testimony against H.R. 8259,[24] and then notes that at the conclusion of the hearings, "the Subcommittee met in executive session and drafted a new bill that included the [willfulness] language ultimately enacted." NWA Brief at 85. NWA then attributes this change to legislators who opposed the extension of liability in cases not involving conscious disregard of the law. *Id.* at 86. To substantiate this new learning as to the true meaning of the legislative materials, NWA cites a sentence from the minority statement in the Committee report on the revised bill, indicating that the Subcommittee's discussions had "resulted in the adoption of several amendments offered by members of the minority." *Id.* (citing H.R.Rep. No. 871, *supra*, at 74). NWA jumps from this statement to the conclusion that the willfulness provision was adopted "in response to the criticism of the proposal to impose an additional year of liability even on 'honest' violators of the [Equal Pay] Act." NWA Reply Brief at 42.

NWA's argument proves no such thing. The single sentence upon which it relies from the minority statement provides woefully inadequate support for its restrictive reading of the "willfulness" language. That sentence stands all by itself in the introduction to the minority report. Nowhere in this document is there any description of the amendments which the minority proposed, why it proposed them, what the majority said in response to the proposals, or why the proposals were adopted by the full Committee. Moreover, the minority report does not contain *a single word* about the "willfulness" provision in H.R. 10815. This brings us, then, to a broader point about this provision. The proposed legislation was lengthy, complex, and dealt with a number of thorny issues, including an increase in the minimum wage and a significant expansion of the FLSA's coverage. Adoption of the "willfulness" language ultimately codified in section 255(a) was undoubtedly a matter of limited congressional focus in the 1965 and 1966 deliberations over this legislation; the paucity of pertinent legislative materials, therefore, is not surprising.

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[23] NWA claims that the *Laffey I* court "overlooked" this committee report. *Id.* While the opinion in *Laffey I* does not expressly refer to the report, it is clear that the court was aware of the genesis of section 255(a) as we know it. *See* 567 F.2d at 460 & n. 222 (reference to hearings on H.R. 8259). Even though neither party called the court's attention to the committee report in *Laffey I*, there is no reason to believe that the court was unaware of it. Moreover, NWA badly over-argues the point that the *Laffey I* court was operating without benefit of the enlightening legislative history which NWA has unearthed at the eleventh hour. NWA says that the *Laffey I* court fashioned its "willfulness" test "on the impression that there was no relevant legislative history." NWA Brief at 85. *Laffey I* said no such thing, nor did it imply as much. Rather, the court noted, quite correctly, that it had uncovered no "*clearcut statement* in the legislative history as to why the extension to three years was thus encumbered." 567 F.2d at 460 (emphasis added).

[24] NWA specifically references a colloquy between Secretary of Labor Wirtz and Congressman Martin, an opponent of all three bills considered in 1965, in which Rep. Martin expressed concern that an across-the-board extension of the limitations period to three years would penalize employers who had not deliberately violated the law. *Hearings on H.R. 8259 Before the House Ed. and Labor Comm., General Subcomm. on Labor*, 89th Cong., 1st Sess. 54 (1965). NWA also notes that a number of witnesses in the hearings on H.R. 8259 were of the opinion that the back-pay period "*should not* be increased for violations which 'result from misunderstanding of the law,' or 'honest differences of opinions.'" NWA Brief at 85, citing *id.* at 980, 2250 (emphasis added).

Given the relative silence of the legislative record in this respect, *Laffey I*, 567 F.2d at 460, a silence which NWA has not persuasively broken with its theory advanced on this third appeal, we defer to the careful treatment and final settlement of this issue in *Laffey I*. The law of the case we honor here rests on the *Laffey I* court's painstaking review of the legislative history, including Congress' pivotal concern over small, unsophisticated businesses—a category that manifestly excludes NWA—which might not recognize the sweep of the FLSA's coverage. *Id.* at 460–61. Equally important, *Laffey I* recognized the need for a liberal construction of remedial statutes, and at the same time appropriately took into account the absence of clear congressional intent to impose upon plaintiffs the heavy burden of demonstrating an employer's evil intent. *Id.* This latter point is especially important in light of the fact that the Equal Pay Act merely allows a plaintiff to recover, after an appropriate showing, wages which have been improperly denied, and does not involve the imposition of criminal sanctions.

In short, we find nothing compelling, and certainly nothing demonstrating "clear error" in this court's earlier opinion, in the 1965 sources relied upon by NWA. The careful analysis of the meaning of 29 U.S.C. § 255(a) set out in *Laffey I* must stand.

B. *Backpay*

Moving from the domain of the Equal Pay Act's legislative history to an issue under Title VII, the district court's *1974 Remedial Order* awarded each Title VII plaintiff[25] backpay in the amount of the full difference between what she earned as a stewardess and what she would have earned if she had been paid at the same rate as a purser of equal seniority. 374 F.Supp. at 1385–86. On appeal in *Laffey I*, NWA challenged certain aspects of these "remedial measures," 567 F.2d at 437, including what it saw as the district court's improper refusal to adjust the pursers' rates of pay downward in the amount of the compensation allegedly based on the "foreign flying" required of pursers. Of pivotal importance, however, NWA failed at that time to appeal the underlying decision to use pursers' pay rates as the upper end of the back-pay formula.

The court in *Laffey I* determined that NWA had failed to show that any portion of the pursers' pay was attributable to "foreign flying." 567 F.2d at 452 n. 153. *See infra* section III. B.2. The *Laffey I* decision also affirmed the back-pay formula adopted by the district court. *Id.* at 478.

In 1978, following the remand of these proceedings to the district court after *Laffey I*, NWA for the first time attacked the use of the full purser rates, apart from its unsuccessful, earlier argument with respect to the alleged "foreign flying" component. NWA at this juncture claimed that the district court should use a hypothetical wage rate which would have been paid to a single, combined class of "cabin attendants," rather than purser rates, in computing backpay. Record Document ("R.") 16. The district court, however, refused to entertain NWA's argument, on the ground that "the relief requested is precluded by the Judgment of the Court of Appeals in that it is beyond the Mandate of that Court and seeks to raise issues not challenged on appeal ...." Order Denying Motion to Modify Award of Backpay to the Title VII Class (D.D.C. July 9, 1979), R. 50.

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[25] It will be recalled that the instant action was brought both under Title VII and the Equal Pay Act. The back-pay element of relief was granted by the district court as part of the remedy to the Title VII class, as well as to the Equal Pay Act plaintiffs. In this appeal, NWA's challenge to the computation of backpay is with respect to the Title VII plaintiffs only.

NWA now seeks to avoid the law of the case as to the computation of backpay by arguing that under the post-*Laffey I* decisions of the Supreme Court in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), *City of Los Angeles v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), and *Ford Motor Co. v. EEOC,* 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), the back-pay award here impermissibly overcompensates the Title VII plaintiffs by placing them "in a better position than they would have been in if the alleged discrimination had not occurred." NWA Brief at 15; *see* also *id.* 43–47. NWA also revives its earlier, unsuccessful argument that the back-pay awards under both Title VII and the Equal Pay Act are incorrectly inflated by the court's failure to exclude from pursers' pay that portion attributable to "foreign flying." NWA once again tries to characterize "foreign flying" compensation as a "factor other than sex" for Equal Pay Act purposes, and invokes the three above-cited High Court decisions in support of its claim that Title VII damages should be reduced by this amount.

Because this court affirmed the back-pay awards in *Laffey I,* and inasmuch as we discern no relevant supervening change in the law embodied in the decisions relied upon by NWA, we decline the invitation to overturn the law of the case as to the computation of backpay.

1. *Wage Rate for Hypothetical Combined Cabin Attendant Classification*

[9] NWA strenuously contends that if it had not maintained the sex-segregated job classifications of purser and stewardess and had, instead, used only a single "cabin attendant" classification, the wage rate paid to employees in that hypothetical classification would have closely approximated the rates paid by other airlines with only a single classification, rather than the "premium pay level" NWA established for pursers. In support of this proposition, NWA relies upon an affidavit proffered in 1978. *See* Declaration of Terry M. Erskine, Joint Record Excerpts ("J.R.E.") 139.

NWA argues that the use of the pursers' pay rate in the back-pay formula, rather than the lower rate which arguably would have been paid to those in the hypothetical, combined cabin attendant classification, violates the bedrock rule that Title VII backpay may not "catapult [plaintiffs] into a better position than they would have enjoyed in the absence of discrimination." *Ford Motor, supra,* 458 U.S. at 234, 102 S.Ct. at 3067. It also argues that *Manhart,* in particular, establishes that the back-pay remedy here was improper. NWA Brief at 43–44.

We disagree. In the first place, and most critically, we do not read these three High Court decisions as establishing *any* pertinent new rule of law as respects this case under Title VII. The fundamental proposition that the purpose of Title VII remedies is to "make whole" the victims of discrimination has been settled for some time, *see, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975), and was clearly recognized by this court in *Laffey I. See* 567 F.2d at 476 ("The remedial order in this case is to make employees whole, but not more than whole."). Therefore, we perceive nothing new, as respects NWA's argument, in these three decisions.

We also find unpersuasive NWA's assertion that *Manhart* compels the abandonment of the back-pay formula affirmed in *Laffey I.* Above all, *Manhart* arose out of the extraordinarily sensitive setting of a sex-based contributory system in a pension plan, circumstances far removed from the situation here of treating female employees differently although they performed the same work as male employees. Second, the only language that provides comfort to NWA is set forth in a single footnote,[26]

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[26] Footnote 36 of the *Manhart* opinion reads, in relevant part:

Further doubt about the District Court's equitable sensitivity to the impact of a refund consisting of guardedly worded *dicta*. *Manhart*, in contrast to the case before us, disallowed *any* retroactive monetary award, and in the course of so doing suggested that *if* such an award had been appropriate, the lower court "should at least have considered" a different formula. The High Court's understandably deep concern for equitable considerations, including the grave consequences to pension funds flowing from a retroactive finding of liability, strongly suggests that this portion of the *Manhart* footnote was not addressed to the matter of remedies in garden-variety Title VII cases, such as the case at hand.[27]

[10] Moreover, in the absence of supervening, controlling authority, NWA cannot properly request—for the first time—that this court mandate the use of "averaging techniques" in the back-pay formula.[28] As explained *supra* at p. 1076, the procedural posture of this case at the time of *Laffey I* "enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication," *Laffey II*, 642 F.2d at 584 n. 49. The issues reserved by the district court dealt only with the "mechanics of payment" pursuant to the *1974 Remedial Order*. *See* 374 F.Supp. at 1389. The part of the case that the court reserved obviously did not include the back-pay formula itself, which was clearly set out by the district court, *id.* at 1385–87 (paragraphs 5–7), and which plainly used the full purser pay rates as the upper end of the back-pay computation.[29] Thus, NWA had the opportunity to appeal any feature of the back-pay award, including the use of the full purser rates, in *Laffey I*. Therefore, NWA must be deemed to have waived any argument available at that time which it did not assert.

Adherence to the rule that a party waives a "contention that could have been but was not raised on [a] prior appeal," *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 62 (1982), is, of course, necessary to the orderly conduct of litigation. Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly, "that a party

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> order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

435 U.S. at 720 n. 36, 98 S.Ct. at 1381 n. 36.

[27] It is, as we note in the text above, clear that *Manhart* involved Title VII principles in the extraordinarily sensitive and complex setting of a contributory pension plan. Concern for the financial stability of pension plans, upon which employees ultimately rest their hopes and expectations for financial security at retirement, was evident throughout the Court's opinion. As Justice Stevens, speaking for the Court, put it: "Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security." 435 U.S. at 721, 98 S.Ct. at 1382. *See also Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, ——, 103 S.Ct. 3492, 3512, 77 L.Ed.2d 1236 (1983) (O'Connor, J.) (to avoid adverse impact on pension funds, decision extending *Manhart*'s liability rule should be made prospective).

[28] NWA did not have to languish on the legal sidelines awaiting the 1978 culmination of the *Manhart* litigation. *Manhart* scarcely enunciated for the first time a principle that, save for its footnote 39, would have theretofore been unsupportable in Title VII law or theory. As we previously indicated, *Manhart* in this particular respect broke no new legal ground, but instead observed the possible effects of the well-established "make whole" principle in the setting of that case.

[29] It further appears from the record that NWA considered the district court's *1974 Remedial Order* to be a final judgment. *See* R. 161 (NWA Notice of Appeal from "[t]he final judgment entered in this action on May 20, 1974...."), R. 160, R. 164 (NWA supersedeas bond entered in its appeal from the May 20, 1974 "final judgment").

who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir.1981), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). NWA's failure to challenge the backpay formula on its first appeal resulted in the *Laffey I* affirmance of that portion of the *1974 Remedial Order*, and the inclusion of the formula in the law of the case. *See Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir.1982).

2. *Foreign Flying*

[11] As previously indicated, NWA reargues its already rejected position that purser pay included compensation directly traceable to "foreign flying" and that this component of compensation should be excluded as a "factor other than sex" under the Equal Pay Act back-pay computations, and from the Title VII back-pay computations under the Supreme Court decisions discussed *supra* in section III.B.1.

We disagree. We find, for the reasons outlined in the preceding section, that the Supreme Court decisions in *Manhart*, *Teamsters*, and *Ford Motor* do not bring into question the treatment in *Laffey I* of the "foreign flying" issue, as those cases merely articulate already established principles of Title VII law.[30] NWA's other arguments on this issue are foreclosed by the law of the case, clearly set out in *Laffey I*, 567 F.2d at 452–53 n. 153. Unless there is supervening authority, and we have concluded that there is none, NWA must satisfy the stringent test of "clear error" and "manifest injustice," a rigorous standard which has not been met as to the foreign flying issue. As this court held eight years ago, NWA simply failed to carry its burden on this issue the first time around. We refuse to replough this well-worn field that much deserves henceforth to lie fallow.

C. *Composition of the Title VII Class*

NWA challenges the composition of the Title VII class on several grounds. It argues that the district court's order of December 5, 1980, J.A. 168, improperly added to the class "hundreds of new employees" who had been "hired after the cut-off date for the last round of notices" of the class action. NWA Brief at 55–56. NWA also appeals from the district court's order of June 6, 1980, J.R.E. 162, which included in the Title VII class two groups of stewardesses which NWA seeks to exclude—those on leave from their jobs as stewardesses as of the cut-off date who subsequently decided not to return to work, and those who as of the cut-off date had transferred permanently to non-stewardess jobs at NWA. We consider each of these arguments separately.

1. *Stewardesses Not Notified of Class Action*

In its February 1971 order, the district court certified the instant case as a class action under *both* Fed.R.Civ.P. 23(b)(2) and 23(b)(3). The court defined the Title VII class as "all female in-flight cabin attendants currently employed by [NWA] and/or employed by [NWA] any time since July 2, 1965." 321 F.Supp. 1041, at 1043. Thereafter, two rounds of notices were sent to class members, in 1971 and 1972, pursuant to the requirements of Fed.R.Civ.P. 23(c)(2).

The district court, in its *1974 Remedial Order*, again defined the term "Title VII plaintiff(s)" to include "all female cabin attendants employed by [NWA] at any time on or after July 2, 1965, excluding only those who filed timely written elections with this Court to be excluded from this lawsuit in its entirety." 374 F.Supp. at 1384. In its appeal from this order in *Laffey I*, NWA did not challenge the foregoing definition of the class on the grounds it now advances. NWA did, however, challenge the inclusion of stewardesses whose employment with NWA was terminated prior to the ninetieth day preceding the first filing with the Equal Employment Opportunity Commission ("EEOC"). The *Laffey I* court agreed, and directed the district court to exclude this group of ex-employees from the class. *See infra* section III.C.2. On remand, the district court corrected its earlier error (and another, minor mistake as to the actual date of the first EEOC filing). It redefined the Title VII class to include only stewardesses who were employed by NWA on or after January 29, 1970. Employees terminated prior to this date were to be included only on a showing of certain extenuating circumstances. This redefinition was reflected in the district court's Order Respecting Computation of Backpay and Implementation of Final Judgment, November 30, 1982.[31] Thus, NWA had scrutinized the Title VII class definition at the time of *Laffey I*.

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[30] At most, NWA can argue that *Manhart* expressly mandates "equitable sensitivity" in fashioning back-pay awards. This principle does not embody some novel and independent requirement, but rather is aimed at ensuring the fidelity of the lower federal courts in shaping equitable decrees to implement fully the paramount Title VII "make whole" principle.

Seeking to avoid waiver and law of the case obstacles to appellate review, NWA claims, in effect, that it was not on notice at the time of *Laffey I* that the district court would include in the class stewardesses never furnished the requisite notice or opportunity to opt out under Rule 23(b)(3). NWA interprets the district court's refusal to exclude those stewardesses who had not received notice of the class action, J.A. 168, as dependent upon the district court's view that the parties and the court had shared, as of the time of the 1971 and 1974 orders, "the intent and understanding" that the definition of the Title VII class adopted therein was broad enough to encompass the disputed group of stewardesses. NWA Brief at 56–57.

NWA argues that there was no such "understanding" between the parties, and claims that it "proceeded to trial with the understanding that the backpay class had been fixed by the universe of cabin attendants to whom notice was sent." NWA Brief at 57. It further argues that the December 1980 order was improper, inasmuch as Rule 23(c)(1) permits a court to "alter" a class certification only prior to the decision on the merits. NWA perceives here the evil of "one-way intervention."

Appellees, on the other hand, heatedly dispute NWA's claim as to the original "understanding" that the Title VII class did not include the disputed group of stewardesses. Appellees cite to substantial portions of the record as support for the true "understanding" of an open-ended class.[32] Under appellees' theory, NWA had full knowledge of the manner in which the class definition would be applied and thus waived the arguments now advanced here because it did not assert those contentions in the proceedings leading up to the *1974 Remedial Order* or in its appeal to this court in *Laffey I*. Appellees further argue that *Laffey I* established the open-ended class definition as the law of the case, which, as an additional ground, bars NWA from now attacking inclusion of the disputed group of stewardesses.

[12] Without deciding whether the parties had the disputed "understanding" as to the meaning of the 1971 definition of the Title VII class, we conclude that NWA's attack on the 1980 order (and definition) is barred by the doctrines of waiver and law of the case. We reach this conclusion in light of the fact that the *1974 Remedial Order*, issued long after the 1972 cut-off date now urged by NWA, contained essentially the same open-ended class definition as the 1971 certification order. NWA knew, or should have known, that the express terms of the 1974 order—sweeping into the class "all female cabin attendants employed by [NWA] *at any time* on or *after July 2, 1965*" (emphasis added)—

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[31] The 1982 Order defines the Title VII class as "all female cabin attendants employed by the Company at any time on or after January 29, 1970 (and certain other female cabin attendants who are to be treated as eligible ... by reason of detrimental reliance on certain class notices), except for those female cabin attendants who filed timely written elections ... to be excluded...." J.R.E. 202.

[32] Appellees' Reply Brief at 60–62 (discussing appellees' argument to district court regarding the December 1980 order, R. 31 at 5–12).

could manifestly be read as extending beyond 1972. It was up to NWA to test the meaning of the 1974 order as to stewardesses who had not received notice of the class action, if it so desired, in its appeal from that order—the appeal which culminated in *Laffey I.* NWA failed to do so. NWA, albeit represented now by different counsel, must be held to have waived the opportunity to raise this issue. For the reasons stated *supra* at pp. 1089–1090, we must recognize the law of the case established in *Laffey I.*

[13] In addition, we note that NWA's argument regarding the impropriety of "one-way intervention" has been rejected by other courts which have held that "classwide backpay under Title VII can be awarded in a [Rule 23] (b)(2) class action." [33] This development in Title VII law, signalled by the Fourth Circuit's 1971 decision in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), was well under way as of NWA's appeal in *Laffey I.* Had NWA wished to clarify the definition of the Title VII class in relation to this expansion of (b)(2) actions, it clearly had the opportunity to raise the issue in *Laffey I.*[34]

2. *Former Stewardesses*

In *Laffey I,* NWA argued that the district court erred, in its *1974 Remedial Order,* "in granting relief pursuant to Title VII in the form of backpay to stewardesses whose employment with [NWA] [had] terminated more than ninety days prior to the first filing by an employee of [a] ... charge with the Equal Employment Opportunity Commission." 567 F.2d at 472. NWA's argument was based upon the settled rule that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the ... class." *Id.* NWA reasoned that the discrimination in this case "could not be deemed continuing as to those who left [NWA's] employ more than ninety days prior to the class filing with the [EEOC]," *id.* at 473, and that, as a result, those employees were not entitled to recover as members of the Title VII class.

The *Laffey I* court agreed with NWA's contention in this respect:

> A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

Id. (citations omitted). Accordingly, the *Laffey I* opinion directed the district court, on remand, to "exclude from the Title VII recovery those employees whose connection with NWA was dissolved more than ninety days before the class filing with the [EEOC]," while retaining those terminated stewardesses "who would have brought themselves within the Equal Pay Act class ...." *Id.* at 476.

After remand, NWA then sought the exclusion of two *additional* groups of ex-stewardesses: those on leaves of absence on the 90th day prior to the filing of the first EEOC charge and who, subsequent to that date, left the employ of NWA without having returned to work as stewardesses; and those who were employed by NWA at least until the 90th day prior to the first EEOC filing, but who had transferred to non-stewardess positions. The district court denied NWA's requested exclusions in an order dated June 6, 1980. J.R.E. 162. This denial was based on the district court's understanding that *Laffey I* had resolved this issue. *See* District Court's Order of February 19, 1981, denying reconsideration of its June 6, 1980 order. J.A. 172, 173.

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[33] Appellees' Reply Brief at 63–64 (citing, *inter alia, Paxton v. Union National Bank,* 688 F.2d 552, 563 (8th Cir.1982), *cert. denied,* 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983); *Alexander v. Aero Lodge No. 735, Intern. Ass'n,* 565 F.2d 1364, 1372 (6th Cir.1977), *cert. denied,* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 801–02 (4th Cir.), *cert. dismissed,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971).

[34] In light of our conclusion in this respect, we do not have to reach, nor do we, the specific question addressed in decisions from other Courts of Appeals, such as *Lorillard.*

NWA challenges the June 6, 1980 order, arguing that the district court misunderstood *Laffey I*. Downplaying the fact that *Laffey I* dealt explicitly only with terminated stewardesses, NWA claims that a truer indication of that court's mandate was its recognition that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class." 567 F.2d at 472. This language, NWA argues, empowered the district court to consider its claims that certain stewardesses, other than those in the terminated group expressly dealt with in *Laffey I*, had no viable claims allowing their inclusion in the class. NWA traces the district court's failure to so interpret the mandate of *Laffey I* to its overly "wooden reliance" on the "phrase 'left the Company's employ ....'" NWA Brief at 61.

[14] Without reaching the merits of NWA's arguments against inclusion of the two disputed groups of stewardesses, we hold that the district court correctly construed the *Laffey I* mandate. NWA had the opportunity in *Laffey I* to raise the issue of the status of these two additional groups of class members, just as it had the opportunity to raise the issue of the terminated stewardesses. NWA simply and indisputably failed to do so. Its failure to raise these arguments constituted a waiver of them. *See supra* at pp. 1089–1090. Moreover, as to the law of the case, in *Laffey I* the court "affirm[ed]," 567 F.2d at 478, the award of backpay to all class members except those "whose connection with [NWA] was *dissolved* more than 90 days before the class filing with the Commission." *Id.* at 476 (emphasis added). NWA's attack on the district court's December 1980 ruling is thus barred by the principles of waiver and law of the case.

IV. THE LIMITATION PERIOD ON TITLE VII BACKPAY

[15] In the 1972 amendments to Title VII, Congress limited back-pay liability to no more than two years prior to the filing of charges with the Equal Employment Opportunity Commission. *Laffey I* held that the 1972 amendments did not apply to this case and directed the district court on remand to "determine the local statute of limitations most appropriate to this case," 567 F.2d at 469. On remand, the district court referred to District of Columbia law, noted that the District has no borrowing statute and generally applies its own statute of limitations as a "procedural" prescription, and determined that the most relevant statutes are the D.C. Minimum Wage Law, D.C.Code Ann. § 36–416 (1973) (now codified at D.C.Code Ann. § 36–216 (1981)), and the general statute of limitations, D.C. Code Ann. § 12–301 (1981). *See Laffey v. Northwest Airlines, Inc.*, 481 F.Supp. 199, 200–01 (D.D.C.1979). Both of these laws provide for a three-year limitations period.

Were we writing on a clean slate, we might well decide that the two-year rule specified in the 1972 Title VII amendments should apply, if not directly, then at least by analogy, as the best indicator of the federal legislators' view of the appropriate back-pay liability limitation period. We are reluctant, however, to depart from the law of the case on the nonretroactivity of Title VII's current two-year limitation. Nevertheless, we modify the district court's decision specifying a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. In the unique circumstances presented here, we hold that the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages ... under any federal or state law." Minn.Stat.Ann. § 541.07(5) (West Supp.1982–1983).

Absent a federal limitation period which we can apply, we generally borrow the limitation period of the state in which the federal trial court sits. If a traditional statute of limitations were needed here, we would be required to employ a District of Columbia statute of limitations. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C.Cir.1977). However, what is at issue is not a statute of limitations in the usual sense but rather a substantive cap on the amount of backpay that may be awarded.

Having refused to apply the federal two-year limit, *Laffey I* stated:

> [T]he problem at this point is simply that of fashioning a federal common law period of limitations. Most often this is effected by adopting the period prescribed by the most analogous state statute.... [A]doption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action or when it would amount to a discriminatory restriction of a federal right of action. Neither of those conditions exists here.

567 F.2d at 468–69 (footnotes omitted). The current two-year federal statutory cap on recovery, 42 U.S.C. § 2000e–5(g), for which *Laffey I* wished to find a "federal common law" substitute, is not addressed, as a statute of limitations would be, to the timeliness of the filing of charges or the institution of a lawsuit. Timeliness of filing with the Commission is governed by section 2000e–5(e) and that of the institution of a lawsuit by section 2000e–5(f)(1). But when those provisions are satisfied by timely filings, and when a plaintiff has made his substantive case, section 2000e–5(g) comes into play for the first time to define the maximum remedy. As the court stated in *Miller v. Miami Prefabricators, Inc.*, 438 F.Supp. 176, 181 (S.D.Fla.1977):

> When measured against the broad "make whole" purposes of Title VII it becomes evident that the two year cap on back pay contained in 42 U.S.C. § 2000e–5(g) is not a statute of limitations. Rather, that provision was inserted by Congress in an attempt to limit the back pay which could be recovered from employers who have been engaged in discrimination for many years.

As a limit on liability rather than a statute of limitations, section 2000e–5(g) is a substantive rather than a procedural measure. Where there is no similar back-pay cap in state law, a state statute of limitations will be used for federal purposes, here a substantive purpose. Where the issue is substantive, the District of Columbia does not automatically apply its own prescription. *See In re Air Crash Disaster at Washington, D.C.*, 559 F.Supp. 333, 341–42 (D.D.C.1983); *Williams v. Williams*, 390 A.2d 4, 5 (D.C.1978).

In this case, we have been pointed to no jurisdictions other than Minnesota and the District of Columbia that have a relevant connection to the parties and actions involved in this litigation.[35] The District of Columbia is obviously a jurisdiction whose laws should be examined. But of the two conceivably applicable D.C. statutes, neither manifests a policy closely analogous to the one at stake here. The Minimum Wage Law, D.C.Code Ann. § 36–203, on which the district court relied, is not designed to prevent sex discrimination but rather to establish minimum hourly wages, maximum hours, and overtime compensation rates. That statute's three-year limit on minimum wage claims, D.C.Code Ann. § 36–216, seeks merely to prevent the prosecution of stale claims—a policy not implicated here. Likewise, the D.C. three-year "catch-all" statute of limitations, D.C.Code Ann. § 12-301, on which the district court also relied, serves to limit the bringing of stale claims and evinces no particular interest in preventing sex discrimination.

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[35] Appellees contend that neither state has a governmental interest or statutory policy that is relevant because this is a federal claim that no state has any legitimate interest in regulating substantively. But at the time of *Laffey I* there was a federal limit on liability and this court, though it found the federal limit itself inapplicable, did not decide that backpay should be awarded back to the effective date of Title VII, as appellees here then contended. Instead, *Laffey I* found that federal policy required that a relevant state limitation should be found. The state does not regulate the federal claims; the federal common law does, and it does so by constituting itself from analogous state law.

Minnesota law is more to the point and there is no doubt that the parties and actions at issue touch and concern that state. Appellant is a Minnesota corporation; appellant's headquarters are in Minnesota; the wage scales challenged in this case were all set by collective bargaining agreements negotiated and signed in Minnesota; the employment relationship of every member of the appellee class was established in Minnesota and was controlled by decisions taken there; all interviews and hiring occurred in Minnesota; the employment contract of each appellee class member stated that it was to be "viewed as a Minnesota contract of employment governed by the laws of that state in every respect"; and, when this case was certified as a class action, notice was directed to 2,634 stewardesses, of whom only ten lived in the District of Columbia while 1,694 lived in Minnesota. *See* Declaration of James A. Abbott, R. 61 at ¶¶ 2–4.

In contrast to the District of Columbia, Minnesota does have a statute closely analogous to Title VII, *i.e.*, the Minnesota Human Rights Act, Minn.Stat.Ann. § 363.01 (West 1983). Like Title VII, the Minnesota Human Rights Act extends its protection beyond sex-based classes to other groups and prohibits discrimination in aspects of employment besides compensation. The Minnesota Equal Pay Act that appellant would have us adopt merely prohibits wage differentials and protects only sex-based groups. Minn.Stat.Ann. § 181.67 (West 1983). Significantly, the Minnesota Supreme Court, in discussing the Minnesota Human Rights Act, has applied case law interpreting Title VII. *See Brotherhood of Railway & Steamship Clerks v. State*, 303 Minn. 178, 188–91. 229 N.W.2d 3, 9–11 (1975).

The Minnesota Supreme Court has decided that Minn.Stat.Ann. § 541.07(5) (West Supp.1982–1983) is the statute of limitations that should govern claims of discrimination brought under the Human Rights Act. *See Brotherhood of Railway & Steamship Clerks*, 303 Minn. at 195–96, 229 N.W.2d at 13–14. Section 541.07(5) prescribes a two-year limitations period "for the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties...." We find that the limitations period for recovery of backpay should be established by recourse to that statute. Accordingly, the recovery period is two years.

V. THE LIQUIDATED DAMAGES AWARD

The district court's 1974 Remedial Order, 374 F.Supp. at 1390, disallowed liquidated damages under the Equal Pay Act. On appeal in *Laffey I*, we "remand[ed] the matter of liquidated damages in toto for reconsideration by the District Court." 567 F.2d at 466 n. 279. With our *Laffey I* instructions as its guide, the district court permitted further discovery and ultimately found that the relevant facts mandated a liquidated damages award. *Laffey v. Northwest Airlines, Inc.*, 24 Empl.Prac. Dec. (CCH) ¶ 31,384 (D.D.C. Nov. 21, 1980) [hereafter, *Nov. 21, 1980, Decision*]. NWA contends that the district court erred in finding liquidated damages mandatory and in calculating the amount of the award. We reject both contentions as insubstantial and sustain the district court's liquidated damages adjudication in all respects.

A. *Plaintiff's Entitlement to Liquidated Damages*

As *Laffey I* recounted, 567 F.2d at 463–65, the Fair Labor Standards Act, which serves as the procedural and remedial framework for Equal Pay Act claims, initially provided that prevailing employees were entitled to an automatic award of liquidated damages in an amount equal to unpaid wages. Congress amended the statute in 1947[36] to commit to judicial discretion disallowance or limitation of liquidated damages if the employer satisfies the court that he acted "in good faith" and with "reasonable grounds for believing that his act or omission was [lawful]." 29 U.S.C. § 260 (1982). Both prior to and after this amendment, courts have described liquidated damages as serving a compensatory, not a penal, purpose. *See, e.g., Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945); *Thompson v. Sawyer,* 678 F.2d 257, 281 (D.C.Cir.1982); *Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir.1982); *Usery v. Chef Italia,* 540 F.Supp. 587, 591 n. 9 (E.D.Pa.1982).

Initially, the district court concluded that NWA had acted "in good faith": NWA committed a "willful" violation of the Equal Pay Act, the court explained, because it "was fully aware of [the Act] and adopted a deliberate and knowing course of conduct despite its awareness"; but the evidence did not indicate "an intentional, bad faith, attempt [by NWA] to evade the law." *1974 Remedial Order,* 374 F.Supp. at 1390.[37] For several reasons, the district court, on first examination, also found it "not unreasonable" for NWA to believe that its purser/stewardess pay differential was lawful. *Id.*

On review, we held "the reasons given by the District Court for disallowing liquidated damages ... legal[ly] inadequa[te]." *Laffey I,* 567 F.2d at 465. "The good faith of which the Act speaks," we restated, "is 'an honest intention to ascertain what the ... Act requires and to act in accordance with it.'" *Id.* at 464 (quoting *Addison v. Huron Stevedoring Corp.,* 204 F.2d 88, 93 (2d Cir.), *cert. denied,* 346 U.S. 877, 74 S.Ct. 120, 98 L.Ed. 384 (1953)). "Good faith" must be established affirmatively, we observed; it is not enough that "it appear that the employer probably did not act in bad faith." *Laffey I* at 465.

Four of the five reasons supplied by the district court for finding NWA reasonably believed it complied with the law related to then traditional industry practice and employee acquiescence.[38] We stated: "That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks." *Id.* (footnote omitted). Further, we remarked that "the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law." *Id.* (footnotes omitted).[39]

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[36] *See Laffey I,* 567 F.2d at 463–65 & n. 25 (quoting and discussing section 11 of the Portal to Portal Act of 1947, 29 U.S.C. § 260 (1982)).

[37] *See also* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 58–59, *Laffey I* (arguing that to rebut NWA's proof in support of its alleged good faith, plaintiffs had to point to "direct evidence of bad faith or deliberate [Equal Pay Act] wrong, or that sex was consciously the rate basis, or that employer was trying to evade the [Equal Pay Act]").

[38] The fifth factor cited by the district court was "the absence of any clear legal precedent or guideline precisely in point." *1974 Remedial Order,* 374 F.Supp. at 1390. We recognized that this factor was indeed relevant to a determination whether an employer had a good faith, reasonably grounded (but erroneous) belief that his conduct was lawful. But "legal uncertainty," we added, "to assist the employer's defense, must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice." *Laffey I,* 567 F.2d at 466. We indicated that on remand it would be appropriate for the district court to consider whether "the absence of precise legal guidelines" was in fact the "condition [that] actually led NWA to believe that it was in compliance with the Equal Pay Act." *Id.* The district court did so and concluded: "[NWA] was in the position to study and know the nature of the work being performed by its employees. For it to erroneously conclude that the jobs were different was not a consequence of *legal* uncertainty." *Nov. 21, 1980, Decision,* 24 Empl.Prac.Dec. at 18,286 (emphasis in original).

[39] *Cf. Laffey I,* 567 F.2d at 466 n. 276 (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 422, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280 (1975) (Title VII decision) for proposition that maintenance of practice of "highly questionable legality" constitutes bad faith).

In *Laffey I,* we recognized that "[a]ny assessment of an employer's good faith or grounds for his belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous." 567 F.2d at 464 (footnote omitted). We found, however, that the district court had erroneously declared and applied the governing law: it had misperceived the meaning of both "good faith" (by apparently accepting the absence of bad faith as sufficient) and "reasonable grounds" (by considering several factors irrelevant to that determination). The "clearly erroneous" rule, *see* Fed.R.Civ.P. 52(a), therefore did not stand in the way of a remand.

On this appeal, by contrast, we find no legal infirmity in the district court's assessment. Instead, we are satisfied that the district court closely followed the guidance supplied in *Laffey I,* which constitutes the law of the case and of this circuit. Approaching the district court's fact findings with appropriate regard to that tribunal's function and to the need for finality served by Fed.R.Civ.P. 52(a), we have no occasion to disturb the liquidated damages award.

[16] We summarize here the principal points made by the district court, with ample record support, in explanation of its ultimate finding that NWA did not have "a reasonable foundation for a *positive* belief that in fact its policies compl[ied] with the law." *Nov. 21, 1980, Decision,* 24 Empl. Prac.Dec. at 18,286 (emphasis in original). First, NWA officials concluded that the jobs of purser and stewardess were in fact different "without consulting the in-flight supervisors responsible for knowing the duties of each, without commissioning a study of the jobs (as they did nine years later), and without scrutinizing the jobs for differences in duties." *Id.*[40] Next, NWA's alleged belief that "wages established through collective bargaining" were invulnerable to Equal Pay Act challenge, despite the language of the Act and the Wage-Hour Administrator's published interpretation,[41] could not rest on "an honest intention to ascertain what the Act required." *Id.*

Additionally, NWA could not establish its "good faith" by reason of its termination of "*other* discriminatory personnel practices—after considerable delay and an EEOC finding of probable violations." *Id.* (emphasis in original). Further, NWA gained no mileage from its "purported reliance on an EEOC statement that the duties of the purser and stewardess were different," for the vaunted EEOC statement "merely recited [NWA's] own job descriptions." *Id.* at 18,287. Finally, NWA's actions "*after* the lawsuit was filed ... fail[ed] to satisfy its burden of showing an honest intention to comply [with the law] prior to commencement of litigation." *Id.* (emphasis in original).[42]

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[40] NWA refers to its "thorough" internal review of the possible application of the Equal Pay Act to the Company's personnel practices as indicative of its "good faith" and "reasonable grounds." *See* NWA Brief at 72; *see also Nov. 21, 1980, Decision,* 24 Empl.Prac.Dec. at 18,285–86 (summarizing NWA's contentions). This review consisted of conversations shortly after the Act's passage among Robert Ebert, Vice President for Personnel, James Abbott, Labor Relations Counsel (Personnel Department), and Homer Kinney, Director of Labor Relations (Personnel Department). *See* 12/20/78 Deposition of Homer R. Kinney at 4–7, *reprinted in* Supplemental Record Excerpts (S.R.E.), Vol. I; 12/19/78 Deposition of James A. Abbott at 56, *reprinted in* S.R.E., Vol. I. No participant asserted that he in fact recalled discussing the differences in duties between pursers and stewardesses. *See* 12/20/78 Deposition of Homer R. Kinney at 4–7, 42–43; 12/19/78 Deposition of James A. Abbott at 56–57, 62–63, 66–67. Nor does it appear that the officials in question were best-positioned to conduct a close review of the work of pursers and stewardesses. *See Laffey I* Joint Appendix at 723–24, 734–36 (trial testimony of Chester L. Stewart) (chain of direct supervision of pursers and stewardesses ran through Department of Transportation Services, not Personnel Department); *id.* at 897 (trial testimony of Robert Ebert) (he had only general, not detailed knowledge of purser and stewardess duties).

[41] The district court quoted and added emphasis to the United States Department of Labor, Wage-Hour Administrator, Interpretive Bulletin on Equal Pay for Equal Work § 800.106 (Apr. 25, 1964), which states:

> [W]here equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees ***cannot be justified on the ground that it is a result of negotiation by the union with the employer,*** for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

Reprinted in 29 C.F.R. § 800.106 (1983). The district court appropriately rejected NWA's various attempts to cloud this clear statement. *See Nov. 21, 1980, Decision,* 24 Empl.Prac.Dec. at 18,286 (citing *Clifton D. Mayhew, Inc. v. Wirtz,* 413 F.2d 658, 663 (4th Cir.1969)) ("If [employer] did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there.").

In *Laffey I*, we cautioned the district court that the employer bore a "'substantial burden' of proving that his failure to comply was in good faith and also was predicated on reasonable grounds for a belief that he was in compliance." 567 F.2d 464–65 (quoting in part *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir.1953)) (footnote omitted). "If the employer cannot convince the court in these respects," we emphasized, "an award of liquidated damages remains mandatory." *Id.* at 465 (footnote omitted). The district court, for solid, plainly stated reasons, was unconvinced that NWA acted with the requisite "good faith" and "reasonable grounds."[43] We uphold that determination as free from any clear error.

B. *The Liquidated Damages Calculation*

NWA next argues that, even if the district court properly determined that the statute entitled the Equal Pay Act plaintiffs to liquidated damages, the years 1974 and 1975 should have been left out of the calculation. These are the relevant facts. NWA's contract with the cabin attendants' union expired at the end of 1973. Negotiations for a new contract took place in 1974 and 1975. During that two-year interval, pursers and stewardesses were paid under the terms of the expired contract, which accorded higher pay to pursers. The new contract, signed December 20, 1975, equalized purser and stewardess wage rates[44] and provided for a retroactive adjustment covering the negotiation period.

[17] Thus, in early 1976, the stewardesses received "retro-pay" for the difference between wages paid pursers and stewardesses in 1974 and 1975. The parties agreed on subtraction of this retro-pay from NWA's basic back-pay liability. NWA unsuccessfully sought credit for the retro-pay against liquidated damages as well, and now challenges the district court's refusal to subtract the retro-pay from the liquidated damages award. *See Laffey v. Northwest Airlines, Inc.*, 582 F.Supp. 280 at 281, 282–284 (D.D.C.1982)

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[42] Nor, in light of the record as a whole, did NWA's conduct after the commencement of litigation impel any finding that "good faith" and "reasonable grounds" supported NWA's 1970–1976 retention of the sex-based pay differential. *See infra* pp. 1098–1099 (differential maintained for two years following district court declaration that it violated the Equal Pay Act).

[43] We have described the "good faith" inquiry—did the employer honestly intend to ascertain and act in accordance with Equal Pay Act requirements—as "subjective," and the "reasonable grounds" inquiry as "objective." *Laffey I*, 567 F.2d at 464. If theoretically discrete, the two inquiries are not so readily compartmentalized in practical application. Inquiry into the subjective state of mind of the employer, if we attribute rationality to that employer, is likely to be influenced by the fact trier's perception whether a reasonable person, diligently seeking to conform his or her conduct to legal requirements, might have acted as the employer in fact did.

NWA now argues for rigid separation of "good faith" from "reasonable grounds" and incorrectly reads our *Laffey I* opinion to leave untouched the district court's original finding of good faith. *See* NWA Brief at 20, 72 n.*. We note, however, that NWA itself has exhibited less than perfect consistency in deciding whether to characterize a factor as relevant to "good faith" or to "reasonable grounds." *Compare* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 54–55, *Laffey I* (arguing that collective bargaining history and stewardess acquiescence demonstrated NWA acted in good faith), *with* NWA Brief at 72 n.* (arguing that, when *Laffey I* rejected these factors, the court addressed only "reasonableness," not "good faith").

[44] This contract, effective January 31, 1976, and applicable to the years 1974–1977, merged all cabin attendants into a single classification. *See* NWA Brief at 11 n.*.

[hereafter, *Oct. 25, 1982, Mem. Op.*], *reprinted in* J.R.E. 180, 183–89.

In opposing credit for the retro-pay against liquidated damages, plaintiffs relied on the district court's November *1973 Findings*, 366 F.Supp. at 789, holding that the purser/stewardess pay differential violated the Equal Pay Act.[45] Retroactive adjustment over two years later, plaintiffs argued and the district court agreed, did not relieve NWA of its liquidated damages liability for the years 1974 and 1975, a period during which pursers received, but stewardesses continued to await, the higher pay. NWA, on the other hand, maintained that the retro-pay stewardesses received in 1976 should be treated for all Equal Pay Act remedial purposes as if it had been paid in 1974 and 1975. NWA characterized payments under 1973 contract as merely "on account"; lump-sum adjustments retroactively establishing actual wage rates for past years, NWA stressed, were a "standard feature of labor agreements in the airline industry." *See Oct. 25, 1982, Mem.Op.* at 282, *reprinted in* J.R.E. 185 (quoting NWA); NWA Brief at 22, 82.

We conclude that the district court appropriately refused to "relate back" the retro-pay, and thereby exclude 1974 and 1975 from the liquidated damages calculation. The wages involved in fact were not received until two years after they were earned. That reality, in the circumstances here presented, is dispositive of plaintiffs' statutory entitlement to liquidated damages.

[18] In rejecting NWA's "relate back" argument, the district court stressed this central consideration: "liquidated damages are not punitive"; they are intended to compensate employees for a payment delay "which might result in damages too obscure and difficult of proof" to be redressed by any other means. *Oct. 25, 1982, Mem.Op.* at 282–283, *reprinted in* J.R.E. 185–86 (quoting language appearing in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583–84, 62 S.Ct. 1216, 1222–23, 86 L.Ed. 1682 (1942)); *see* cases cited *supra* 1096. As its principal ground of objection to the district court's ruling,[46] NWA asserts that section six of the Railway Labor Act, 45 U.S.C. § 156 (1982), obligated it to maintain the status quo as to all conditions of employment, including wages, during the two-year pendency of contract negotiations.[47] That Act, we are confident, does not stop an employer from immediately equalizing wages upward in accordance with the judicial determination

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[45] The district court's April *1974 Remedial Order*, 374 F.Supp. at 1385, provided that backpay would continue to accrue until NWA equalized purser and stewardess wages. This Order was stayed pending NWA's appeal, petition for rehearing, and petition for certiorari. *See supra* p. 1075.

[46] The district court correctly observed, *see Oct. 25, 1982, Mem.Op.* at 282–283, *reprinted in* J.R.E. 185–86, that the right to liquidated damages is nonwaivable by employees, *see Schulte v. Gangi*, 328 U.S. 108, 114, 66 S.Ct. 925, 928, 90 L.Ed. 1114 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S.Ct. 895, 900, 89 L.Ed. 1296 (1945), and that a union, in collective bargaining, cannot surrender rights secured by the Equal Pay Act. *See* 29 U.S.C. § 206(d)(2) (1982); *EEOC v. AT & T Co.*, 365 F.Supp. 1105, 1128 (E.D.Pa.1973), *aff'd in relevant part*, 506 F.2d 735 (3d Cir.1974) (without discussion of this point). Thus airline industry collective bargaining patterns, *see supra* p. 1099, provide no insulation to NWA against the full measure of recovery Congress specified for Equal Pay Act violations.

We further note our agreement with the district court's remarks on a Fair Labor Standards Act regulation cited by NWA, 29 C.F.R. § 778.303 (1983) (employer who grants retroactive pay increase must also increase overtime pay retroactively). This regulation serves to insure employees' receipt of overtime compensation on retroactive pay increases; it is not addressed to situations involving an "underlying unlawful differential in wages" or any other delinquency in meeting statutory obligations. *See Oct. 25, 1982, Mem.Op.* at 283–284, *reprinted in* J.R.E. 187–88.

[47] The provision on which NWA relies states that "[i]n every case where [the negotiation procedures of the Act have come into play], rates of pay, rules, or working conditions shall not be altered by the carrier [until the Act's negotiation procedures have run their course]." 45 U.S.C. § 156 (1982).

that an existing wage disparity violates the Equal Pay Act.[48]

The Railway Labor Act provision NWA cites fosters bargaining over disputes to avert the disruption of commerce strikes and lockouts occasion. *See, e.g., Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union,* 396 U.S. 142, 148–50, 90 S.Ct. 294, 298–299, 24 L.Ed.2d 325 (1969). But the Equal Pay Act *requires* equalizing the wages of the lower paid sex up to the level of the higher paid sex. *See, e.g., Corning Glass Works v. Brennan,* 417 U.S. 188, 206–07, 94 S.Ct. 2223, 2233–2234, 41 L.Ed.2d 1 (1974). A court determination of an Equal Pay Act violation leaves nothing for the employer and union to bargain about. Just as the National Labor Relations Act's prohibition against an employer's unilateral change in wages under negotiation[49] gives way to commands for an employer's compliance with other laws,[50] so the analogous provision of the Railway Labor Act erects no obstacle, on the facts here presented, to an employer's immediate payment of equal wages to men and women performing equal work.

Stewardesses did not receive until 1976 pay made to pursers in 1974 and 1975; NWA must now compensate for the withholding period, during which it remained out of compliance with the Equal Pay Act, by paying the liquidated damages ordered by the district court.

VI. Issues Raised by Laffey as Cross-Appellant

A. *Pre-Act Longevity*

[19] In calculating the amount of backpay due for NWA's post-Act wage violations, the district court held that the women should receive credit only for stewardess service performed subsequent to the Act under which they were recovering. The district court reasoned that the Supreme Court's decisions in *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), precluded crediting the women with pre-Act longevity. Because we find that the district court improperly applied these decisions, we reverse.

The back-pay recovery period covers the years 1967 through 1976. During that time NWA had a pay ladder for pursers such that salary rose with increased years of service or "longevity." Under this policy a man hired as a purser in 1957 would have accumulated ten years' longevity by 1967 and would have been paid accordingly. The issue facing the district court was whether, for purposes of computing backpay, a woman who had also been hired in 1957 as a cabin attendant and who had worked continuously as such until 1967 should be credited with the same longevity in determining her 1967 salary. Under the district court's holding, the woman in this example would be entitled only to the pay of a purser with three years' longevity if she were recovering under the Equal Pay Act. She would be entitled only to the pay received by a purser with two years' longevity if she were recovering under Title VII.

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[48] We note in this context the specific command directed to unions in the Equal Pay Act:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of [the Equal Pay Act].

29 U.S.C. § 206(d)(2) (1982). *See also, e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235, 249–53, 90 S.Ct. 1583, 1591–1594, 26 L.Ed.2d 199 (1970) (to advance objectives of other legislation, court may sanction exception to Norris LaGuardia Act that does not undermine that Act's purposes); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.,* 353 U.S. 30, 39–42, 77 S.Ct. 635, 639–641, 1 L.Ed.2d 622 (1957) (same); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.,* 523 F.2d 164, 168–69 (2d Cir.1975) (Railway Labor Act's unilateral wage change prohibition does not block trustee's unilateral change made to keep bankrupt operating), *cert. denied,* 423 U.S. 1017, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975), 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 82 (1976).

[49] *See, e.g., NLRB v. Katz,* 369 U.S. 736, 743, 745–47, 82 S.Ct. 1107, 1111, 1112–14, 8 L.Ed.2d 230 (1962) (employer's unilateral change in wages under negotiation violates § 8(a)(5) of the National Labor Relations Act).

[50] *See* Standard Candy Co., 147 NLRB 1070, 1073 (1964) (ALJ opinion adopted by Board) (unilateral change in wages to comply with Fair Labor Standards Act does not violate § 8(a)(5) of the National Labor Relations Act); Southern Transport, Inc., 145 NLRB 615, 617–18 (1963) (Board opinion) (same); *cf. EEOC v. AT & T Co.,* 365 F.Supp. 1105, 1129 (E.D.Pa.1973) (unilateral changes in provisions of currently binding contract to conform with Title VII or Equal Pay Act do not violate National Labor Relations Act), *aff'd in relevant part,* 506 F.2d 735 (3d Cir. 1974) (without discussion of this point).

We think that a woman hired in 1957 should today be credited with the same longevity as a man hired in that year. This does not involve finding that discrimination prior to the passage of the Act was somehow illegal. The stewardesses claim no damages for pre-Act pay differentials, nor could they. Their claim is that their current status be the same as that of men who have the same job characteristics, including job longevity. That claim of equal treatment seems to us required by the law. Indeed, the only case authority we have found dealing expressly with this subject holds squarely that a back-pay award should take into account "the length of service of the employees," including years of service prior to the effective date of Title VII. *Sears v. Atchison, T. & S.F. Ry.*, 645 F.2d 1365, 1378 (10th Cir.1981), *cert. denied*, 456 U.S. 964, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982).

United Air Lines, Inc. v. Evans and *Teamsters v. United States* are not to the contrary. In these cases the Supreme Court held that *bona fide* seniority systems do not violate Title VII even where they perpetuate the effects of prior discrimination. The Court based its decisions on section 703(h) of that Act, which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ...." Section 703(h), 42 U.S.C. § 2000e–2(h) (1976). These decisions do not apply to cases, such as the present one, where there is no allegation that a seniority system violates Title VII, but only a claim for an appropriate remedy.[51] The distinction between a remedy issue and a violation issue under Title VII was explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), and repeated in *United Air Lines, Inc. v. Evans*, 431 U.S. at 559, 97 S.Ct. at 1889–1890. In *Evans* the Court stated:

> The difference between a remedy issue and a violation issue is highlighted by the analysis of § 703(h) of Title VII in *Franks*. *As we held in that case, by its terms that section does not bar the award of retroactive seniority after a violation has been proved.* Rather, § 703(h) "delineates which employment practices are illegal and thereby prohibited and which are not." 424 U.S. at 758 [96 S.Ct. at 1261].

431 U.S. at 559, 97 S.Ct. at 1889–1890 (footnote omitted) (emphasis added). Clearly, section 703(h) does not preclude the crediting of retroactive pre-Act longevity in the present case. Indeed, *Franks v. Bowman Transportation* highlights this point by stating:

> There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved ....

424 U.S. at 761–62, 96 S.Ct. at 1262–1263.

Having demonstrated that the district court's holding was not required by *Evans* and *Teamsters*, we turn to the affirmative reasons for according pre-Act longevity. To deny women longevity credit for their pre-Act service, when men were given such credit for doing what the court has held to be the same work, would "differentiat[e] between similarly situated males and females on the basis of sex." *Evans,* 431 U.S. at 558, 97 S.Ct. at 1889. If NWA unilaterally computed the backpay in this way, its action would violate Title VII; *a fortiori,* such a method of calculation is not permissible as part of a judicial remedy. Moreover, such a limited remedy would run counter to the "make whole" purpose of Title VII. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419, 421, 95 S.Ct. 2362, 2372, 2373, 45 L.Ed.2d 280 (1975). The Supreme Court has stated that Congress' purpose in vesting discretionary powers in the courts to provide relief under Title VII was to "make possible the 'fashion[ing] [of] the most complete relief possible.'" *Albemarle Paper Co.,* 422 U.S. at 421, 95 S.Ct. at 2373 (quoting section-by-section analysis accompanying Conference Committee Report on the Equal Employment Opportunity Act of 1972). We therefore reverse the district court's ruling on this issue and instruct the court to credit plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act time periods.

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[51] Moreover, the district court did not hold, as appellant argues, that Northwest's longevity system was a bona fide seniority system. Absent such a conclusion, there is no basis whatever for application of the Court's decisions in *Teamsters* and *Evans*.

B. *Interest*

1. *Rate of pre-judgment interest for the 1974–82 period*

[20] In paragraph 19 of its 1974 order, the district court made the following ruling on pre-judgment interest:

> 19. INTEREST—With respect to all monies to be paid under the foregoing provisions of this Order, the Company shall pay six percent interest per annum from the date the violation occurred giving rise to said liability through the date upon which payment is made in accordance with this Order.

1974 Remedial Order, 374 F.Supp. at 1389. In 1974, the district court believed that the judgment it was entering was a final one (R. 7, at 4; R. 115, at 25, 26). The panel in *Laffey II,* however, ruled in 1980 that the 1974 order was not a "final judgment," 642 F.2d 578, 583–84 (1980). This ruling had the effect of extending the prejudgment period from May 20, 1974 through the entry of final judgment on November 30, 1982.

Following the decision in *Laffey II,* plaintiffs moved for a determination of the pre-judgment interest that should apply to this additional period. Plaintiffs noted that interest rates generally had risen greatly after 1974 and recommended that the rate for each year of the 1974–82 period be 90% of the average prime rate for that year, compounded quarterly. At the hearing on plaintiffs' motion, the district court concluded that its prior ruling should not be revised. We affirm.

We are unpersuaded by plaintiffs' argument that the district court did not make a decision as to the rate of interest that should be awarded from 1974 to 1982. In rejecting plaintiffs' contention, the district judge stated that he had "determined the interest to be awarded without regard to the length of the pre-judgment period." R. 120; *Laffey v. Northwest Airlines, Inc.,* 29 Empl.Prac.Dec. (CCH) 25,330, 25,332 (D.D.C. Oct. 6, 1981). Moreover, the express terms of the 1974 order set no limit on the length of the pre-judgment period. We stress that although the 1974 judgment was ultimately declared non-final, we entertained in *Laffey I* all objections to dispositive rulings that the parties placed before us. *See Laffey II,* 642 F.2d at 584 n. 49. We have discussed above the salutary purposes served by the doctrine of the law of the case. According to that doctrine,

> a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.

1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1] (1983). Reconsideration of a prior decision, unappealed at an earlier stage although the opportunity to do so was present, is justified only in a limited number of circumstances:

> [The law of the case] must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has

> since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

White v. Murtha, 377 F.2d 428, 431–32 (5th Cir.1967). *See also Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1189–90 (5th Cir.1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Jennings v. Patterson*, 488 F.2d 436, 441 n. 4 (5th Cir.1974). None of the above criteria for reopening the district court's decision obtains here. We therefore affirm the district court's holding that plaintiffs are entitled to pre-judgment interest at six percent simple for the 1974–82 period.

2. *Post-judgment interest on liquidated damages*

In 1981 the district court held that the law of the case precluded it from awarding post-judgment interest on liquidated damages. In paragraph 19 of its 1974 order, the district court noted, it had not awarded post-judgment interest on pre-judgment interest. By analogy, it reasoned, that ruling "is fully applicable to liquidated damages since liquidated damages are a substitute for pre-judgment interest" (R. 119, at 2). We do not believe that law of the case settles this issue. Our evaluation of the merits leads us to conclude that plaintiffs are entitled to post-judgment interest on liquidated damages. Consequently, we reverse.

[21] The district court did not award liquidated damages until 1980; it thus had no occasion to decide in 1974—and it did not decide in 1974—whether plaintiffs were entitled to post-judgment interest on liquidated damages. That question did not arise until 1981, following our *Laffey I* decision. Since the district court had not previously decided this question, it was "free to rule thereon as it thought proper." *Salvoni v. Pilson*, 181 F.2d 615, 619 (D.C. Cir.), *cert. denied*, 339 U.S. 981, 70 S.Ct. 1030, 94 L.Ed. 1385 (1950).

The district court's 1974 ruling refusing to award post-judgment interest on pre-judgment interest does not apply by analogy here, for liquidated damages are not merely "a substitute for pre-judgment interest" (R. 119, at 2). As defined by this court in *Thompson v. Sawyer*, 678 F.2d 257, 281 (1982), liquidated damages are "compensatory, intended to reimburse workers for intangible losses—difficult to prove but nonetheless the very real consequences of unfair wages." Liquidated damages differ in amount and, to some extent, in kind from pre-judgment interest. Inasmuch as the law of the case did not control the question whether post-judgment interest should accrue on liquidated damages, that issue was and is open for determination on the merits.

[22] The federal post-judgment interest statute, 28 U.S.C. § 1961 (1982), provides, in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in district court ....

This statute has been interpreted to mean that

> once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed.

Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir.1973); *see R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.1983). The law requires the awarding of post-judgment interest on all elements of the judgment, including liquidated damages. We therefore reverse the determination below and hold that plaintiffs are entitled to post-judgment interest on liquidated damages.

CONCLUSION

For the reasons stated, we instruct the district court on remand to (1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC charge; (2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service; and (3) allow post-judgment interest on liquidated damages. In all other respects, we affirm the district court's dispositions.

It is so ordered.

Emerson EMORY, Appellant,
v.
SECRETARY OF the NAVY.
No. 85-5685.
United States Court of Appeals,
District of Columbia Circuit.
May 19, 1987.

Retired officer brought action seeking declaratory and injunctive relief for alleged discrimination that resulted in his nonselection for promotion to rank of rear admiral in United States Naval Reserve. The United States District Court for the District of Columbia, June L. Green, J., dismissed complaint for want of subject matter jurisdiction, and retired officer appealed. The Court of Appeals held that: (1) officer's Rule 59(e) motion, and thus his notice of appeal, were timely, and (2) district court had jurisdiction to consider retired officer's claim that selection boards that considered him for promotion discriminated against him on basis of race.

Reversed and remanded.

1. **Federal Civil Procedure ⇔2658**
Federal Courts ⇔668

Rule 59(e) motion, which was dated seven days after district court's judgment and which was filed within reasonable time thereafter, was timely, and thus subsequent notice of appeal was also timely, notwithstanding that date of service appeared slightly above certificate of service rather than in text of certificate of service itself. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; F.R.A.P.Rule 4(a)(4), 28 U.S.C.A.

2. **Armed Services ⇔7**

Although district court lacked authority to order retired navy officer promoted retroactively to rank he sought, and although operation of military is vested in Congress and executive branch, district court nonetheless had jurisdiction to consider retired officer's constitutional claim that selection boards that considered him for promotion discriminated against him on basis of race; moreover, retired officer's inactive status was not bar to district court fashioning some relief if it determined that claim was meritorious.

Appeal from the United States District Court for the District of Columbia Civil Action No. 83-02494.

Emerson Emory, pro se.

Sherman Cohn, Washington, D.C., appointed by the Court, was on the brief as amicus curiae.

Joseph E. diGenova, U.S. Atty., Royce C. Lamberth, R. Craig Lawrence and Eileen M. Houghton, Asst. U.S. Attys., Washington, D.C., were on appellee's motion for summary affirmance.

Before BORK, SILBERMAN and GINSBURG, Circuit Judges.

Opinion PER CURIAM.

ON MOTION FOR SUMMARY AFFIRMANCE

PER CURIAM:

Appellant Emerson Emory has appealed the dismissal of his complaint by the district court. Emory had filed suit seeking declaratory and injunctive relief for alleged discrimination that resulted in his nonselection for promotion to the rank of rear admiral in the United States Naval Reserve. The district court dismissed the complaint for want of subject matter jurisdiction. We hold that the district court has jurisdiction to consider Emory's claims. Accordingly, we reverse.

Emory was an ensign in the Medical Corps of the United States Naval Reserves beginning in 1949. He remained on active duty as a reserve officer from that time until his voluntary retirement in 1980.[1] In the interim, he was promoted in the normal sequence to the rank of captain, obtaining that status in 1972. Thereafter he was considered, but not selected, for promotion to the rank of rear admiral by selection boards meeting in January of 1977, 1978, 1979, and in October of 1979. During the period 1977–1979, Emory was eligible for promotion to the rank of rear admiral. Emory was not, however, in what is known as the "primary promotion zone." Because Emory was "below the zone" during the years in question, a promotion selection board would have had to consider him to be one of a select group of especially well qualified applicants to recommend him for promotion. Emory would have been in the "primary zone" for the first time in 1980. Prior to the next duly convened rear admiral promotion selection board, however, Emory was transferred at his request to the Retired Reserve List. He was therefore not considered for promotion after October, 1979.

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[1] Emory's voluntary retirement may have been induced, in part, by his conviction and sentence in a federal district court to twelve years in prison. Had Emory not voluntarily retired, he would have been liable to an involuntary separation proceeding as a result of his conviction.

In August, 1983, after exhausting his administrative remedies, Emory filed this action in the district court alleging that his failure to advance to the rank of rear admiral was due to racial discrimination within the Navy. Specifically, Emory alleged that the failure to include a black officer on the promotion selection boards resulted in his not being promoted. He sought a declaratory judgment that the Navy had violated his rights under the law and Constitution, a preliminary injunction requiring appellee to promote him immediately to the rank of rear admiral retroactive to July 1, 1978, and such other relief as the court deemed appropriate. Emory waived any back pay entitlement he might have had. He alleged that the court had jurisdiction to order the relief sought under the fifth and fourteenth amendments to the Constitution and under 28 U.S.C. §§ 1331, 1343 (1982).

On July 20, 1984, the district court granted appellee's motion to dismiss, finding that the case was nonjusticiable because is not capable of resolution through judicial process without interference i areas reserved to other branches government." The court reasoned that cause promotion under 10 U.S.C. § (1982)[2] is a matter reserved to the legis tive and executive branches of governm the court did not have the power to order retroactive promotion.

Moreover, the court concluded that ev if Emory's claims were meritorious, in der even to be considered for promotio Emory had to be on active status. U.S.C. § 5891(a) (1982). The court stat that "[t]here is no basis for the court order plaintiff reinstated to active sta pending final disposition of his claim b cause his inactive status was not invol tarily imposed upon him and it was not result of the alleged wrongs." Thus, th court concluded that Emory's decision v untarily to retire made his claim for pr motion moot. With respect to Emory's r quest for declaratory relief, the court rul that such relief was "inappropriate" on claim that has become moot.

1

We note at the outset that the notice appeal in this case was timely filed.[3] Fe eral Rule of Appellate Procedure 4(a) provides that in a civil case in which th United States is a party, a notice of appe must be filed within sixty days of entry the judgment. Fed.R.App.P. 4(a)(1). Su section (4) of that rule provides, howeve that this time period may be tolled if party files a timely motion to alter amend the judgment under Federal Rule Civil Procedure 59(e). Rule 59(e) provid that such a motion must be "served n later than 10 days after the entry of jud ment." District courts are not empowere to extend the ten day time limitation. S

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[2] 10 U.S.C. § 5912 provides:

> Permanent and temporary appointments under this chapter in grades above lieutenant commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate.
>
> All other permanent and temporary appoi ments under this chapter shall be made by th President alone.

[3] We acknowledge with appreciation the su stantial contribution of *Amicus*, Professor Sh man Cohn, to the resolution of this issue.

Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 941 (D.C.Cir.1986).

Courts have routinely construed papers captioned "motion to reconsider" as a motion to alter or amend the judgment under Rule 59(e). *See Fischer v. United States Dept. of Justice*, 759 F.2d 461, 464–65, n. 4 (9th Cir.1985); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir.1982). Such treatment is appropriate even though the movant does not specify under which rule relief is sought, because "[a]ny motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label." 9 *Moore's Federal Practice* ¶ 204.12[1] at 4-67 (1987). Parties may reasonably rely, however, only upon a timely Rule 59(e) motion to reconsider as a basis for delaying the filing of their notice of appeal. *See Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d at 942.

In this case, the district court's judgment was entered on July 20, 1984.[4] Emory's notice of appeal was filed on May 16, 1985, well beyond the sixty-day appeal period. When this case was last before us, we were concerned that a motion to reconsider, filed by Emory on August 6, 1984, did not toll the appeal period because it was filed beyond the ten days allowed by Rule 59(e). We are now satisfied that although the motion was not filed within the prescribed ten day period, it was served during that time. That being the case, the motion, and hence, the notice of appeal, are timely.

Briefly, Fed.R.App.P. 4(a)(4) contains two distinct requirements. First, that the motion relied upon to toll the appeal period be "filed" in the district court, and second, that it be a "timely motion." A "timely motion" under Fed.R.Civ.P. 59(e) is one that is served not later than 10 days after entry of judgment. *Keohane v. Swarco, Inc.*, 320 F.2d 429, 430–32 (6th Cir.1963). Thus, Rule 4(a)(4) is satisfied if the motion is served not later than ten days after the entry of judgment, and if the motion is "filed", which under Fed.R.Civ.P. 5(d), can occur "within a reasonable time [after service]." *Id.* If Emory perfected service of his Rule 59(e) motion by mailing[5] it to the United States Attorney within ten days after entry of the July 20, 1984 judgment, and the motion was filed within a reasonable time thereafter, the motion and his subsequent appeal were timely. *Interstate Commerce Comm'n v. Carpenter*, 648 F.2d 919 (3d Cir.1981).

[1] Emory's Rule 59(e) motion was dated July 27, 1984, seven days after judgment. In addition, Emory submitted an affidavit together with his supplemental brief to this court in which he avers that the motion was indeed mailed that day. It is true, as noted by the government, that the text of the Certificate of Service does not indicate the date of service. In light of the fact that Emory is proceeding *pro se*, however, it would seem hypertechnical at best to conclude that the date of service cannot be determined because the date appears slightly above the certificate, rather than in the text of the certificate itself. In light of these facts, we conclude that the Rule 59(e) motion, and hence, the notice of appeal, were timely filed.

II

Emory alleged that there were no minority members on the selection boards that considered him for promotion. He also alleged that he was discriminated against by the selection boards because of his race. He sought a preliminary injunction requiring appellee retroactively to promote him to the rank of rear admiral, and a declaratory judgment that appellee had violated his statutory and constitutional rights.

Generally, courts have shown an extreme reluctance to interfere with the military's exercise of its discretion over internal management matters. *See, e.g., Orloff v. Willoughby,* 345 U.S. 83, 93–94, 73 S.Ct. 534, 539–40, 97 L.Ed. 842 (1953); *Reaves v. Ainsworth,* 219 U.S. 296, 306 (1911). This deference is "at its highest when the military, pursuant to its own regulations, effects personnel changes through the promotion or discharge process." *Dilley v. Alexander,* 603 F.2d 914, 920 (D.C.Cir. 1979), *clarified,* 627 F.2d 407 (D.C.Cir. 1980).

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[4] The order of July 20, 1984, satisfies the procedural requirements for the entry of judgment established by this court in *Diamond v. McKenzie*, 770 F.2d 225, 230 n. 10 (D.C.Cir.1985). The order stated the judgment of the district court on a separate document, and was entered by the Clerk of the court on the civil docket.

[5] Fed.R.Civ.P. 5(b) provides that "[s]ervice by mail is complete upon mailing."

Here, Congress has enacted legislation that details the procedures for the promotion of officers in the Naval Reserves and, as pointed out by the district court, the courts have no role in this process. *See* 10 U.S.C. § 5891 *et seq.* (1982). The selection and promotion process has been specifically reserved to the executive and legislative branches of government. The promotion selection board must first recommend Emory for promotion. The President must then nominate Emory to the Senate, and upon Senate confirmation, appoint him to his new rank. 10 U.S.C. § 5912. The district court was clearly correct in concluding that it cannot intervene in this process and order Emory promoted retroactively to the rank of admiral.

[2] To so conclude, however, is not to say that there is an absence of subject matter jurisdiction over Emory's constitutional claims. We have no quarrel with the district court's conclusion that the operation of the military is vested in Congress and the Executive, and that it is not for the courts to establish the composition of the armed forces. But constitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). It is precisely the role of the courts to determine whether those rights have been violated. *Dillard v. Brown,* 652 F.2d 316, 320 (3d Cir.1981).

We note that Emory's current inact status is not a bar to the district co fashioning some relief if it determines t his claims are indeed meritorious. *See D ley v. Alexander,* 603 F.2d at 925. *Dilley,* suit was brought by Army Rese officers who had been released from ac duty because they had twice been pass over for promotion. The officers co plained that the promotion selection boar were in violation of applicable statutes a regulations because they did not include a appropriate number of reserve officer Judge MacKinnon, writing for this cour concluded that the officers were entitled be reinstated to active duty and to be co sidered again by promotion selecti boards constituted in accordance with app cable statutes and regulations. *Id.* at 9 Unlike the appellants in *Dilley,* Emory v untarily chose to remove himself from a tive status. That fact, however, does n affect the justiciability of claimed constit tional violations that preceded his decisi to retire.

We express no view on the merits Emory's claims. We simply hold that di missal of his complaint for want of subjec matter jurisdiction was error. Accordin ly, we reverse and remand the case to th district court for further proceedings co sistent with this opinion.

TAXPAYERS WATCHDOG, INC., et al., Appellants,

v.

Ralph L. STANLEY, Administrator, Urban Mass Transportation Administration, et al.

No. 86–5714.

United States Court of Appeals,
District of Columbia Circuit.

May 19, 1987.

Taxpayers' association filed complai seeking to enjoin Urban Mass Transport

COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, et al., Plaintiffs,

v.

UNITED STATES of America, et al., Defendants.

Civ. A. No. 82-0912.

United States District Court,
District of Columbia.

Jan. 10, 1983.

As Corrected March 11, 1983.

Seven black citizens who were registered to vote in county moved to intervene in voting rights action instituted by county and two county officials seeking declaratory judgment, implemented by injunction, that at-large method of election in county was not subject to preclearance by Attorney General, that preclearance had already been given, and that at-large method did not have purpose or effect of denying or abridging right to vote on account of race, color or previous conditions of servitude. Three-judge District Court, Bork, Circuit Judge, and Barrington D. Parker and Oberdorfer, JJ., held that: (1) black citizens' motion to intervene would be granted; (2) institution of at-large elections required preclearance; and (3) Attorney General's failure to object to two statutes relating to at-large elections for county governing body did not amount to preclearance by Attorney General; (4) substantial fact issue existed as to retrogressive effect of at-large elections precluding summary judgment.

Order accordingly.

See also, 102 S.Ct. 715; 509 F.Supp. 1334.

1. Declaratory Judgment ⇨306

Although black registered voters' motion to intervene in Voting Rights Act proceeding was filed relatively late, where they moved for intervention less than one month after United States abandoned issue of whether, in order to obtain declaratory judgment of preclearance, county officials were required to demonstrate that voting procedure change did not violate statute prohibiting denial or abridgment of right to vote on account of race or color through voting qualifications did not seek discovery or to relitigate old issues, and their local perspective on current and historical fact at issue could be enlightening to court, motion to intervene would be granted. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

Memorandum on Summary Judgment

2. Elections ⇨12

Where laws eliminated legal power of governor and General Assembly over local affairs and vested it exclusively in county council elected at large by county voters, institution of at-large elections for unfettered county local government was sufficient change to require preclearance under Voting Rights Act. S.C.Code 1976, §§ 4-9-10 et seq., 4-9-10(b); S.C.Act June 20, 1967, 55 Stat. at Large, p. 523, § 1 et seq.; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

3. Elections ⇨12

De jure change in voting qualifications and procedures as well as de facto change in voting requires preclearance by Attorney General under Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

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holder may prosecute derivative action pro se because he is properly a plaintiff, and may represent himself and simultaneously present arguments common to corporate plaintiff), *appeal dismissed,* 312 F.2d 399 (2d Cir.1963); *cf. Church of the Visible Intelligence that Governs the Universe v. United States,* No. 574-79T (Ct.Cl. Feb. 20, 1981) (semble). *See generally* Annot., 19 A.L.R.3d 1073, 1082-87 (1968).

None of these exceptions applies here. Furthermore, there is no first-, fifth-, or sixth-amendment right to representation by a layman. *See Turner,* 407 F.Supp. at 480, 481. Finally, I note that plaintiff has obtained counsel in other cases in this court. *See Move Org'n v. City of Philadelphia,* 89 F.R.D. 521, 523 n. 1 (E.D.Pa.1981).

4. **Elections** ⇐12

Political subdivision must state that it desires preclearance of election before it can claim preclearance by silence of Attorney General. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

5. **Elections** ⇐12

Where letter that submitted state statute affecting voting changes in county to Attorney General did not request preclearance nor mention any voting changes, Attorney General's silence concerning statute did not constitute preclearance of at-large election system for county provided for in statute. S.C.Act June 20, 1967, 55 Stat. at Large, p. 523, § 1 et seq.

6. **Elections** ⇐12

Where Attorney General reserved his right to object to any referendum adhered to by local counties pursuant to home rule statute passed by South Carolina legislature, Supreme Court held that letter informing Attorney General of referendum results was only request for reconsideration of Attorney General's earlier objection to statute, and that county's at-large method of election had still not been precleared, Attorney General did not preclear at-large elections when he reviewed home rule statute. S.C.Code 1976, § 4-9-10 et seq.; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

7. **Federal Civil Procedure** ⇐2491.5

Voting rights action in which county and two of its officials alleged that even if at-large method of election did represent change in method requiring preclearance, change did not have effect of denying or abridging right to vote on account of race, affidavit submitted by black citizens opposing county's motion for declaratory judgment raised substantial fact issue as to whether system was retrogressive precluding summary judgment. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

8. **Elections** ⇐12

District court has no authority either to review, or to preview, decision of Attorney General under section of Voting Rights Act governing alteration of voting qualifications and procedures. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

9. **Elections** ⇐12

District court's role under section of Voting Rights Act governing alteration of voting qualifications and procedures is to examine change de novo, as alternative to Attorney General's decision regarding preclearance. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

10. **Elections** ⇐12

Difference between background circumstances which prevailed in county at time of original Voting Rights Act, specifically fact that less than half of voting population was registered to vote, and those currently prevailing, that over 50% of voting population are registered, did not justify reexamination of firm conclusions made by Congress in extending Act to county and Supreme Court in holding that categories chosen by Congress were and are appropriate. Voting Rights Act of 1965, § 4(b), as amended, 42 U.S.C.A. § 1973b(b).

Joseph W. Dorn, Kilpatrick & Cody, Washington, D.C., Randall T. Bell, M. Elizabeth Crum, McNair Glenn Konduros Corley Singletary Porter & Dibble, P.A., Columbia, S.C., Howard P. King, Bryan, Bahnmuller, King, Goldman & McElveen, Sumter, S.C., for plaintiffs.

Gerald W. Jones, Paul F. Hancock, J. Gerald Hebert, David S. Cunningham, III, Attys., Civ. Rights Div., Dept. of Justice, Washington, D.C., for defendants.

Armand Derfner, Washington, D.C., Laughlin McDonald, Atlanta, Ga., for defendants-intervenors.

Before BORK, Circuit Judge, and BARRINGTON D. PARKER and OBERDORFER, District Judges.

MEMORANDUM ON MOTION TO INTERVENE

Seven black citizens who are registered to vote in Sumter County, South Carolina, at least one of whom was a party in *Blanding v. DuBose*, 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1982), move pursuant to Fed. R.Civ.P. 24 to intervene in this Voting Rights Act proceeding which is a sequel to *Blanding*. Some of the movants made representations to the Attorney General in opposition to the preclearance of the at-large voting method for Sumter County Council members at issue in *Blanding*. When the Attorney General first refused preclearance, Sumter County nevertheless continued to schedule at-large elections. Some movants and the United States sought to enjoin future at-large elections pending preclearance. After a three-judge District Court in South Carolina granted a preliminary injunction, but ruled for the County on the merits, the United States did not perfect its appeal; intervenors perfected theirs and prevailed in the Supreme Court on their contention that the Attorney General had not precleared at-large elections for the Sumter County Council. *Blanding v. DuBose, supra.*

Movants allege that they have an "intensely local" perspective with respect to the allegedly discriminatory effects and purpose of the change in elections methods effected by Sumter County that would be helpful to us and necessary to the full and proper resolution of this case.[1]

Movants also allege that the United States defendants may or cannot adequately represent movants' interests because those interests may diverge from defendants' conception of the public interest. In support of this allegation movants point to the failure of the United States to pursue its appeal in *Blanding*, contending that if they had not protected their own interests in the Supreme Court they would have already lost the rights which they preserved there and now defend here. In addition, movants point to defendants' change in position in the instant proceeding on October 27, 1982, at which time defendants abandoned a contention that in order to obtain a declaratory judgment of preclearance under Section 5 of the Voting Rights Act plaintiffs must demonstrate that the voting procedure change did not violate section 2 of the Act.

Movants represent that they would enter the case subject to all outstanding orders, that they do not seek to reopen discovery, and that in making a factual record without delaying the trial, they would rely principally upon an opportunity to examine and cross-examine witnesses called by others, and not attempt to call any other witnesses, except by leave of court if special circumstances arise.

Plaintiffs oppose the motion to intervene as untimely, and urge that, if it is granted, movants' participation should be limited to the filing of a post-trial memorandum. Plaintiffs object to movants' failure to seek to intervene until the close of discovery and on the eve of argument on motions for summary judgment. Plaintiffs claim prejudice in that they would have conducted their discovery and prepared and evaluated their case differently if the movants had been parties earlier. For example, plaintiffs say they would have conducted more extensive discovery had they known that Section 2 would be at issue. Plaintiffs emphasize the time essence here because there have been no local elections in Sumter County for six years, pending resolution of this controversy. In addition to the difficulty of confronting a Section 2 issue without discovery, plaintiffs urge that movants' intervention would necessarily make the trial longer, and more complicated and, for plaintiffs at least, more expensive. *See* Plaintiffs' Memorandum in Response to Petition for Leave to Intervene (Dec. 13, 1982).

Movants rely on a long line of cases in which this Court has routinely allowed intervention by persons situated similarly to movants,[2] and point to at least one other case in which intervenors, and not the United States, made the only argument for their position in the Supreme Court. *City of Lockhart v. United States,* — U.S. —, 103 S.Ct. 998, 74 L.Ed.2d 863 (1982). Moreover, they cite authority that intervention should be allowed, even where the United States' interest is apparently parallel, upon a "minimal" showing that the United States' representation of the public interest as it views that interest "may" not adequately represent the movants' legitimate interest. *See Trbovich v. United Mine Workers,* 404 U.S. 528, 538–39 and n. 10, 92 S.Ct. 630, 636 and n. 10, 30 L.Ed.2d 686 (1972).

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[1] *See* Plaintiffs' Memorandum in Support of Petition for Leave to Intervene (Nov. 26, 1982) at 4.

[2] *Busbee v. Smith*, C.A. No. 82-0665 (D.D.C.) (order allowing intervention March 22, 1982);

[1] We are persuaded that, on balance, movants should be allowed to intervene on a limited basis. Although movants filed relatively late, they moved less than a month after defendants' abandoned the Section 2 issue. *See Liddell v. Caldwell,* 546 F.2d 768 (8th Cir.1977). Plaintiffs have not explained why the discovery they conducted before October 27, 1982, (when the defendants' Section 2 argument was at issue) did not prepare them to deal with that issue. Movants do not seek discovery or to relitigate old issues, but only to participate prospectively, and to assure a vigorous response to plaintiffs' claim. *See Natural Resources Defense Council v. Costle,* 561 F.2d 904 (D.C.Cir.1977). Their local perspective on the current and historical facts at issue could be enlightening to us. Finally, we are confident that we can effectively limit movants' cross-examination and other potentially time-consuming activities in the same way that we intend to control the presentations of the parties themselves so as to minimize the burden on them as well as on the Court, which unfettered intervention might otherwise entail.

The Section 2 issue cannot be ignored, at least upon first impression, and the intervenors will be permitted to pursue it, if they so desire, within the limits of their proposed intervention and such other limits as the Court may set. We may or may not be required to decide the Section 2 issue, but we will be better able to deal with it if we have evidence than if the argument were before us only in the abstract.

In passing the Voting Rights Act Amendments of 1982, Pub.L. No. 97–205, 96 Stat. 131–135 (June 29, 1982), Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to read as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to

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City of Port Arthur, Texas v. United States, 517 F.Supp. 987, 991 n. 2 (D.D.C.1981), *prob. juris. noted,* 455 U.S. 917, 102 S.Ct. 1272, 71 L.Ed.2d 457 (1982); *City of Richmond, Va. v. United States,* 376 F.Supp. 1344, 1349 n. 23 (D.D.C. 1974), *remanded on other grounds,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975); *Beer v. United States,* 374 F.Supp. 363, 367 n. 5 (D.D.C.1974), *remanded on other grounds,* 425 U.S. 130, 133 n. 3, 96 S.Ct. 1357, 1360 n. 3, 47 L.Ed.2d 629 (1976); *City of Petersburg, Va. v. United States,* 354 F.Supp. 1021, 1024 (D.D.C. 1972), *aff'd,* 410 U.S. 962, 93 S.Ct. 1441, 35 L.Ed.2d 698 & *sub nom. Diamond v. United States,* 412 U.S. 901, 93 S.Ct. 2290, 36 L.Ed.2d 967 (1973); *New York State v. United States,* 65 F.R.D. 10, 12 (D.D.C.1974); *see also Trbovich v. United Mine Workers,* 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

have members of a protected class elected in numbers equal to their proportion in the population.

96 Stat. at 134. The Senate Report on the 1982 Amendments stated that: "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S.Rep. No. 97–417, 97th Cong., 2nd Sess. (May 25, 1982) at 12 n. 31, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 189 n. 31. In a Reply Brief to the Supreme Court in *City of Lockhart v. United States & Cano,* No. 81–802 (Oct. 1982) (filed by defendants in this action together with their Amended Memorandum on October 27, 1982), the United States noted the importance and complexity of the impact of the 1982 amendment of Section 2 on a Section 5 case: "Whether ... the 'results' standard of Section 2 can properly be imported into Section 5 presents a complex issue which can be decided only after a comprehensive assessment of the statutory scheme and legislative history." *Id.* at 4. The United States also represented that "[t]hat inquiry should be performed in the first instance by [a] district court." *Id.*

In order to best address the issue, as preserved by the intervenors, but not delay resolution of the primary subject of this action which has precluded County Council elections in Sumter County for at least four years, the Court will allow intervenors to preserve the issue, cross-examine witnesses and rebut evidence on it adduced by plaintiffs.

An accompanying Order will grant intervenors' motion. A separate accompanying Order will set a pretrial briefing schedule with the expectation that the parties (including defendants if they wish) may include in those briefs argument regarding the legal issues and an outline of the evidence which will be developed to resolve the Section 2 issue originally raised by defendants and now preserved by intervenors (including an estimate of any additional courtroom time required to adduce such evidence).

MEMORANDUM ON SUMMARY JUDGMENT

The County Council of Sumter County, South Carolina (Sumter County), and two Sumter County officials brought this action against the United States pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ("the Act"). They have also invoked the Ninth, Tenth, Fourteenth and Fifteenth Amendments of the United States Constitution. Their amended complaint seeks declaratory judgment, implemented by an injunction, that an at-large method of electing the Sumter County Council is not subject to preclearance by the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965; that if such preclearance is required, the Attorney General has already given it; and that, in any event, the at-large method at issue does not have the purpose or effect of denying or abridging the right to vote on account of race, color, or previous condition of servitude. In 1978, the two individual plaintiffs and other qualified electors of Sumter County voted in favor of the at-large method of election in a referendum. Plaintiffs now also seek declaratory and injunctive relief to protect the rights of the qualified electors of Sumter County to vote for the at-large method of election for County Council in a referendum, and to have the votes counted in the at-large elections which they advocate. Finally, they challenge as inappropriate and, therefore, unconstitutional, Congress's 1982 extension of the Act as applied to Sumter County.

Defendants, who are the United States, its Attorney General and its Assistant Attorney General for Civil Rights, have moved to dismiss and for summary judgment on six of the seven counts in the complaint. Plaintiffs have filed cross-motions for summary judgment, including a motion for partial summary judgment on Count III, the count on which defendants believe a trial is required. Meanwhile, when defendants retreated from an earlier contention concerning the interrelation between Sections 2 and 5 of the Voting Rights Act,[1] seven blacks voters of Sumter County moved for leave to intervene and to take a limited role in the proceedings henceforth.

All of these motions have been fully briefed, and all except the motion to intervene have been argued to this three-judge court. For reasons more fully stated below, the Court in an accompanying Order will deny the defendants' motion to dismiss and the plaintiffs' motion for summary judgment, and grant defendants' motions for summary judgment, thereby leaving for trial Count III in its entirety. The motion for limited intervention is the subject of a separate Memorandum and Order issued today.

I

This case is a sequel to litigation which culminated in the decision of the Supreme Court in *Blanding v. DuBose*, 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1982) (*per curiam*) *rev'g*, 509 F.Supp. 1334 (D.S.C. 1981). A brief account of that case will set the stage for this one.[2]

In *Blanding*, a number of citizens of Sumter County sought to enjoin at-large elections for Sumter County's County Council in 1978. In 1967, the South Carolina General Assembly passed Act No. 371, placing governmental powers for Sumter County in a County Council, whose members were to be elected at-large from the County. By oversight, plaintiffs allege, Act No. 371 was not submitted to the U.S. Attorney General for preclearance pursuant to the Voting Rights Act, and at-large County Council elections were held in Sumter County in 1968, 1970, 1972 and 1974.[3] In 1975, South Carolina passed the Home Rule Act, which permitted each of South Carolina's counties to select by referendum one of five alternate forms of local government contained in the statute, and to decide in the referendum whether the county governors would be elected from single-member districts or at-large. The Act specifically provided that if Sumter County held no referendum, the council-administrator system derived from Act No. 371 in 1968 would remain in place. Section 4–9–10(b). The Home Rule Act of 1975 was submitted to the U.S. Attorney General for preclearance; he interposed no objection at that time, but "he indicated that the outcomes of Home Rule Act referenda or assignments of forms of government under the Act would be subject to preclearance." 454 U.S. at 396, 102 S.Ct. at 716.[4] Thereafter, Sumter County held no referendum and by assignment the council-administrator system was elected at-large. In 1976, Sumter County submitted for preclearance Act No. 371 of 1967 and the County Ordinance implementing that Act on authority of the Home Rule Act. The Attorney General interposed no objection to the council-administrator form, but "made a timely objection to the at-large method of election of the Council." 454 U.S. at 396, 102 S.Ct. at 717. Private parties in Sumter County then instituted suit, and on June 21, 1978, the scheduled at-large elections for County Council were enjoined by a District Court in *Blanding v. DuBose*, No. 78–883 (D.S.C. June 22, 1978) (Defendants' Ex. C). In November 1978, the County went ahead with a planned referendum, and a majority of voters in Sumter County approved an at-large method of election for County Council, despite the Attorney General's 1976 objection.

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[1] *Compare* Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 18, 1982) at 17–19 *with* an Amended Memorandum (Oct. 27, 1982) at 17.

[2] *Blanding* had been consolidated in the three-judge District Court in South Carolina with another action involving the same subject matter as *Blanding* and the same parties as in the case now at hand. *See United States v. County Council of Sumter County*, No. 78–883 (D.S.C.), Exs. A, B & C to Defendants' Motion for Summary Judgment (Oct. 1, 1982). The government's appeal to the Supreme Court evidently was not perfected.

[3] Upon application by the plaintiffs in *Blanding*, the South Carolina District Court enjoined the at-large elections scheduled in 1978, *see* Defendants' Motion for Summary Judgment (Oct. 1, 1982), Ex. C, and County Council elections evidently have not been held in Sumter County since that time.

[4] The U.S. Attorney General's letter of August 28, 1975, to the South Carolina Attorney General with respect to the Home Rule Act had stated that such an "assignment of such forms of government also constitutes a change which is subject to preclearance requirements of the Voting Rights Act of 1965." Plaintiffs' Motion for Summary Judgment (Oct. 4, 1982) Ex. Q.

In 1981, the defendants in *Blanding*, including E.M. DuBose, one of the plaintiffs here, won a declaratory judgment from a three-judge District Court in South Carolina that the County had obtained preclearance from the Attorney General for at-large elections in June 1979, when the County had sent a letter to him reporting that the 1978 referendum had approved at-large council elections for Sumter County, and the Attorney General had failed to respond until September of that year, more than 60 days after receiving the letter. The District Court stated that the 1978 county referendum had approved an election method different from that in effect on November 1, 1964, and that the 1979 letter reporting its results was a request for preclearance. The District Court concluded that the Attorney General's failure to respond within 60 days as required by the Act constituted preclearance of the change by default. 509 F.Supp. at 1336–37. On appeal, the Supreme Court reversed, holding that the 1979 letter had been a request for reconsideration of the Attorney General's 1976 refusal to preclear the change, and was thus not subject to the 60-day requirement. *Blanding v. DuBose*, 454 U.S. at 399–401, 102 S.Ct. at 719.

Having failed to persuade the Attorney General to reconsider his 1976 refusal or to persuade the Supreme Court that the Attorney General had precleared the at-large method by default in 1979, plaintiffs now invoke the alternate remedy available to them under Section 5: seeking a declaratory judgment from this Court that the at-large election method of electing the county's governing body authorized for Sumter County by the General Assembly and the 1978 county referendum is not a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," or if it is, that it either has been precleared or "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. The complaint is in seven counts. We address them in order.

A

Count I alleges that the at-large method of election did not establish a "practice or procedure with respect to voting [in Sumter County] different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, and that it is therefore not subject to the requirements of the Voting Rights Act. Plaintiffs allege that before that date and until about 1968, the Sumter County Board of Commissioners, the local forerunners of the County Council, acted as a ministerial body only. It is a fact that that Board was appointed by the Governor of South Carolina on the recommendation of the Sumter County delegation to the South Carolina General Assembly. The legislative functions contemplated now for the County Council were allegedly performed prior to 1968 by the State Legislature which enacted local Sumter County bills on the recommendation of the Sumter County delegation. The plaintiffs' theory is that before November 1, 1964, the Sumter County delegation was the *de facto* governing body of Sumter County, and was elected at-large, and now the County Council would be the governing body and it would also be elected at-large. Since each body was or is to be elected at-large, plaintiffs argue that functionally there has been no method of election change that requires preclearance either by the Attorney General or this Court.

Plaintiffs' argument, although facile, simply ignores the Governor's *de jure* power before November 1, 1964, to appoint the county's governing body,[5] the Governor's *de jure* power to veto legislation (including local bills for Sumter and other counties) and the *de jure* power of the entire General

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[5] *Compare United States v. County Council of Charleston County, South Carolina*, 473 F.Supp. 641 (D.S.C.1979), where the pre-1964 County Commission was elected at-large.

Assembly to enact local laws for Sumter County different from those recommended by the Sumter County delegation. The plaintiffs' argument also ignores the legal fact that the Governor and the majority of the legislators who had the actual and legal powers to govern Sumter County were not elected at-large by the voters of Sumter County; they were elected by the voters of the entire State of South Carolina. It may be that their legal powers were subject, by some diplomatic arrangements and customs, to the political power of the Sumter County delegation which, in turn, had legal powers over the local affairs of other counties. But, at the very least, legal authority over the local affairs and choice of Commissioners of Sumter County was shared between the Governor (elected statewide), the General Assembly (elected from all counties, only one of which was Sumter), and the County Commissioners (appointed by the Governor and confirmed by the General Assembly on recommendation of the Sumter County delegation).

In 1967, the General Assembly passed Act No. 371 (later implemented by the Home Rule Act of 1975). By vesting the local County Council with all local legislative powers and making it locally elected, Act No. 371 stripped away the legal power theretofore vested in the Governor, the General Assembly and the Sumter County delegation over local Sumter County affairs. It eliminated the power of South Carolina voters outside Sumter County over that County's local affairs. The 1967 law released the locally chosen County Commissioners from those actual and legal restraints, and from out-of-county voter influences, and vested in them all these legal powers, subject only to the will of the voters of Sumter County, voting at-large.

[2, 3] It may be that plaintiffs could prove at trial their proffer that the Governor and the General Assembly universally deferred (without any trade-offs) from 1895 until 1968 to the Sumter County delegation with respect to the governance of Sumter County, and that the County Commissioners were uniformly mere ministerial agents of the delegation. But the laws of 1967 and 1975 which eliminated the legal powers of the Governor and the General Assembly, persons elected by voters outside of Sumter County, over local affairs and vested it exclusively in a County Council elected at-large by Sumter County voters is too vast a change to ignore. As plaintiffs' counsel conceded at oral argument a *de jure* change as well as a *de facto* change in voting requires preclearance under the Act. Hearing Transcript (Nov. 29, 1982) at 17–18.[6] We note that both the District Court and the Supreme Court in *Blanding v. DuBose* stated that the Home Rule Act of 1975 (which implemented Act No. 371 of 1967) changed the voting method involved in the selection of supervisors in Sumter County. 454 U.S. at 395, 102 S.Ct. at 716 ("this change"), 399, 102 S.Ct. at 718 ("change to at-large County Council elections"); *Blanding v. DuBose*, No. 78–764, mem. op. at 1 (D.S.C. June 22, 1978) (Defendant's Ex. C) ("The record in these cases establishes conclusively that in 1967 the procedure for electing members of the County Council for Sumter County, South Carolina, was changed by statute"). Without regard as to whether the change was good or bad for the people of Sumter County, or for the advantage or disadvantage of any racial or other group there, we are persuaded as a matter of law that the institution of at-large elections for the unfettered Sumter County local government required preclearance.

Plaintiffs invite our attention to an opinion of the Supreme Court of South Carolina holding that, under the South Carolina State Constitution in place on November 1, 1964, the General Assembly enacted "many local laws" so that "for all practical purposes the county government was controlled by the Acts of the General Assembly" and "the General Assembly was the governing body of the respective counties." *Duncan v. York County*, 267 S.C. 327, 334, 228 S.E.2d 92, 95 (1976). The Supreme Court of

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[6] JUDGE BORK: [I]s it enough to trigger Section V that there was a *de jure* change?

MR. BELL: As I understand the case, it's either a *de jure* change or a factual change.

South Carolina noted that "it is common knowledge that only legislative delegations from the counties affected concerned themselves with local bills." Thus, "[i]n addition to being state legislators, members of the Senate and of the House were effectually the county legislature and governing board." *Id.* The foregoing statement of local law does not alter the fact that during all the years prior to 1967 the *de facto* power of the county delegation with respect to local legislation was subject to the *de jure* power of the entire General Assembly and the Governor, just as its *de facto* power over appointments to the local Board of Commissioners was subject to the *de jure* power of the Governor. This *de jure* scheme was unarguably altered by the 1967 and 1975 statutes, and constitutes a change cognizable under Section 5 of the Act.[7] *Accord Chariton County (Georgia) Board of Ed. v. United States,* No. 78–0564 (D.D.C. July 27, 1978) *Horry County (South Carolina) v. United States,* 449 F.Supp. 990 at 995 (D.D.C.1978).

Defendants urge us to preclude plaintiffs from litigating the question of whether there was a change in voting methods requiring preclearance because they raised (or could have raised) and lost that contention in the District Court proceedings which culminated in the Supreme Court's decision in *Blanding v. DuBose, supra.* The undisputed facts of the shift of power from the Governor and the General Assembly to the new County Council require a ruling for defendants on the merits of Count I without resort to the technicalities of collateral estoppel.

B

Count II of the complaint, on which both parties seek summary judgment, alleges that the at-large method of election for Sumter County Council was precleared by the Attorney General's failure to object to two statutes (Act No. 1339 of 1968 and the Home Rule Act of 1975) relating to at-large elections for the Sumter County governing body. Undisputed facts show that plaintiffs' preclearance claim is without merit. These undisputed facts are that in 1967, Bill No. 371 established the seven-member Sumter County Commission, elected at-large. 1967 South Carolina Act No. 371. In 1968, Bill No. 1339 made a modest amendment to Act No. 371: it gave the Commission power to decide for itself which members would serve four year terms and which would serve two year terms, instead of directly specifying which members would so serve. Act No. 1339 did not affect the at-large method of election set forth in Act No. 371, and by itself the amendment might well not be a change in voting procedures requiring preclearance. For reasons which plaintiffs do not entirely explain, the South Carolina Attorney General did not submit Act No. 371 of 1967 to the Attorney General of the United States for preclearance, despite its broad-ranging effect on the organic relationship between the State Governor, the General Assembly, and the government of Sumter County. *See* pp. 700–701, *supra.* On July 29, 1968, an Assistant State Attorney General submitted to the U.S. Attorney General copies of seven acts passed by the General Assembly in its 1968 session; one of the seven was Act No. 1339.

[4, 5] The U.S. Attorney General precleared neither of these Acts. Act No. 371 was not submitted to him. The letter that submitted Act No. 1339 did not request preclearance nor mention any voting changes. Defendants' Ex. B. *Cf. City of Rome v. United States,* 446 U.S. 156, 169 n. 6, 100 S.Ct. 1548, 1557 n. 6, 64 L.Ed.2d 119 (1980). Nor did plaintiffs claim in the litigation culminating in *Blanding v. DuBose,* to which they were party, that the 1968 transmittal of Act No. 1339 had any preclearance implications. Nevertheless, plaintiffs now claim that the Attorney General's

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[7] This resolution of the issue makes it unnecessary for us to reach the factual dispute as to whether the County Board of Commissioners appointed by the Governor (on recommendation of the County delegation) as of November 1, 1964, was a cipher, as contended by plaintiffs, or exercised joint governing responsibility with the state legislative delegation, as urged by defendants.

nce about Bill No. 1339 effected pre-arance of the entire at-large election sys-. This claim is without merit. As the preme Court ruled in *United States v. ard of Commissioners of Sheffield, Ala.*, U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148), a political subdivision must state t it desires preclearance before it can m preclearance by silence. *Id.* at 136 98 S.Ct. at 981. That ruling applies here requires summary judgment for de-ndants on plaintiffs' claim that the Attor- General's silence about Act No. 1339 of precleared an at-large election system Sumter County.

[6] The other prong of plaintiffs' pre-arance claim relates to the Home Rule Act of 1975. 1975 S.C. Acts, No. 283, codi-ed as S.C. Code § 4–9–10 *et seq.* (1976 and upp.1980) (Plaintiffs' Ex. M). The 1975 Home Rule Act implemented Act No. 371 and its counterparts applicable to other uth Carolina counties. *See* pp. 699 , *supra.* When the Home Rule Act as submitted for preclearance, the Attor- General reserved his right to object to ny referenda or assignment results ad-ered to by local counties pursuant to that Act. When Sumter County submitted the 967 Act No. 371 and its local ordinance mplementing the Home Rule Act assign-ment of at-large elections to the Attorney eneral for preclearance in 1976, he "made timely objection to the at-large method of ection of the Council." *Blanding v. DuBose*, 454 U.S. at 396, 102 S.Ct. at 717. In 978, the Attorney General declined to ithdraw his objection to at-large elections or the council even if the election method ere approved by county referendum; evertheless, in November 1978, a county eferendum opted for the at-large election ethod originally contemplated by Act No. 71. In *Blanding*, the Supreme Court held hat a letter informing the Attorney General of the referendum results was only a equest for reconsideration of the Attorney eneral's 1976 objection, and that Sumter ounty's at-large method of election still ad not been precleared.

Despite the Supreme Court's ruling in *Blanding v. DuBose*, and the terms of the Attorney General's letter of August 28, 1975, *see* note 4, *supra*, plaintiffs persist in contending that the Attorney General's "attempt . . . to reserve his right to reconsider the assignment [of forms of government and methods of election] . . . was ineffective." Plaintiffs' Memorandum in Support of Motion for Summary Judgment (Oct. 4, 1982), at 16. They contend that the Home Rule Act itself established the form of government and method of election for each South Carolina county, including Sumter. According to plaintiffs, at that point, the Attorney General was obligated either to object or to forever hold his peace. They rely upon a statement of the South Carolina District Court made before the Supreme Court spoke in *Blanding v. DuBose* that the Attorney General was required to pass on "all components" of the Home Rule Act submission at the time of the submission; and that the subsequent passage of "adoptive ordinances merely implemented statutes which had been previously precleared." *United States v. County Council of Charleston County, South Carolina*, 473 F.Supp. 641, 646–47 (D.S.C.1979). Plaintiffs also rely upon a District Court's decision in *United States v. Georgia*, C.A. No. C76–1531A (N.D.Ga.1977), *aff'd. mem.*, 436 U.S. 941, 98 S.Ct. 2840, 56 L.Ed.2d 782 (1978). *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment (Oct. 4, 1982) at 16–17. Significantly, perhaps, this same October 4, 1982 Memorandum of plaintiffs fails to discuss or even cite the Supreme Court's opinions in *Blanding* or *Sheffield, supra.*

Defendants point out in response that when, in 1976, the Attorney General precleared the Home Rule Act, there was no way of knowing whether Sumter County would hold a referendum or not, or whether a referendum if held would select a new form of government or method of election and, if it did, which form or method it would adopt. Defendants point to regulations formulated by the Attorney General for the administration of Section 5 which adopt the traditional, common sense principle that he may refrain from reviewing voting changes prematurely. *See* 28 C.F.R. § 51.7 (1975); *cf.* 28 C.F.R. § 51.20 (1982). So here, defendants urge, the Attorney General precleared the "ripe" provisions of the Home Rule Act that transferred certain legal powers of the Governor and the General Assembly to local governments and created the right to hold referenda, while he reserved for future review those sequelae of the Home Rule Act which depended upon local decisions about whether to hold referenda and the results of those held.[8] *Cf. United States v. Board of Commissioners of Sheffield, Ala., supra.*

From the foregoing we are satisfied, again without reference to principles of collateral estoppel, that the Supreme Court's precedent of *Blanding v. DuBose*, the plain language of the Attorney General's letter of August 28, 1975, and ensuing events in Sumter County all combine to require that we reject plaintiffs' claim that the Attorney General precleared at-large elections when he reviewed the Home Rule Act of 1975. An accompanying Order therefore grants summary judgment to defendants on both issues raised by Count II of the complaint.

C

In Count III of their complaint, plaintiffs assert that, even if the at-large method of election did represent change in method requiring preclearance, and, even if the change were not precleared by the Attorney General, it passes muster under Section 5 of the Voting Rights Act. More specifically, Count III alleges that the changes effected pursuant to Act No. 371 and the Home Rule Act of 1975 as implemented by the 1978 referendum, gave all Sumter County voters an opportunity to elect the members of the county's governing body, "which opportunity no voter in Sumter County enjoyed on November 1, 1964," Amended Complaint (Aug. 23, 1982), ¶ 39; augmented the ability of black voters to participate in the political process and to vote for their county's governing body "which was previously appointed by the Governor of South Carolina," *id.* ¶ 40; does not abridge any right to vote on account of race, color, or otherwise; will not lead to "retrogression" in the position of racial minorities with respect to the effective exercise of their right to vote; and does not have the purpose or effect of diluting the voting strength of black voters in South Carolina.

Plaintiffs move only for a partial summary judgment on Count III: that the "change" does not have the effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.[9] Plaintiffs contend that before and after the change black voters voted in the election for Sumter County's governing body: before the change the legislative delegation was the governing body and was elected at-large; after the change the County Commission was the governing body and was also so elected. Secondly, plaintiffs support their motion with proffers of evidence that the "black community . . . did not object to the at-large method of election for members of the Commission, but in fact welcomed the opportunity to be able to vote for members of the Commission." Plaintiffs' Memorandum (Oct. 4, 1982), *supra*, at 23 Thirdly. plaintiffs urge that the pre-1964 Board of Commissioners was appointed and no black had any role in appointing a member of the Board, whereas the method at issue gives all voters, black and white, a role in the process. Since the black voters now have a right to vote for members of the County Commission which they did not previously have, defendants claim on authority of *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and *Chariton County Board of Ed. v. United States*, C.A. No. 78 0564 (D.D.C.1978), that the minority's ability to participate is actually increased.

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[8] Ignoring *Charleston County* (as did the Supreme Court in *Blanding v. DuBose*), defendants distinguish *United States v. Georgia, supra,* on the ground that the voting changes which the Attorney General purported to reserve for review in that case were all in place when he reviewed Georgia's Home Rule Act, whereas the Sumter County changes on which the Attorney General reserved judgment were uncertain and yet to take effect when he ruled on part of South Carolina Home Rule Act and reserved on other parts. Amended Memorandum of the United States in Opposition to Summary Judgment (Oct. 27, 1982) at 13–14. This appears correct to the Court.

[9] Defendants make no cross-motion with respect to Count III and contend a trial is necessary on that count as a whole.

Defendants point out that plaintiffs would test for retrogression by comparing the role of black voters before 1967 with their role now, even though plaintiffs sought no preclearance in 1967 and the matter is only coming to issue in 1983. Defendants contend that retrogression must be tested by examining how the appointive system used prior to 1967 would operate *today* as compared to how an at-large system in place *today* would operate. Defendants refer us for guidance to the Supreme Court's decision in *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). There, as here, the local jurisdiction had delayed the preclearance process, in that case with respect to several annexations to municipality of Rome, Georgia. The Supreme Court endorsed the procedure, once the case finally came to litigation, of responding "to the realities of a situation as they exist at the time of decision." *City of Rome v. United States*, 472 F.Supp. 221, 247 (D.D.C.1979), *aff'd.*, 446 U.S. 156, 186, 100 S.Ct. 1548, 1566, 64 L.Ed.2d 119 (1980).

[7] In traversing the plaintiffs' motion, defendants proffer deposition testimony from qualified political historians and local South Carolina political figures that if an appointive system were operative today at least two black persons would be serving on the county's governing board, two more than now serve. We agree with defendants and *City of Rome* that we should consider a comparison of the appointive and at-large methods in the context of the present. Accordingly, the defendants' proffer raises an issue of fact about retrogression which cannot be resolved without an evidentiary hearing.

In addition, defendants originally contended that even if the change from the appointive method which previously obtained to the current at-large system were not demonstrably retrogressive, defendants are entitled to an opportunity to show that the changed method is itself discriminatory, and that plaintiffs have the burden of establishing that the at-large system does not violate section 2 of the Voting Rights Act.[10] Defendants subsequently have abandoned their contention that plaintiffs have an obligation to satisfy Section 2 requirements.[11] Defendants preserve, however, the contention that, according to *Beer*, even if a change is not retrogressive, it may not be precleared if it "discriminates on the basis of race or color so as to violate the Constitution." *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976); *see Busbee v. Smith*, 549 F. Supp. 494 (D.D.C.1982). *Compare* Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 18, 1982) at 17 n. 7, *with* Amended Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 27, 1982) at 17. In support of their amended opposition argument that the new method is unconstitutionally discriminatory, defendants proffer substantially the same evidence that they originally had proffered in support of their Section 2 argument: e.g., expert testimony concerning the historical evidence of racial discrimination in South Carolina governments (including Sumter County's); the purpose and effect of the institution of an at-large voting system in Sumter County; alleged racial polarization of voting in the county; and difficulties encountered by blacks seeking political support in Sumter County at-large, as distinguished from in single member districts. Defendants' Amended Memorandum, *supra,* at 19–22. Defendants suggest that the retrogression, purpose and effect questions are inextricably intertwined, that decision on all of these issues should be postponed until after the trial on the merits, and that therefore plaintiffs' motion for partial summary judgment on retrogression should be denied.

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[10] The Voting Rights Act Amendments of 1982, Pub.L. No. 97 205, 96 Stat. 131, amended Section 2 of the Act to read that

> No voting . . . practice or procedure shall be imposed or applied . . . in a manner that results in a denial or abridgement of the right . . . to vote.

See 96 Stat. at 134. The Senate Report on the 1982 Amendments stated that by amending Section 2, "it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S.Rep. No. 97 417, 97th Cong., 2d Sess. (May 25, 1982) at 12 n. 31, *reprinted at* 1982 U.S. Code Cong. & Ad.News 177, 189 n. 31. Defendant United States has argued in its Reply Brief to the Supreme Court in *City of Lockhart v. United States & Cano*, No. 81-802, (Oct. 1982) that "[w]hether . . . the 'results' standard of Section 2 can properly be imported into Section 5" should be determined "in the first instance" by a District Court. *Id.* at 4 (filed in this action together with Defendants' Amended Memorandum, Oct. 27, 1982).

[11] This argument will apparently be preserved, however, by the intervenors in this action whose petition to intervene is granted today in a separate Memorandum and Order.

We agree that decision on all of these questions depends upon facts which should be developed at trial. Accordingly, we will follow the example of our colleagues in *Busbee v. Smith, supra,* to the extent of reserving resolution of these issues until after trial. In addition, a separate Order filed today will grant the motion to intervene filed by interested black voters of Sumter County thereby preserving the Section 2 argument now raised by them and permitting them to cross-examine witnesses and possibly adduce rebuttal evidence.

D

[8, 9] Count IV of the complaint alleges that the Attorney General will object to any method of election other than a single-member district method, and that such a method would dilute the voting strength of black voters in Sumter County and deny and abridge their right to vote in violation of Sections 2 and 5 of the Voting Rights Act and the First and Fifteenth Amendments of the Constitution. Cross-motions for summary judgment dispute whether we can, or should, anticipate in this proceeding the position that the Attorney General would take, if we later invalidate the at-large election method at issue here. As defendants point out, however, we have no authority either to review, or to preview decisions of the Attorney General under Section 5. Defendants' Motion for Summary Judgment (Oct. 1, 1982) pp. 8–9, ¶ 9; see *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). Plaintiffs seek a declaratory judgment in the nature of an advisory opinion with respect to a matter over which we have no jurisdiction. Even if the Attorney General's intention were as alleged,[12] it is not within our power to anticipate or rule on it; this Court's role under Section 5 of the Act is to examine the change *de novo* as an alternative to the Attorney General's decision regarding preclearance. Accordingly, the accompanying Order will deny plaintiffs' motion for summary judgment on Count IV and grant defendants' motion thereon.

E

In Count V, plaintiffs claim that defendants' refusal to preclear the method of election for which the individual plaintiffs voted in the 1978 referendum denied and impaired their constitutional right to vote and the similar right of all of the other citizens who voted in the 1978 referendum for the at-large system, and effectively denied their rights to vote in scheduled at-large elections pursuant to the Home Rule Act. Plaintiffs invoke the First, Fifth, Ninth and Tenth Amendments, as well as Section 17 of the Voting Rights Act.

Again, in Count V, the plaintiffs are challenging the failure of the Attorney General to preclear the at-large method of election for Sumter County. For reasons already stated, our role must be limited to *de novo* consideration of whether the method of election violates rights protected by the Voting Rights Act or the Constitution. We cannot sit in judgment here upon whether the Attorney General's refusal to preclear violated rights asserted by plaintiffs. *See*

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[12] Defendants state that plaintiffs have misstated defendants' true position on this issue. Defendants' Motion for Summary Judgment (Oct. 1, 1982), p. 9, ¶ 9, and Ex. D.

Morris v. Gressette, supra; City of Rome v. United States, 450 F.Supp. 378, 380 82 (D.D.C.1978). Plaintiffs are not entitled to any declaratory judgment about the effect on them of defendants' refusal to grant Section 5 preclearance. The accompanying Order will grant defendants' motion for summary judgment on Count V.

F

Count VI is a rather bold demand that this Court in effect overrule decisions of the Supreme Court validating Congress's decision to apply the Voting Rights Act to some States and not to others. Since this issue has been resolved by the Supreme Court, plaintiffs may be raising it here to preserve it for reconsideration by the Supreme Court upon appeal. Our accompanying Order granting the defendants' motion for summary judgment on Count VI will accomplish this. *See City of Rome v. United States,* 472 F.Supp. 221, 235 (D.D.C.1979), *aff'd.,* 446 U.S. 156, 180, 100 S.Ct. 1548, 1563, 64 L.Ed.2d 119 (1980); *South Carolina v. Katzenbach,* 383 U.S. 301, 324–28, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966).

G

[10] Count VII of the complaint challenges the constitutionality of the 1982 amendments to Section 5 of the Voting Rights Act of 1965 on the ground that Congress failed to make current factual findings about the extent of voting registration in 1975 and 1982 comparable to the congressional findings made on this subject to justify the Voting Rights Act legislation enacted in 1965. With regard to Congress's 1975 extension of the Act, the Supreme Court has ruled that it was constitutionally accomplished. *City of Rome v. United States, supra,* 446 U.S. at 180, 100 S.Ct. at 1563. Defendants maintain, in effect, that the voting discrimination that justified the 1965 Act has been eliminated, at least in South Carolina and in Sumter County, so that the conditions found to exist in 1965 can no longer justify extending the regional requirements of the Voting Rights Act in 1982. Specifically, plaintiffs point to Section 4(b) of the Act which made the Act applicable to a state or political subdivision only if less than half of the state's or subdivision's voting population was registered to vote on November 1, 1964. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Oct. 18, 1982) at 51. Plaintiffs proffer without contradiction that while less than half of the voting populations of South Carolina and of Sumter County were registered to vote in 1964, on May 28, 1982, slightly more than half were registered. These circumstances, plaintiffs claim, distinguish the 1982 extension as applied to them from the circumstances relied upon in *South Carolina v. Katzenbach, supra,* to uphold the 1964 Act.

Defendants respond that voting practices in Sumter County have not changed so remarkably as to justify this Court's re-examination of the factual premise for Congress's decision to include the county in the category of political entities embraced by the Voting Rights Act as amended. Indeed, defendants point out that the Senate Judiciary Committee specifically mentioned Sumter County as a jurisdiction which had not yet complied with Section 5 as it was enacted in 1964. *See* S.Rep. No. 97–417, 97th Cong., 2nd Sess., p. 14 (May 25, 1982), *reprinted at* 1982 U.S.Code Cong. & Ad.News 177, 191. Obviously, the preclearance requirements of the original act and its 1982 amendment had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent. We are not persuaded that the difference between the background circumstances which prevailed in Sumter County in 1964 as related by plaintiffs in support of their motion and those obtaining today, justify our re-examination of the firm conclusions made by Congress in extending the Act,[13] and the Supreme Court in *City of Rome* and *South Carolina v. Katzenbach, supra,* in holding that the categories chosen by Congress were and are appropriate. Accordingly, plaintiffs' motion for summary judgment on Count VII will be denied, and defendants' will be granted. This ruling is without prejudice to reopening of the issue of the constitutionality of the 1982 amendments by the plaintiffs or by the Court, *sua sponte,* if the proof at trial should require reconsideration of this aspect of the case.

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[13] We note that both Houses of the 97th Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982. *See, e.g.,* S.Rep. No. 97–417, 97th Cong., 2d Sess. (May 25, 1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 177–410; H.R.Rep. No. 97–227, 97th Cong., 1st Sess. (Sept. 15, 1981); 128 Cong.Rec., Nos.

Douglas GATES, etc., Plaintiff,

v.

Michael MONTALBANO, Defendant.

No. 82 C 1269.

United States District Court,
N.D. Illinois, E.D.

Jan. 10, 1983.

Suit was brought by administrator of decedent's estate claiming that police officer's fatal shooting of decedent violated decedent's constitutional rights. On officer's motion to dismiss, the District Court, Shadur, J., 550 F.Supp. 81, found wrongful death claim was barred, and administrator moved for reconsideration. The District Court, Shadur, J., held that wrongful death claim arising out of fatal shooting of victim by police officer was barred where it was not brought within two years as specified in Illinois Wrongful Death Act.

Motion denied.

Death ⇐38

Wrongful death claim arising out of fatal shooting of victim by police officer was barred where it was not brought within two years as specified in Illinois Wrongful Death Act. Ill.Rev.Stat.1981, ch. 83, ¶ 15.

Janette C. Wilson, Wilson, Howard, P.C., Chicago, Ill., for plaintiff.

William W. Kurnik, Judge, Kurnik & Knight, Ltd., Park Ridge, Ill., for defendant.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Douglas Gates ("Administrator Gates"), Administrator of the Estate of Waymon Gates ("Gates"), initially sued several defendants under 42 U.S.C. §§ 1983 and 1985, claiming the fatal shooting of Gates by City of Dwight Police Officer Michael Montalbano ("Montalbano") was without probable cause and a violation of Gates's constitutional rights. After the other defendants had been dismissed for other reasons, Montalbano moved to dismiss the complaint (filed some three years after the cause of action accrued) on limitations grounds. In *Gates v. Montalbano,* 550 F.Supp. 81 (N.D. Ill.1982) ("Opinion I") this Court dismissed the wrongful death claim of Gates's next of kin but denied dismissal as to Gates's own claim (which had survived his death and devolved upon Administrator Gates).

Administrator Gates has now moved for reconsideration of Opinion I's dismissal of the wrongful death claim.[1] For the reasons stated in this memorandum opinion and order, his motion is denied.

Opinion I

Opinion I found *Beard v. Robinson,* 563 F.2d 331, 334–38 (7th Cir.1977) dispositive as to Gates's own civil rights claim. *Beard*

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74 77 (daily eds. June 14–18, 1982) (Senate); 128 Cong.Rec. H3839–H3846 (daily ed. June 23, 1982) & 127 Cong.Rec. H6938–H7011 (daily ed. Oct. 5, 1981) (House).

[1] As Opinion I pointed out, 550 F.Supp. at 82, Administrator Gates had not complied with the briefing schedule set by this Court on Montalbano's motion, so that the Court had to review the legal questions on its own. Apparently neither Montalbano's motion nor notice of the Court's order was received by Administrator Gates's counsel, who had moved offices since filing this action.

meet the case or controversy requirement. *Valley Forge Christian College v. American United, etc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980). As in *Duffy v. Quattrocchi*, 576 F.Supp. 336, 342 (D.R.I.1983), "(t)he plaintiff's pruritis cannot be scratched by the federal judiciary in the absence of a live controversy." And second, there is a failure to plead with the requisite specificity. *See O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 676–77, 38 L.Ed.2d 674 (1974); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir.1979) (Title VII); *Black v. Brown University*, 555 F.Supp. 880, 886 (D.R.I.1983).

[2] As to the conditions attendant upon the plaintiff's confinement, none of the allegations of harm or deprivation appear facially to sink to the level of constitutional violations—a level which must be met to confer jurisdiction on this court. *Procunier v. Martinez*, 416 U.S. 396, 404–05, 94 S.Ct. 1800, 1807–08, 40 L.Ed.2d 224 (1974). And in any event, Chase is part of the class for whose benefit suit has long since been brought in this court to insure that conditions at the ACI are no worse than the minimum level permissible under the Eighth Amendment.[1] That case remains pending, and is a more apt forum for a generalized complaint of the type noted by this plaintiff. It would defeat the salutary purposes of Fed.R.Civ.P. 23 to permit Chase to attempt collaterally to traverse the same ground in an individual action.

The prisoner's complaint as to interference with his First Amendment rights is far too attenuated to be swallowed whole. Members of the plaintiff's faith are not, for aught that appears, treated better or worse than others who dine (not by choice) at the HSC. And, some effort has apparently been made, to the extent feasible, to honor valid sectarian dietary demands.

At bottom, Chase's action presents the flip side of a familiar aphoristic coin: if the way to a man's heart lies through his stomach, then so does the way to his bile. But, prison life cannot be modeled after a religious retreat. Incarceration, after all, itself impedes the exercise of a variety of freedoms—as well it should. The Constitution requires that correctional facilities meet certain minimum standards of decency, wholesomeness, cleanliness and the like—not that they cater to the individual preference of each inmate or that institutional cuisine be presented and served in a manner which Guide Michelin would applaud. A jail is, when all is said and done, a penal institution maintained for the purpose of imprisoning those who have committed wrongs against society and thus are receiving their just desserts; it is neither a country club, nor a three-star bistro. The applicable criteria must be judged accordingly.

Chase's complaint is not judicially digestible in the form presented. Consonant with the foregoing, the action must be, and it hereby is, dismissed.

So ordered.

COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, et al., Plaintiffs,

v.

UNITED STATES of America, et al., Defendants,

Larry Blanding, et al., Defendants-Intervenors.

Civ. A. No. 82–0912.

United States District Court,
District of Columbia.

May 25, 1984.

In a Voting Rights Act case, a three-judge panel of the District Court held that at-large system for electing council members in a South Carolina County violated Voting Rights where county officials failed to prove that the at-large election system would not lead to a retrogression in position of racial minorities with respect to their effective exercise of the electoral franchise and also failed to disprove that a discriminatory purpose was present as a motivating factor among other legitimate nondiscriminatory ones.

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[1] Judge Pettine specifically retained jurisdiction in *Palmigiano v. Garrahy*, 443 F.Supp. 956, 990 (D.R.I.1977).

Order in accordance with opinion.

Case denied.

Counties 🔑38

At-large system for electing council members in a South Carolina County violated Voting Rights where county officials failed to prove that the at-large election system would not lead to a retrogression in position of racial minorities with respect to their effective exercise of the electoral franchise and also failed to disprove that a discriminatory purpose was present as a motivating factor among other legitimate nondiscriminatory ones. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

Joseph W. Dorn, Kilpatrick & Cody, Washington, D.C., Terrell Glenn, M. Elizabeth Crum, McNair, Glenn, Konduros, Corley, Singletary, Porter & Dibble, P.A., Columbia, S.C., Howard P. King, Bryan, Bahnmuller, King, Goldman & McElveen, Sumter, S.C., for plaintiffs.

Gerald W. Jones, Paul F. Hancock, J. Gerald Hebert, Thomas G. Snow, Attys., Civ. Rights Div., Dept. of Justice, Washington, D.C., for defendants.

Armand Derfner, Washington, D.C., Laughlin McDonald, Atlanta, Ga., Herbert Buhl, II, Columbia, S.C., for defendants-intervenors.

Before BORK, Circuit Judge, and PARKER and OBERDORFER, District Judges.

PER CURIAM:

We are concerned that because this and related proceedings have been so protracted and, more recently, because of the "exigencies of judicial deliberation," *Beer v. United States*, 374 F.Supp. 357, 360 (D.D.C.1974), elections have not been held in Sumter County for some time. Although this court is not yet ready to issue its full opinion and findings of fact, we have agreed upon a disposition. Rather than permit the current situation to continue, with no elections being held, we have decided to issue an order stating our agreed disposition, with opinions and findings to follow.

We conclude that plaintiffs have failed to carry their burden of proof under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1982), and have failed to prove that Act 371, 1967 S.C. Acts 371 ("Act 371"), as amended and supplemented, has neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote.

The Supreme Court has said: "The fact that a covered jurisdiction adopted a new election practice after the effective date of the Voting Rights Act raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect." *McCain v. Lybrand*, — U.S. —, 104 S.Ct. 1037, 1049–50, 79 L.Ed.2d 271 (1984). Plaintiffs have failed to rebut the inferences that can be drawn from the following facts. Their application for a declaratory judgment must therefore be denied.

Summary Findings of Fact

1. South Carolina is a covered jurisdiction under the Voting Rights Act. The State has a history of segregation and pervasive racial discrimination which has been an important factor in detrimentally affecting the political participation of black South Carolinians. Until after the passage of the Voting Rights Act, South Carolina enacted and enforced a variety of laws that had the purpose and effect of denying the right to vote to its black citizens.

2. In 1980, Sumter County blacks constituted 44.1 percent of the population, 41.3 percent of the voting age population, and 42.1 percent of the registered voters.

3. Racial segregation was, and in large measure remains, the way of life in much of the private sector of Sumter County. Voting in Sumter County is racially polarized.

4. Before Act 371 was passed in 1967, members of the Sumter County Board of Commissioners, the County's governing body, were appointed by the Governor on recommendation of the local delegation to the State General Assembly (the "Legislative Delegation"). This Legislative Delegation *de facto* governed Sumter County, although the General Assembly of South Carolina possessed the *de jure* authority to enact local laws for Sumter County and the Governor had the *de jure* authority to veto all such legislation. Both the Governor and the Legislative Delegation were elected at-large.

5. Prior to 1967, the Governor followed the Legislative Delegation's recommendations concerning appointments to the County governing body. As long as this appointive system was in effect, no black person was appointed to Sumter County's Board of Commissioners.

6. In mid-1967, the Governor began appointing blacks to various offices.

7. During 1966–67, the South Carolina Senate was compelled to alter its apportionment system after its apportionment was held to violate the fourteenth amendment. This created the possibility that a black senate district would be created and the person elected from that district might control appointments to the Sumter County governing body.

8. In 1967, the South Carolina legislature passed Act 371. Act 371, which was formulated without significant input from Sumter County's black community, creates a seven-member Sumter County Council. Under Act 371, each Council member is elected at-large. The winners are determined by majority vote and voting is without regard to geographic location of residency. Thus, under this Act, the citizens of Sumter County—a majority of whom are white—elect all of the Council members.

9. Since the adoption and implementation in 1967 of the at-large system, only one black person (Phillip Rembert in 1974) has been elected to the Sumter County governing body.

10. There are three gubernatorially appointed boards in Sumter County; each has more than one black. Although the number of persons representing the black community who would be appointed by the Governor today if that system were in place is to a degree speculative, appointments by race to these boards is probative.

11. Regardless of the relative merits of comparing the appointive system with the at-large system, a fairly drawn single-member district election plan would give black voters of Sumter County a better opportunity to elect candidates of their choice to the Sumter County Council than the at-large system does. A fairly drawn single-member district plan for the Sumter County Council is more likely to allow black citizens to elect candidates of their choice in three of seven districts (or 42.8 percent of the representation on the Council).

12. Act 371 was not submitted to the Attorney General for preclearance pursuant to the Voting Rights Act. Thus, the at-large elections for the Sumter County Council held in 1968, 1970, 1972, 1974 and 1976 were in violation of section 5 of the Voting Rights Act.

13. In 1975, the South Carolina legislature passed the Home Rule Act, which permitted each of South Carolina's counties to hold a referendum to select one of five alternate forms of local government, and to decide whether county governors would be elected at-large or from single-member districts. The Sumter County Council did not call for a referendum, thus preserving the council administrator system derived from Act 371.

14. The reason the members of Sumter County Council gave for refusing to hold

the referendum, despite the objections of, among others, the Sumter County League of Women Voters, the Sumter County Republican Party, and the only black councilman, was "that they knew more or less what was best for the community." Plaintiffs have not effectively rebutted evidence that racial considerations influenced the Council's decision not to hold a referendum.

15. The white members of the Sumter County Council have at all times taken public positions favoring at-large elections. In an advisory referendum held in November 1978 on at-large elections, all the organizations in Sumter County that took a position on the referendum question favored single-member districts. The white councilmen continued to favor at-large districts and issued a position paper warning against "fragment[ing] county government into special interest groups." The white councilmembers also secretly prepared a full-page advertisement endorsing at-large elections which appeared in the *Sumter Daily Item* on the eve of the referendum. Plaintiffs have not effectively rebutted evidence that the advertisement was intended to make clear that the referendum question (at-large versus single-member districts) was essentially a racial one.

16. In the referendum election, the at-large system was preferred by the slight majority of 787 votes out of approximately 12,700 votes cast. Whites are estimated to have voted for at-large elections by a four to one margin; blacks are estimated to have voted nine to one against at-large elections.

17. Plaintiffs have failed to carry their burden of proving that the legislature did not pass Act 371 in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County, because the at-large method of voting may have diluted the value of the then-increasing voting strength of the black minority, may have prevented formation of a black majority senate district, and probably prevented appointment by the Governor of blacks to the Sumter County Council.

18. Plaintiffs have failed to carry their burden of proving that the at-large system was not maintained after 1967 for racially discriminatory purposes and with racially discriminatory effect.

Conclusions of Law

1. Although it may seem anomalous to some to apply a statute prohibiting any actions denying or abridging the "right to vote" where an appointive system has been replaced by an elective one, we are convinced that section 5 of the Voting Rights Act does apply to this case. We reach that conclusion for two reasons. First, the Supreme Court has strongly implied in *Blanding v. DuBose,* 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1982), that the Voting Rights Act applies *to this case.* Second, in *McCain v. Lybrand,* — U.S. —, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984), the Supreme Court applied the Voting Rights Act in a case like this, where an appointive system was replaced by an elective system. Also, in that decision the Supreme Court defined section 5 of the Voting Rights Act to cover "any election practices different from those in effect on November 1, 1964." *McCain v. Lybrand,* 104 S.Ct. at 1044.

2. In *Blanding v. DuBose,* the Supreme Court held that a letter the South Carolina Attorney General sent to the United States Justice Department reporting that the 1978 referendum had approved at-large council elections for Sumter County did not constitute a request for preclearance. The Supreme Court viewed the 1979 letter as a request for reconsideration. Thus, the Court held that the Attorney General's failure to respond within 60 days as required by the Act did not constitute preclearance of the change by default. If the Voting Rights Act does not apply to Sumter County's change to at-large council elections, the Supreme Court need not have decided whether the 1979 letter was a request for preclearance: preclearance would not be necessary.

3. In *McCain v. Lybrand,* the Supreme Court accepted a stipulation that an Act which replaced a Board of County Commis-

sioners that had two appointed members with a three-member County Council elected at-large was required to be submitted for preclearance. 104 S.Ct. at 1046 n. 17. The Court could not have accepted such a stipulation had the Voting Rights Act not applied, as the Act's applicability goes to the Court's subject matter jurisdiction, and parties cannot waive a defect in subject matter jurisdiction. Moreover, in *McCain* the Court expressly and repeatedly defined section 5 of the Voting Rights Act as follows:

> Section 5 of the Voting Rights Act of 1965 ... required a covered State or political subdivision desiring to implement any election practices different from those in effect on November 1, 1964 to obtain a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia holding that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" before the new practice could be implemented.

McCain v. Lybrand, 104 S.Ct. at 1044. It is beyond question that the change here is an election practice different from that in effect on November 1, 1964.

4. In order to rebut the inference of discriminatory effect, plaintiffs here were required to prove that the at-large election system in Sumter County will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976). They have not done this. Neither have they carried the heavy burden they bear as to the purpose of this change. Plaintiffs are required to demonstrate the absence of discriminatory purpose; and section 5 preclearance must be denied if the evidence fails to disprove that a discriminatory purpose was present as a motivating factor among other legitimate non-discriminatory ones. *City of Richmond v. United States,* 422 U.S. 358, 378, 95 S.Ct. 2296, 2307, 45 L.Ed.2d 245 (1975). The evidence plaintiffs have adduced does not do this.

5. Since we find that section 5 of the Voting Rights Act applies, and that plaintiffs have failed to prove that the proposed change is not retrogressive, we need not reach the section 2 issues in this case.

6. Defendant-intervenors have moved that this court order interim elections pending our decision on the merits of plaintiffs' case. They ask that we divide the County into seven single-member districts and that we modify the election schedule to allow for implementation of this interim plan. This motion is mooted by the order we issue today unless this order is stayed by the Supreme Court. There will be time enough to address the need for emergency relief if such a stay is granted. We therefore deny defendant-intervenors' motion for interim elections.

Nothing we say or do in this memorandum or the accompanying order is intended to preclude any party from seeking in another jurisdiction the relief sought by the emergency motion filed here by defendant-intervenors.

Kenneth JOHNSON, Plaintiff,

v.

The Honorable Richard ZURZ, Defendant.

and

Gregory MITCHELL, Plaintiff,

v.

The Honorable Richard V. ZURZ and Referee James Gill, Defendants.

Nos. C 82-1534A, C 82-1805.

United States District Court,
N.D. Ohio, E.D.

May 30, 1984.

Indigent filed a class action for injunctive and declaratory relief on his behalf and

ETHNIC EMPLOYEES OF the LIBRARY OF CONGRESS, et al., Appellants

v.

Daniel J. BOORSTIN, et al.

ETHNIC EMPLOYEES OF the LIBRARY OF CONGRESS, et al., Appellants

v.

Daniel J. BOORSTIN, Librarian of Congress.

Nos. 84-5092, 84-5093.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 16, 1984.

Decided Jan. 11, 1985.

Ethnic employees organization and several of its officers and members brought action against Librarian of Congress, Library of Congress and United States. The United States District Court for the District of Columbia, Norma Holloway Johnson, J., dismissed claims, and organization appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) claim preclusion did not bar other organization members or organization from litigating constitutional issues which two organization officers previously unsuccessfully asserted; (2) claim that defendants violated Civil Rights Act by denying organization privileges granted to other recognized employee organizations was properly dismissed for failure to exhaust administrative remedies; (3) constitutional claims which merely restated claims cognizable under Title VII were properly dismissed; and (4) direct proof of Library's discriminatory motive was not required element of organization's prima facie Title VII case.

Affirmed in part; reversed in part and remanded.

1. Judgment 🔑678(2), 707

Persons who are not parties to action ordinarily are not bound by judgment in action; nonparties to action are in "privity" with party, and therefore bound by judgment, only when relationship between one or more persons is such that judgment involving one of them may justly be conclusive upon others, although those others were not parties to lawsuit.

2. Judgment 🔑949(4)

Although employee organization officers included among their allegations in earlier action some assertions that they were discriminated against as officers of organization, officers' complaint, alleging civil rights violations, fairly read, did not disclose that officers brought action on behalf of organization, and thus, claim preclusion did not bar organization's civil rights violation claims in subsequent action. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e-16; U.S.C.A. Const. Amends. 1, 5.

3. Civil Rights 🔑32(1)

Employee organization neither exhausted its administrative remedies nor offered any legally adequate excuse for its failure to do so, prior to bringing action against Library of Congress, et alia, where even assuming that equal opportunity program coordinator told members that he would not receive discrimination complaints, Library's regulations and its apparent past practice gave members and organization ample reason to understand that coordinator's position did not represent Library policy, but nonetheless, organization did not submit administrative complaint or even protest in writing. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e-16.

4. Civil Rights 🔑13.12(3)

Constitutional claims by federal employee organization against Library of Congress that simply restated claims of racial, ethnic, or other discrimination cognizable under Title VII, or claims of retaliation for invocation of Title VII rights, were properly dismissed. Civil Rights Act of 1964, § 717, as amended, 42 U.S.C.A. § 2000e–16.

5. Civil Rights ⇐12.3

Assertion that Library of Congress punished employee organization and its members for their constitutionally protected criticism of Library policies and that Library required disclosure of organization's membership as condition of official recognition, and that organization members had some due process right to continue recognition of their organization, fell outside scope of Title VII, and thus, were not required to be dismissed as employment discrimination claims actionable only under Title VII. U.S.C.A. Const.Amends. 1, 5; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6. Administrative Law and Procedure ⇐5

Library of Congress is not "agency" under Administrative Procedure Act. 5 U.S.C.A. § 551(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⇐43

Direct proof of discriminatory motive on part of Library of Congress was not required element of employee organization's prima facie Title VII case; proof that organization was a protected group under Title VII, that it sought continued official recognition from Library and qualified for recognition under all uniformly enforced standards, but was denied recognition under disputed regulation, and that other applicants seeking continued recognition for their organizations who were not members of same protected group or groups were not required to conform to disputed regulation, would be sufficient to establish prima facie case, thus shifting burden of production to Library. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

8. Federal Civil Procedure ⇐2544, 2546

In ruling on motion for summary judgment, district court is required to determine whether movants showed absence of any genuinely disputed issue of material fact, rather than requiring plaintiff to establish prima facie case by preponderance of evidence.

Appeals from the United States District Court for the District of Columbia (Civil Action Nos. 80–2163 & 82–2264).

Joel D. Joseph, Washington, D.C., for appellants.

John W. Polk, Asst. U.S. Atty., Washington, D.C., with whom Joseph E. diGenova, U.S. Atty., Royce C. Lamberth, R. Craig Lawrence and Michael J. Ryan, Asst. U.S. Attys., and Lana Kay Jones, Asst. Gen. Counsel, Library of Congress, Washington, D.C., were on brief, for appellee.

Before WALD, EDWARDS and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

In these two consolidated cases, an organization called the Ethnic Employees of the Library of Congress (EELC) and several of its officers and members appeal from summary judgment dismissing claims against the Librarian of Congress, the Library of Congress, and the United States.[1]

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[1] In No. 84–5092, the EELC and seven officers and members sued the Librarian of Congress, the Library, and the United States. *See* Complaint, No. 84–5092, R. Item 1. In No. 84–5093, the EELC and two of its officers, who are also parties in No. 84–5092, sued the Librarian of Congress. *See* Complaint, No. 84–5093, R. Item 1. All plaintiffs in both actions have appealed.

In its first action, No. 84–5092, the EELC alleged that the Library violated section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16, and the first and fifth amendments to the Constitution by denying the EELC privileges granted to other recognized employee organizations. The district court held that because two EELC officers unsuccessfully asserted constitutional claims based on similar discrimination in a previous lawsuit, claim preclusion barred other EELC members and the organization itself from litigating the constitutional issues in this case. The district court then dismissed the Title VII claims for failure to exhaust administrative remedies. *See Ethnic Employees v. Boorstin*, Civ. Nos. 80–2163 & 82–2264, slip op. at 4–5 (D.D.C. Dec. 20, 1983) [hereinafter cited as District Court Op.]. We find that claim preclusion does not bar the constitutional claims in No. 84–5092 and remand those claims for further proceedings. We affirm the district court's dismissal of the Title VII claims in that case.

The EELC's second action, No. 84–5093, was filed after the Library withdrew recognition of EELC as an official employee organization. The EELC alleged that the Library's decision discriminated on the basis of national origin in violation of Title VII, and also violated the first and fifth amendments. The district court dismissed the constitutional claims on the ground that Title VII is the exclusive remedy for charges of discrimination in federal employment. It then held that the EELC could not make out a prima facie case under Title VII. District Court Op. at 5–7. We find that Title VII is the exclusive remedy for some but not all of the EELC's constitutional claims, and we therefore affirm in part and reverse in part the district court's constitutional holding. We find in addition that the district court misstated the appropriate standard for determining, on a defendant's motion for summary judgment, whether a Title VII plaintiff may succeed at trial in establishing a prima facie case. We therefore vacate summary judgment on the Title VII claims in No. 84–5093 and remand those claims, together with the constitutional claims that may be maintained apart from Title VII, for further proceedings.

I. No. 84–5092

A. *Background*

The EELC is an organization of Library employees "dedicated to promoting non-discriminatory treatment of ethnic and racial minorities at the Library." Affidavit of George E. Perry ¶ 3, R. Item 7.[2] In 1973, George E. Perry, then an employee of the Library and an appellant in both of the cases before us today, founded the EELC. *Id.* ¶¶ 2–3. The Library agrees that from 1973 until approximately April of 1981, the EELC complied with Library of Congress Regulation [hereinafter cited as LCR] 2022–2 (1975), which governs the official recognition and conduct of cultural and social organizations composed of Library employees. Affidavit of Doris E. Pierce ¶ 6, R. Item 15, Exhibit 5.

However, the two principal officers of the EELC, George E. Perry and Howard R.L. Cook, have both been involved in numerous controversies with the Library administration, some of which related to activities they conducted in connection with the EELC. In 1974, Perry, the president of the EELC, was suspended without pay for ninety days based on various charges of misconduct, among them the authorship of a published letter that was highly critical of Library policies. *See* Affidavit of George E. Perry ¶ 4, R. Item 7. Perry alleges that the Library subsequently opened mail addressed to him as president of the EELC, unsuccessfully pressured him not to testify against the nomination of Daniel J. Boorstin as Librarian of Con-

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See Notice of Appeal, No. 84–5092, R. Item 22; Notice of Appeal, No. 84–5093, R. Item 12.

For brevity, we refer to appellants in both actions as "EELC," and to appellees in both actions as "the Library."

[2] Record citations in Part I and Part II of this opinion are to the record in No. 84–5092 and the record in No. 84–5093 respectively.

gress, and otherwise harrassed him. In 1977, the Library discharged Perry, in part for allegedly making false and malicious statements about another Library employee.

Cook, the vice president of the EELC, has been involved in similar controversies. Some of these have apparently centered on his activities on behalf of the EELC and the Black Employees of the Library of Congress (BELC), a separate employee organization not involved in these lawsuits.[3] Others centered on Cook's and Perry's individually expressed opposition to various Library actions and policies. In July of 1977, Cook was suspended without pay for allegedly making statements similar to those for which Perry was discharged.

Cook and Perry have previously brought two lawsuits concerning these events. One of these actions, brought in the United States Court of Claims against the United States, challenged the statutory and constitutional validity of the Library of Congress regulation under which Perry was discharged and Cook was suspended. Perry also argued that in any event, discharge was an unduly harsh punishment for his conduct. The court rejected these claims and granted summary judgment for the United States. *Cook v. United States*, No. 100–80C, mem. at 2, 5–6 (Ct.Cl. Mar. 13, 1981) (disposition reported at 652 F.2d 70), *cert. denied*, 454 U.S. 894, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981) [hereinafter cited as *Cook I*].

In February of 1979, Cook and Perry brought another action in the United States District Court for the District of Columbia against the Librarian of Congress. This action sought damages, rescission of the disciplinary measures imposed on Cook and Perry, and wide-ranging equitable relief. Among the many allegations of mistreatment and discrimination were some that described Library efforts to impede actions Cook and Perry took on behalf of the EELC and the BELC, and retaliation against Cook and Perry based on those actions. The district court dismissed the action on February 11, 1980. *Cook v. Boorstin*, Civ. No. 78–2312 (D.D.C. Feb. 11, 1980) [hereinafter cited as *Cook II*.]. It ruled that Title VII was the exclusive judicial remedy for claims of discrimination in federal employment, and the plaintiffs therefore could not assert claims under the first and fifth amendments. Because Cook and Perry were unwilling to proceed only on their Title VII claims, those claims were also dismissed. *Id.* This court dismissed Cook and Perry's appeal on the grounds that they had waived their Title VII claims, and that the judgment against them in the court of claims was res judicata as to their other statutory and constitutional claims. *See Cook v. Boorstin*, No. 80–1288 (D.C. Cir. Sept. 11, 1981) (disposition reported at 670 F.2d 1234).

The EELC, Perry, Cook, and five other members of the EELC brought the first of the consolidated actions involved in this appeal on August 22, 1980. *See* Complaint, R. Item 1. They asserted claims against the Librarian of Congress, the Library, and the United States under section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16, and the first and fifth amendments. The complaint alleged that the Library had attempted to gain access to the EELC's membership list, denied its request for office space, and refused it other services generally provided to recognized organizations. *See* Complaint ¶ 14, R. Item 1. The complaint also alleged that the Library refused the EELC's request for a dues checkoff system, *id.* ¶ 15; interfered with the relationship between the EELC and the BELC, *id.* ¶ 16; and took actions with the purpose and effect of suppressing criticism by EELC members of Library policies, *see id.* ¶¶ 24–26. Finally, the complaint asserted that "EELC members are deprived of the right to have the effective assistance of the organization in the processing of personnel grievances within the Library," *id.* ¶ 28, allegedly in violation of the fifth amendment.

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[3] According to documents filed by the appellants, Howard R.L. Cook is the executive director of the BELC, and George E. Perry is one of its officers. *See* Affidavit of George E. Perry ¶¶ 3–4, R. Item 7. The relationship between the BELC and the EELC was apparently among the sources of friction between the Library and the EELC. A letter from a Library officer to Perry commented that the BELC "had been a labor organization .... When the provisions of [former LCR 2022–2] were superseded by the issuance of LCR 2026, BELC unsuccessfully sought exclusive recognition in the representation election." Letter from Doris E. Pierce to George E. Perry at 2 (Apr. 29, 1980), R. Item 15, Exhibit 7.

The district court concluded that the EELC was in privity with the *Cook II* plaintiffs, and that the EELC's claims were the same, for purposes of claim preclusion, as those asserted in *Cook II.* It therefore held that res judicata barred the EELC's constitutional claims. The court then dismissed the Title VII claims for failure to exhaust administrative remedies. District Court Op. at 4–5.

B. *Preclusion of the Constitutional Claims*

[1] Persons who are not parties to an action ordinarily are not bound by the judgment in the action. *See* 1 Restatement of Judgments, Second § 34(3) (1981). Nonparties to an action are said to be in "privity" with a party and therefore bound by a judgment only when, under any of several related but distinct exceptions to the general rule, "the relationship between one or more persons is such that a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit." *Gil & Duffus Servs., Inc. v. Islam,* 675 F.2d 404, 405 (D.C.Cir.1982) (per curiam) (citation omitted).

There is no claim in this case that all EELC members are in "privity" with Cook and Perry "under the traditional definition of the term; they are not persons who 'claim[ ] an interest in the subject-matter affected by the judgment *through* or *under* one of the parties, *i.e.,* either by inheritance, succession, or purchase.' " *Id.* at 406 (quoting Comment, *Privity and Mutuality in the Doctrine of Res Judicata,* 35 Yale L.J. 607, 608 (1926)) (emphasis in original). Instead, the district court concluded that EELC members "had an undisclosed interest" in the suit Cook and Perry previously brought in the district court. District Court Op. at 4. We interpret this ruling to mean that Cook and Perry had in effect previously sued as representatives for EELC's members.[4]

The complaint in *Cook II,* however, does not suggest that Cook and Perry were suing in a representative capacity. Cook and Perry were the only plaintiffs of record, and that fact alone strongly suggests that the district court erred in finding that they acted in a representative capacity:

> The traditional representation rules begin with a showing that the prior action was brought by or against a party who was acting in a representative capacity. It is not alone enough that the party had a representative capacity, as for example a trustee of an express trust. If there is no indication in the pleadings or otherwise that the action involved the representative capacity, it must be treated as an individual action. As with other matters of modern pleading and procedure, however, it should be sufficient to show that the action was in fact tried and decided as one that involved the representative capacity of a party.

18 C. Wright, A. Miller & E. Cooper, 18 Federal Practice and Procedure § 4454 at 459 (1981) (footnote omitted).[5]

[2] We think that Cook and Perry's complaint, fairly read, does not disclose

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[4] In other contexts, the district court's phrase might be understood to mean that the EELC had controlled the earlier litigation, which could lead to the application of issue preclusion against it. *See, e.g., Montana v. United States,* 440 U.S. 147, 153–55, 99 S.Ct. 970, 973–74, 59 L.Ed.2d 210 (1979). However, the district court did not so find, and the record at the present stage of the proceedings would not appear to support such a conclusion.

[5] *See also* 1 Restatement of Judgments, Second § 36(1) (1982); *id.* comment b ("The essential question is whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others."); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.411[3.—1] at 417–18 (1984).

that they were suing on behalf of the EELC. It is true that the complaint does include, among its many allegations, some assertions that Cook and Perry were discriminated against as officers of the EELC.[6] Similarly, among the fifteen paragraphs specifying the relief requested appears a prayer "[t]hat the Library be ordered to refrain from its divers acts of harrassment, intimidation and obstruction of Plaintiffs and their organizations coincident with organizational activity." Complaint ¶ 12 at 20, *Cook II*, R. Item 12, Exhibit 3. But the allegations relating to the EELC in the complaint are clearly intended to describe part of a broader campaign of harrassment and discrimination that the Library allegedly undertook against Cook and Perry. To the extent that the Library's allegedly illegal acts against the EELC were directed at Cook and Perry personally, they could properly be complained of in their individual actions. Nor is there any sign in the record before us that the truncated proceedings in *Cook II* were conducted as though that case was a representative lawsuit. The district court's opinion treated Cook and Perry's sudden abandonment of their Title VII claims as a decision properly left entirely to them. That stance, while appropriate in an individual action, would be questionable in an action that determined the Title VII rights of all other EELC members as well. Similarly, this court's memorandum in *Cook II* plainly assumes that the lawsuit was in fact exactly what it purported to be in form: an action asserting claims by two individuals. *See Cook v. Boorstin*, No. 80–1288 (D.C.Cir. Sept. 11, 1984) (disposition reported at 670 F.2d 1234).[7]

Finally, we note that strong policy considerations support our reluctance to look beyond the gravamen of the complaint and the district court's opinion for isolated hints that Cook and Perry acted in a representative capacity. EELC members other than Cook and Perry were not protected by any of the procedural safeguards that are required in class actions. *See* Fed.R.Civ.P. 23. Holding *Cook II* to have been a de facto class action would thus risk serious inequity to EELC members who, even had they known of the lawsuit, would have had little reason to suppose that their rights were being adjudicated. Moreover, the rules governing the preclusive consequences of suits brought by an unincorporated association are quite complex, and may vary depending on whether the association brought suit as a jural entity in its own right or as a representative of its members' rights. *See* Fed.R.Civ.P. 17(b)(1) (unincorporated association may sue to enforce substantive federal right); Fed.R.Civ.P. 23.2 (suit by unincorporated association may proceed as class action); 1 Restatement of Judgments, Second § 35 & comment d (1982); *id.* reporter's note to comment d at 357 (authorities on res judicata effect of representative suit brought by unincorporated association are "in a state of profound confusion and discord"); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4456 (1981). The Library asks us to draw highly questionable inferences from scattered allegations in a complaint brought by two individuals; decide exactly what rights of the EELC and its members were at issue in the resulting "inferred" representational lawsuit; and then determine the preclusive consequences of that lawsuit for the case before us. We prefer the more straightforward course of reading the *Cook II* complaint to assert complaints only on behalf of the named plaintiffs.[8]

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[6] *See* Complaint ¶¶ 3, 5, 15(j), 24–28, 30(a), 31(a)–(b), 36, 44–45, 49–50, 73, 79, 81, 84, 87, *Cook II*, R. Item 12, Exhibit 3.

[7] The Library argues in this court, as it did in the district court, that *Cook I* as well as *Cook II* bars the EELC's constitutional claims in No. 84–5092. The opinion of the court of claims in *Cook I*, however, makes it absolutely plain that the court was dealing with nothing more than a challenge by two employees to disciplinary measures imposed by the Library. There is thus no basis for holding that Cook and Perry represented EELC in *Cook I*.

In addition, we note that the appellate holding in *Cook II* rested entirely on the preclusive effect of *Cook I*. To apply claim preclusion in this case would require us to rule that, despite this fact, the preclusive consequences of *Cook II* reach far beyond any reasonable view of the preclusive consequences of *Cook I*. The facts of this case do not require so anomalous a result.

C. *The Title VII Claims: Exhaustion of Administrative Remedies*

Section 717 of Title VII of the Civil Rights Act of 1964, which was added by section 11 of the Equal Employment Opportunity Act of 1972, Pub.L. No. 92–261, 86 Stat. 103, 111, expressly prohibits employment discrimination against employees of the Library of Congress on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e–16(a). Section 717(c) authorizes a Library employee to bring suit under Title VII after 30 days following notice of final action on an administrative complaint of discrimination, or after 180 days following filing of the administrative complaint, if no final action has been taken within that time. *See* 42 U.S.C. § 2000e–16(c); *Nordell v. Heckler*, 749 F.2d 47 (D.C. Cir.1984). As this court said in *Kizas v. Webster*, 707 F.2d 524 (D.C.Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984):

> Congress did not casually impose the requirement that a person charging violation of Title VII by a federal agency initiate his or her complaint with the agency. Nor is the requirement a technicality. Rather, it is part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel "primary responsibility" for maintaining nondiscrimination in employment.

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[8]
> A final major question posed by association representation goes to litigation that is conducted by some members rather than the association itself. For most cases, it should be clear that mere common membership does not create power in one member to represent others. Preclusion of other members is likely to be achieved, if at all, on the theory of virtual representation ....

18 C. Wright, A Miller & E. Cooper, Federal Practice and Procedure § 4456 at 493 (1981).

The doctrine of virtual representation has a highly uncertain scope, *see id.* § 4457 (1981); *cf.* 2 Restatement of Judgments, Second § 62 (1982) ("Conduct Inducing Reliance on an Adjudication"), and the parties have not discussed it in their briefs. Perhaps the broadest statement of the doctrine is in *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *appeal dismissed and cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975), in which the Fifth Circuit declared that "[u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Id.* at 719 (citations omitted). That court qualified this statement in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir.1978), which held that "[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." *Id.* at 1008; *cf. Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 97 & n. 50 (5th Cir.) (noting "inconsistent" and confusing character of doctrine), *cert. denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977). In general, cases in which courts have based preclusion on virtual representation have involved special factors such as "substantial elements of participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, or close relationships between the parties," such as that between family members. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4457 at 498–99 (1981) (footnotes omitted) (collecting cases); *see, e.g., United States v. Geophysical Corp.*, 732 F.2d 693, 697–98 (9th Cir.1984) (collaterally estopping limited partners and partnership based on previous litigation by general partner).

Even if we were to adopt an expansive view of virtual representation as the law of this circuit, we would be unwilling to hold that the interests of the *Cook II* plaintiffs were "closely aligned" with the interests of the EELC and its members in the present case in a way that justifies preclusion. As we discuss in the text, neither the pleadings in *Cook II*, *see Oneida Indian Nation v. New York*, 732 F.2d 261, 266 (2d Cir.1984), nor anything we know about the conduct of that litigation, *cf. Jackson v. Hayakawa*, 605 F.2d 1121, 1126 (9th Cir.1979), *cert. denied*, 445 U.S. 952, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980), nor anything we know about the factual relationship between the *Cook II* plaintiffs and other EELC members, *see Aerojet*, 511 F.2d at 719–20, suggests that the *Cook II* plaintiffs can fairly be regarded as acting on behalf of the EELC and all of its members. Moreover, any such holding would raise serious questions as to whether the *Cook II* plaintiffs adequately represented the EELC in their conduct of that litigation and, if not, whether the EELC and its members are nonetheless bound. *See* 1 Restatement of Judgments, Second § 42(1)(e) (1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4457 at 502 (1981).

Id. at 544 (quoting 42 U.S.C. § 2000e–16(e)) (citations omitted).

The district court dismissed the Title VII claims in No. 84–5092 for failure to exhaust administrative remedies. The court noted that sections 6D and 12 of LCR 2010–3.1 specifically provide that an organization may file a complaint of discrimination.[9] Cook and Perry submitted affidavits to the district court claiming that the coordinator of the equal opportunity program at the Library repeatedly told them that Library regulations do "not allow organizations to file complaints of discrimination concerning discrimination against the organization." Affidavit of Howard R.L. Cook ¶ 3, R. Item 9; *see also* Affidavit of George E. Perry ¶ 3, R. Item 9. The coordinator during the relevant time filed an affidavit stating that he had "no knowledge of having made" the statements attributed to him in Cook's and Perry's affidavits. Affidavit of Thomas C. Brackeen ¶ 4, R. Item 12, Exhibit 5. The Library also submitted a 1976 letter from the coordinator accepting a "third party" discrimination complaint filed by Cook, another person, and the BELC. Letter from Thomas C. Brackeen to James R. Barnett (May 6, 1976), R. Item 12, Exhibit 4. In the Library's view, the letter demonstrates that it does accept organizational complaints, and that Cook was aware of this policy. The district court evidently either disbelieved Cook's and Perry's affidavits, or regarded them as an insufficient excuse for the failure to file an administrative complaint.

In *Kizas*, this court commented that:

> Because Congress has unambiguously directed federal employment discrimination complainants to proceed first before the agency charged with discrimination, we have grave doubts whether any futility doctrine can be stretched to sanction court adjudication of a Title VII action when no party to the action has ever filed an initial charge with the agency.

707 F.2d at 544–45 (footnote omitted). Similarly, in *Siegel v. Kreps*, 654 F.2d 773 (D.C.Cir.1981), we rejected a federal employee's argument that his failure to file a timely administrative complaint of discrimination was excused by reasonable reliance on erroneous advice from a Civil Service Commission supervisory employee. The *Siegel* court disagreed with the employee's contention that, on the facts of that case, he justifiably relied on the erroneous advice allegedly given, but the court went on to note that:

> Even if appellant had established a justifiable reliance on [the supervisory employee's] alleged erroneous advice, he would, at most, be entitled to a waiver of the time limits for the initiation of a

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[9] District Court Op. at 5. Section 6D of LCR 2010–3.1 (1974) provides:

> If an allegation of discrimination is filed by a group of grievants reflecting an individual complaint which they have in common, and it otherwise satisfies the requirements of this section, it shall be accepted for processing under this Regulation as a single complaint, with a joint investigation and, if necessary, a joint hearing .... If the allegation filed by the group does not reflect an individual complaint which they have in common, it shall be treated as a third party allegation and processed under Section 12, below.

Section 12 of LCR 2010–3.1 (1974) provides in part:

> This Section shall apply to general allegations by organizations, or other third parties, of discrimination in personnel matters within the Library which are unrelated to an individual complaint of discrimination. These shall be considered third party allegations and shall be processed as follows:
>
> A. Such allegations shall be filed, in writing, directly with the Coordinator, who shall, upon accepting the same ... assign them to an Equal Opportunity Officer.
>
> B. In so filing, the organization or other third party shall state the allegations with sufficient specificity so that the Officer may fully investigate it. The Officer may require such additional specificity as necessary to proceed with the investigation.

Section 717(a) of Title VII, 42 U.S.C. § 2000e–16(a), protects "employees and applicants for employment" from illegal discrimination. Section 701(f), 42 U.S.C. § 2000e(f), defines "employee" as "an individual employed by an employer," with certain exceptions. In light of these provisions, we interpret the EELC to argue on behalf of its members that measures taken against the organization have resulted in prohibited discrimination against the members.

complaint with the administrative agency rather than to the right to institute a civil action. Congress intended that administrative agencies should have an opportunity to consider a federal employee's discrimination claim, because such a process promotes dispute resolution through accommodation rather than through litigation. While waiver of the time limits for initiating an administrative complaint through the administrative process ... might have been available to the appellant, he never requested such a waiver. Accordingly, we need not decide whether such a waiver, had it been requested, should have been granted.

Id. at 778 n. 14 (citations omitted).

[3] Here, as in *Siegel*, the Title VII complainant argues not that principles of equity excuse the failure to file a timely administrative complaint, but rather that we should entirely dispense with the requirement of an administrative complaint. *Cf. Bethel v. Jefferson*, 589 F.2d 631, 640–47 (D.C.Cir.1978). This we will not do on so slight an excuse as the facts of this case offer. Even assuming that the coordinator of the Library's equal opportunity program told Cook and Perry that he would not receive complaints of discrimination against an organization, the Library's regulations and its apparent past practice, of which Cook had personal experience, certainly gave Cook, Perry, and the EELC ample reason to understand that the coordinator's position did not represent Library policy. Nonetheless, the EELC did not actually submit an administrative complaint, or, so far as the record indicates, even protest in writing to the coordinator or to anyone else at the Library about the coordinator's alleged defiance of Library regulations. In these circumstances, we hold that the district court correctly concluded that the EELC had neither exhausted its administrative remedies nor offered any legally adequate excuse for its failure to do so. The Library was therefore entitled to summary judgment on the EELC's Title VII claims in No. 84–5092.

II. No. 84–5093

A. *Background*

The EELC's second lawsuit against the Library arises from the Library's decision to terminate its recognition of the EELC as an employee organization. On April 29, 1980, a staff relations officer of the Library of Congress formally informed Perry, as president of the EELC, that the Library was considering withdrawal of recognition from the organization. The Library's letter suggested that the EELC might have violated LCR 2022–2 by failing to conduct its affairs in an orderly manner and in accordance with democratic principles, and by infringing upon the exclusive rights of labor organizations.[10] The letter asked that Perry provide various items of information to assist the Library in deciding whether the EELC was entitled to continued recognition, including a membership list. *See* Letter from Doris E. Pierce to George Perry (Apr. 29, 1980), R. Item 7, Exhibit 7. A lively correspondence followed between the EELC and the Library, *see* R. Item 7, Exhibits 8–16, during which the Library explained that it required only a list of at least fifty EELC members on the Library staff and not a full membership list, *see* Letter from Doris E. Pierce to Joel D. Joseph (June 20, 1980), R. Item 7, Exhibit 8; Letter from Doris E. Pierce to George E. Perry at 2 (Mar. 26, 1981), R. Item 7, Exhibit 12. The EELC refused to supply such a list, claiming that the Library's effort to force partial disclosure of its membership list violated the first amendment. *See* Letter from George E. Perry to Doris E. Pierce at 1 (Apr. 5, 1981), R. Item 7, Exhibit 16. On September 16, 1981, the Director of Personnel at the Library informed the EELC that its recognition was withdrawn. He stated that:

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[10] Section 4A of LCR 2022–2 (1975) provides in part:

> When applying for recognition under this Regulation, an organization shall provide evidence that it meets the following criteria:
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> ....
>
> (2) it is organized and open to all staff members on a Library-wide basis, but is not a labor organization as defined by LCR 2026;
>
> ....
>
> (4) it is organized to conduct its affairs in an orderly manner and in accordance with democratic principles and practices;
>
> (5) it provides proof of membership of not less than 50 employees of the Library of Congress ....

Section 4C of LCR 2022–2 (1975) provides in part:

> The Director of Personnel ... may withdraw recognition of any organization when:
>
> (1) it fails to meet or to conform with the requirements of this Regulation, as set out in A. above; or
>
> (2) its activities infringe upon the exclusive functions and rights of labor organizations ....

> [The EELC has] continually sought to encroach upon rights granted exclusively to the recognized labor organizations and you have not satisfied Staff Relations that you have a "membership of not less than 50 employees of the Library of Congress," as required by LCR 2022-2, Section 4A(5). Scarce benefits are extended to organizations that meet the latter criterion on the basis that a substantial number of Library employees are being served by the organization. To give those benefits to an organization which we have no reason to believe holds annual membership meetings and consists of at least 50 Library staff members, would be a wasteful expenditure of the Library's resources.

Letter from Louis R. Mortimer to George E. Perry at 1 (Sept. 16, 1981), R. Item 1, Exhibit 1. Evidently the EELC administratively appealed this decision. *See* Complaint ¶ 11, R. Item 1. When that appeal failed, Cook, Perry, and the EELC filed an administrative complaint of discrimination on behalf of the EELC and its members. R. Item 1, Exhibit 2. The Library ultimately refused to accept the complaint because the EELC allegedly declined, after repeated requests, to support the complaint with specific enough facts to make an effective investigation possible.[11] *See* Letter from Donald C. Curran to Howard R.L. Cook (July 28, 1982), R. Item 1, Exhibit 3. The EELC sued the Library on August 11, 1982, asserting that the Library's version violated the first and fifth amendments and Title VII.

B. *The Constitutional Claims: The Effect of Brown v. General Services Administration*

The thrust of the EELC's first amendment argument is that the Library's withdrawal of recognition denied the EELC access to Library facilities "on an equal basis with other groups." Complaint ¶ 16, R. Item 1. This denial, the EELC alleged, was based upon the enforcement of "discriminatory and unconstitutional requirements," and had the purpose and effect of suppressing the EELC's criticisms of Library policies. *Id.* ¶¶ 17–18. The EELC also alleged that the Library had deprived EELC members of the effective assistance of their organization in the processing of personnel grievances, in purported contravention of the fifth amendment, *id.* ¶ 20; and that the Library had in some way denied the EELC equal protection of the laws, *id.* ¶ 21.

[4] The district court dismissed these claims, relying on *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), which held that for federal employees, "§ 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in employment." *Id.* at 835, 96 S.Ct. at 1969. *Brown* rested on the Court's view that

> The balance, completeness, and structural integrity of § 717 are inconsistent with the ... contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial remedies.

Id. at 832, 96 S.Ct. at 1967. The Court's discussion showed particular concern over the possibility that litigants might evade "the rigorous administrative exhaustion requirements and time limitations" of section 717 by recasting Title VII claims as claims under other statutes and so frustrate the legislative policies underlying Title VII. *See id.* at 833, 96 S.Ct. at 1968; *see also Great Am. Federal Savings & Loan Ass'n v. Novotsky,* 442 U.S. 366, 372–78, 99 S.Ct. 2345, 2349–52, 60 L.Ed.2d 957 (1979) (deprivation of right under Title VII cannot form basis for suit under 42 U.S.C. § 1985(3)). Allowing federal employees to recast their Title VII claims as constitutional claims would clearly threaten those same policies. For that reason, this circuit has repeatedly held that federal employees may not bring suit under the Constitution for employment discrimination that is actionable under Title VII.[12] Thus, the district court properly dismissed those constitutional claims that simply restated claims of racial, ethnic or other discrimination cognizable under Title VII, or claims of retaliation for the invocation of Title VII rights.[13]

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[11] *See* LCR 2010-3.1 § 12B (1974) (quoted *supra* note 9). The record does not contain details of the Library's request for further information and the responses, if any, of the EELC. We express no opinion on whether the EELC's filing of an administrative complaint, followed by its alleged failure to provide additional information, constituted adequate exhaustion of administrative remedies.

[5] However, not all of the EELC's constitutional claims could be asserted in a Title VII lawsuit. For example, the EELC alleges that the Library has punished the EELC and its members for their constitutionally protected criticisms of Library policies. *Cf., e.g., Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Clark v. Library of Congress,* 750 F.2d 89 at 94–95, (D.C.Cir. 1984). Similarly, the EELC claims that the Library cannot require disclosure of its membership as a condition of official recognition, *cf., e.g., Buckley v. Valeo,* 424 U.S. 1, 15, 24–25, 96 S.Ct. 612, 632, 637, 46 L.Ed.2d 659 (1976) (per curiam); *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 543–44, 83 S.Ct. 889, 892, 9 L.Ed.2d 929 (1963), and that EELC members have some "due process" right to the continued recognition of their organization. Whatever their merits may be, these assertions clearly fall outside the scope of Title VII, and thus could not form the basis for an administrative complaint under that statute. *See Porter v. Schweiker,* 692 F.2d 740 (11th Cir.1982) (federal employee not required to file administrative complaint before challenging discharge allegedly based on constitutionally protected criticisms of superior, since EEOC lacked power to investigate such a complaint). *Brown's* inquiry into the legislative history of section 717 focused on whether federal employees should be able to bring parallel actions under both Title VII and other provisions of federal law to redress the same basic injury. Nothing in that history even remotely suggests that Congress intended to prevent federal employees from suing their employers for constitutional violations against which Title VII provides no protection at all.[14] We intimate no view as to the

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[12] *See Kizas v. Webster,* 707 F.2d 524, 542 (D.C. Cir.1983) (fifth amendment claim based on race and sex discrimination barred), *cert. denied,* — U.S. —, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984); *Lawrence v. Staats,* 665 F.2d 1256, 1257, 1259 (D.C.Cir.1981) (fifth amendment claim based on race discrimination would be barred if § 717 applied); *Torre v. Barry,* 661 F.2d 1371, 1372, 1374 (D.C.Cir.1981) (fifth amendment claim based on race discrimination barred); *Hofer v. Campbell,* 581 F.2d 975, 976, 978 (D.C.Cir.1978) (fifth amendment claim based on national origin discrimination barred), *cert. denied,* 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979); *Richardson v. Wiley,* 569 F.2d 140, 141 (D.C.Cir. 1977) (per curiam) (fifth amendment claim based on race discrimination barred); *cf. Morris v. Washington Metropolitan Area Transit Auth.,* 702 F.2d 1037, 1039–40 (D.C.Cir.1983) (if employer in case were federal agency, first amendment claim for retaliatory discharge prohibited by Title VII would be barred).

[13] *See Porter v. Adams,* 639 F.2d 273, 277–78 (5th Cir.1981) (§ 2000e–16 prohibits retaliation against federal employee invoking Title VII rights).

[14] *See Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (discussed with respect to § 717 in *Davis v. Passman,* 442 U.S. 228, 247, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979)); *Ray v. Nimmo,* 704 F.2d 1480, 1485 (11th Cir.1983) (§ 717 does not foreclose federal employee's suit for deprivation of constitutionally protected property interest without due process); *Brosnahan v. Eckerd,* 435 F.Supp. 26, 28 (D.D.C.1977); *cf. Davis v. Passman,* 442 U.S.

likelihood that the EELC will prevail on constitutional claims for which Title VII could not provide a remedy. We do, however, hold that Congress did not intend for Title VII to displace those claims, and therefore remand them to the district court for further proceedings.

C. *The Title VII Claims*

[6, 7] Finally, the district court dismissed the EELC's Title VII claims based on the withdrawal of recognition for failure to establish a prima facie case.[15] The district court stated that:

> The Supreme Court characterized plaintiffs' burden of establishing a *prima facie* case of disparate treatment as "onerous." Under this "onerous" burden, plaintiffs must prove by a preponderance of the evidence that (1) they are members of a minority group; (2) the Library's request for a membership list of at least fifty members was not applied equally across the board, and (3) the discriminatory application of [the Library regulation requiring disclosure of at least fifty members who are Library employees] was done with a discriminatory motive. Plaintiffs have not met their burden as a prepondrance [sic] of the evidence does not establish that defendants enforced [the regulation] in a discriminatory manner with a discriminatory intent. Rather, it is apparent that defendants required all employee organizations to meet the requirements of LCR 2022–2.

District Court Op. at 6–7 (citations omitted). We believe this passage reflects a misunderstanding of both the elements of a prima facie case under Title VII and the appropriate allocation of burdens on a motion for summary judgment.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court commented that "[t]he burden of establishing a prima facie case of disparate treatment is *not* onerous." *Id.* at 253, 101 S.Ct. at 1093 (emphasis added). When a Title VII plaintiff alleges that an employer has discriminatorily refused to hire him, the Court has described the appropriate allocation of burdens as follows:

> A plaintiff alleging one instance of discrimination establishes a prima facie case justifying an inference of individual ra-

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228, 246–47, 99 S.Ct. 2264, 2277–78, 60 L.Ed.2d 846 (1979) (implied cause of action and damages remedy under fifth amendment against congressman not foreclosed by § 717, where § 717 does not cover congressional employee).

[15] The EELC also claimed that the Library's decision was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 702. In *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980), the Supreme Court noted that the Library of Congress is not an agency under the Freedom of Information Act. *Id.* at 145, 100 S.Ct. at 695; *see* 1 J. O'Reilly, Federal Information Disclosure § 5.02 at 5–5 (1984); *cf.* 36 C.F.R. § 703.1 (1984). As the definition of an agency in the Freedom of Information Act, 5 U.S.C. § 552(e), incorporates the definition of an agency under the Administrative Procedure Act, 5 U.S.C. § 551(1), it follows that the Library is not an agency under the Administrative Procedure Act. The district court was therefore correct in granting summary judgment for the Library on the claim under that act.

The EELC has pursued its claim that the Library applied LCR 2022–2 arbitrarily and capriciously only through the Administrative Procedure Act. But even if we were to consider a "nonstatutory" claim properly before us, *see generally* W. Gellhorn, C. Byse, P. Strauss, Administrative Law: Cases and Comments 919–23 (1979); L. Jaffe, Judicial Control of Administrative Action 152–96 (1965), we would still not be required to decide what review might conceivably be available to the EELC. *Cf. Ringer v. Mumford*, 355 F.Supp. 749 (D.D.C.1973) (enjoining Librarian of Congress from appointing Register of Copyrights without following Library regulations). The EELC has met the Library's efforts to prove even-handed enforcement of its regulation only with claims that the Library acted from motives prohibited by Title VII and the Constitution. We think that even assuming the EELC could assert an action for nonstatutory review that does not repeat the substance of its Title VII and constitutional claims, it has failed to raise a genuine issue of material fact that might allow that action to succeed. To the extent that an action for nonstatutory review would simply cover the same ground as the EELC's Title VII and constitutional claims, it is entirely superfluous in this case.

> cial discrimination by showing that he (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. Once these facts are established, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." [*Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094]. At that point, the presumption of discrimination "drops from the case," *id.*, at 255 n. 10 [101 S.Ct. at 1095 n. 10], and the District Court is in a position to decide the ultimate question in such a suit: whether the particular employment decision at issue was made on the basis of race. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision "remains at all times with the plaintiff," [*id.* at 253, 101 S.Ct. at 1093], and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. [711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)].

Cooper v. Federal Reserve Bank, — U.S. —, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984) (citations omitted). These standards can be readily adapted to the EELC's claim. We think that if EELC members could show that (1) they belong to a protected group under Title VII; (2) they sought continued official recognition from the Library for their organization and qualified for recognition under all uniformly enforced standards; (3) they were denied recognition under the disputed regulation; and (4) other applicants seeking continued recognition for their organizations who were not members of the same protected group or groups were not required to conform to the disputed regulation, the EELC members would have established a prima facie case under Title VII. *Cf. Krodel v. Young*, 748 F.2d 701, 709 (D.C.Cir.1984) (age discrimination claim applying Title VII framework); *Freeman v. Lewis*, 675 F.2d 398, 400 (D.C.Cir.1982) (stating Title VII prima facie burden in discriminatory refusal to promote claim); *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C.Cir.1981) (same).

The district court evidently required direct proof of discriminatory motive as an element of the plaintiff's prima facie case. This was error. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3, 103 S.Ct. 1478, 1481 n. 3, 75 L.Ed.2d 403 (1983); *Krodel*, 748 F.2d at 707–08 & nn. 4–5. Proof of the four elements sketched above would be sufficient to establish a prima facie case and thus shift the burden of production to the Library in the way *Cooper* describes.

[8] The district court also remarked that the plaintiffs had failed to establish a prima facie case by a preponderance of the evidence. District Court Op. at 7. In ruling on the Library's motion for summary judgment, however, the court was required to determine whether the movants had shown the absence of any genuinely disputed issue of material fact. *See, e.g., Williams v. Washington Area Metropolitan Transit Auth.*, 721 F.2d 1412, 1414–15 (D.C.Cir. 1983). Elsewhere in its opinion, the district court referred to the standards governing summary judgment motions, *see* District Court Op. at 2, and perhaps its reference to a preponderance of the evidence was merely a verbal slip. If the district court indeed found that the EELC had not established any genuinely disputed issue over the Library's allegedly discriminatory enforcement of LCR 2022-2, then it properly dismissed the Title VII claim under the framework sketched above.

If these Title VII claims were the only claims on appeal, we might feel constrained to review the factual record for ourselves to determine if such an issue exists. However, in light of our remand on other claims in these cases, we prefer to vacate the district court's holding on the Title VII claims in No. 84-5093 and allow it to reconsider its ruling. Our remand rests entirely on our misgivings about the district court's formulation of the relevant legal principles, and implies no view whatever as to the appropriate disposition of this case.

CONCLUSION

In No. 84-5092, we reverse the district court's ruling that claim preclusion prevents the EELC from asserting its constitutional claims, and remand those claims for further proceedings. We affirm summary judgment for the Library on the Title VII claims.

In No. 84-5093, we affirm summary judgment for the Library on the Administrative Procedure Act claim, and on those constitutional claims for which Title VII provides a sufficient remedy. We reverse summary judgment on the remaining constitutional claims and remand for further proceedings. We vacate summary judgment for the Library on the Title VII claims and remand for further proceedings.

So Ordered.

COUNCIL OF the SOUTHERN MOUNTAINS, INC., Petitioner,

v.

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION, et al., Respondents.

No. 84-1092.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 16, 1984.
Decided Jan. 15, 1985.

Coal miners' organization brought action challenging coal company's refusal to permit it to monitor safety training programs at company's mines. The Federal Mine Safety and Health Review Commission ruled in favor of coal company, and organization sought judicial review. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that coal company did not violate Federal Mine Safety and Health Act by refusing to allow nonemployee representatives of coal miners to monitor safety training programs on mine property.

Affirmed.

Mines and Minerals 🔑92.6

Mine operator did not violate Federal Mine Safety and Health Act of 1977 by refusing to allow nonemployee representatives of coal miners to monitor required safety training programs on mine property; representative's argument that it could not effectively exercise its statutory and regulatory rights without concomitant monitoring right was properly addressed to Secretary of Labor, rather than courts. Federal Coal Mine Health and Safety Act of 1969, §§ 105(c)(1), 115, as amended, 30 U.S.C.A. §§ 815(c)(1), 825.

Petition for Review of an Order of the Federal Mine Safety & Health Review Commission.

L. Thomas Galloway, Washington, D.C., for petitioner.

Jack W. Burtch, Jr., Richmond, Va., for respondents, Martin County Coal Corp. James A. Lastowka and L. Joseph Ferrara, Washington, D.C., entered appearances for respondent, Federal Mine Safety & Health Review Com'n.

Before WALD, EDWARDS and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

This case presents the question whether a mine operator violates section 105(c)(1) of the Federal Mine Safety and Health Act of

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK SUPPORTED THE RIGHTS OF WOMEN

1. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Bork's amicus brief argued that employment discrimination based on pregnancy violated Title VII of the Civil Rights Act of 1964. Six Justices rejected this argument. In 1978, Congress adopted Bork's position when it amended Title VII to prohibit discrimination on the basis of pregnancy.
(Amicus)

2. Vorchheimer v. Philadelphia, 430 U.S. 703 (1977), where the United States as amicus argued that single-sex schools are unconstitutional and illegal if not equivalent in the educational offerings, and said the Court should not reach the question whether such schools are unconstitutional even if educational offerings were equivalent. The Court was equally divided and issued no opinion.
(Amicus)

3. Corning Glass v. Brennan, 417 U.S. 188 (1974), a landmark "Equal Pay Act" case which ruled that men could not be paid more than women for similar jobs on different shifts.

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK SUPPORTED THE RIGHTS OF MINORITIES

1. Runyon v. McCrary, 427 U.S. 160 (1976), which affirmed that Section 1981 applied to racially discriminatory private contracts.
(Amicus)

2. Lau v. Nichols, 414 U.S. 563 (1974), which ruled that Title VI and possibly the 14th Amendment reached actions discriminatory in effect, even where the actions were not intentionally discriminatory.
(Amicus)

3. Fitzpatrick v. Bitzer, 427 U.S. 445 (1975). The United States, as amicus, successfully argued that the 14th Amendment effected a basic change in the constitutional relationship between state and national governments and that Section 5 of that Amendment gives Congress complete power to remedy violations of that Amendment, including the power to abrogate sovereign immunity.
(Amicus)

4. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which held that an employee may sue in court under Title VII employment discrimination statute even though the Union had lost on the issue of discrimination in arbitration.
(Amicus)

5. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), which made it significantly easier for plaintiffs to prove employment discrimination claims on the basis of a discriminatory "effects" test.
(Amicus)

6. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). As in Albemarle, Bork's amicus brief successfully urged the Supreme Court to make it significantly easier for plaintiffs to prove employment discrimination and receive full relief for such violations.
(Amicus)

7. Beer v. United States, 425 U.S. 130 (1976), Solicitor General Bork argued that although a new reapportionment plan increased minority voting strength, the plan nonetheless had a discriminatory "effect" because other proposed plans would have done more to increase the influence of minority voters. The Supreme Court (per Justice Stewart) (5-3) rejected Bork's expansive interpretation of the Voting Rights Act. Instead, the Court held that the Act was satisfied so long as the new electoral scheme did not further dilute the minority vote.

8. Washington v. Davis, 426 U.S. 229 (1976), Bork unsuccessfully argued that employment tests having a discriminatory "effect" violated Title VII.

9. Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court rejected Bork's argument that wholly race-neutral seniority systems violated Title VII if they perpetuated the effects of prior discrimination.

10. Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976), Bork argued that a school district which had already faithfully implemented a wide-spread busing plan could be required by a court to achieve a more perfect racial balance. The court disagreed, holding that the lower court's action directly contradicted Supreme Court precedent foreclosing the use of busing to achieve perfect racial balance.

11. United Jewish Organizations v. Carey, 430 U.S. 144 (1977), which held permissible under the 14th and 15th Amendment race-conscious electoral redistricting to enhance minority voting strength.

12. Virginia v. United States, 420 U.S. 901 (1975). In this case Bork successfully urged the Court to hold that the State of Virginia was not entitled to be relieved of the special burdens imposed by Section 5 of the Voting Rights Act.

Senator HATCH. I have provided a copy of that for Senator Metzenbaum, who had asked for it.

Well, Judge, it has been a long 4 days and I appreciate your patience. We have heard your 1971 Indiana Law Journal article repeatedly quoted, along with your other academic writings and speeches.

For years you were a professor. Now, let me ask you this. Are not professors paid to be provocative, to create interest by speculation and speculating on alternatives and innovations in the law?

Judge BORK. Yes, they are, Senator. But I must say that if professors are paid to be provocative and speculative, I was underpaid for what I did. [Laughter.]

Senator HATCH. I agree. But I think the country has benefited a great deal because of the proliferation of your writings and your other works. As a Judge you have said that you accept legal opinions. You were criticized as a professor in this particular case.

Now, as a judge you said you accept legal opinions. Some have brought out that now you are accepting some legal opinions that you have criticized.

Judge BORK. I accept them as settled law. I have not said that I agree with all of those opinions now, but they are settled law and as a judge that does it for me.

Senator HATCH. Most of the criticisms that we have found here have been because of your criticisms of opinions that you made while you were a professor; is that right?

Judge BORK. That is correct.

Senator HATCH. Or somebody in charge of professional duties such as a law firm, or even a Solicitor General. And I have not heard too many of your approaches criticized as Solicitor General, except for the firing of Archibald Cox.

What would happen if academics had to give the same respect to precedent as do judges?

Judge BORK. Well, I would think that it would dry up academic writing. Nobody wants to sit around and write articles and say, that is a wonderful opinion and that is another wonderful opinion. You usually only write about doctrines that are coming into the law which you think are wrong or questionable or at least require closer examination.

Some people go back and re-examine the rationale of *Marbury* v. *Madison,* which established judicial review in 1803. That is all right as an academic. I do not happen to do that. I happen to think *Marbury* v. *Madison* was correctly decided. But some people do do that.

But I cannot imagine anybody who did that, if he got on a court, saying he was going to overrule *Marbury* v. *Madison.* This just is not done.

Senator HATCH. On the flip side, what if all the judges were as free wheeling in these cases as academics are?

Judge BORK. Well, you would have a chaotic legal system, and you would also have, I think, a legal system that had become politicized.

Senator HATCH. Actually, I think the point that we are bringing out here is that there is a real difference in the roles that you have held through the years.

Judge **Bork**. There is a difference between a practitioner, which I was. There is a difference between that and a professor, which I was. There is a difference between that and the Solicitor General, which I was. And they are all different from being a judge.

Senator **Hatch**. Well, we have had some here criticize you for changing positions when in fact what you have really been doing is changing various roles in the legal practice or legal profession in our society. Yesterday we went through a rather lengthy discussion of how imminent a subversive speech must be before the first amendment protects it. Now, this is a technical line-drawing exercise, it seems to me, in the law.

Some judges and some cases draw the line in one place and some judges and some cases draw them in another.

Judge **Bork**. The Supreme Court has had three different positions on that issue over the years.

Senator **Hatch**. And academics from all sides have criticized those positions one way or the other.

Judge **Bork**. That is correct.

Senator **Hatch**. And it is actually the duty of the judge to draw varying lines. In other words, to protect the constitutional value that we are trying to protect. That is what judges do. Academics can sit back and criticize and find fault or sustain or find support for some of these viewpoints.

Judges do follow precedent. They follow a whole line founded years before and academics are constantly seeking for new lines—new ways of solving their conjectural approaches, new ways of maybe re-drawing the lines in ways in which they should not have been drawn in the first place. I think that is a fair statement. Do you feel that the distinction between judge and academic explains the distinctions between you as a professor and you as a judge—explain apparent inconsistencies, but in fact, may not even be inconsistent, but are merely changes in roles?

Judge **Bork**. I think it does, yes. No, that is right. I have not revisited many areas I have written about. If I did, I might well continue my philosophical criticism of those things, but that has nothing to do with the fact that they are law and, as a judge, I am not a philosopher. I am a judge.

Senator **Hatch**. Well, as a judge, will you continue to obey the rules of judging, regardless of your past professional views or professorial views?

Judge **Bork**. Of course, of course, and if I went back to being a professor, I would follow my professorial instincts, rather than what I did as a judge.

Senator **Hatch**. Well, I think your 5½ years on the bench have proven that to be true. In other words, based once again on the presumption that actions speak louder than words, I would like to just compare your actions, as a judge, with some of the words of your critics, as they have been raised over the last month or so. Have you ever, as an appellate judge, invalidated a civil rights statute of any sort?

Judge **Bork**. No, I have applied them. As Solicitor General, I never argued to invalidate one or ever cast doubt upon one.

Senator **Hatch**. Well, if you listen to your critics talk, you would believe that you had struck down every civil rights law you reviewed. In fact, during your tenure on the D.C. Circuit Court of Appeals, you have, in every instance, upheld civil rights laws, including title VII, the Equal Pay Act, the Voting Rights Act, and, I think, in a manner consistent with, or broader than, Supreme Court decisions. Is that a fair statement?

Judge **Bork**. It is certainly consistent with. I do not know if it is broader than. I just do not have that judgment in my mind at the moment.

Senator **Hatch**. My interpretation, as I have read those, is that they are certainly consistent with, and I believe they are broader than, present interpretations of our present Supreme Court, which many are very pleased with. In your years on the D.C. Circuit, you have had dozens of opportunities to construe civil rights statutes, is that correct?

Judge **Bork**. Well, dozens—I do not know, Senator. I really have not kept account.

Senator **Hatch**. And we have brought out, in all but two of these civil rights cases, you have sided with the minority or with female plaintiffs on those cases.

Judge **Bork**. All but one of those cases. There was an additional case—which I was reminded of by Senator Humphrey, I had forgotten it—in which I ruled against an age discrimination plaintiff.

Senator **Hatch**. But even if you accept that case, again, in both of those cases, the Supreme Court and Justice Powell agreed with you. Is that right?

Judge **Bork**. As I recall.

Senator **Hatch**. That is my recollection, too, and they determined that the law required a ruling against the minority plaintiffs in those two cases. That is my resolution of it, as I saw it. But, I think it is valuable maybe to deal with specifics on some of these things. Would you sketch, for the committee, the issues in the *Sumter County* v. *U.S.* case? This was a South Carolina voting rights case, decided in 1983 by your circuit.

Judge **Bork**. That was not by our circuit, Senator. That kind of case calls for a three-judge district court.

Senator **Hatch**. Right, this was a three-judge——

Judge **Bork**. And our practice is to put one Court of appeals' judge and two district court judges down in the courtroom to hear the case.

Senator **Hatch**. Okay.

Judge **Bork**. Sumter County had moved from a method of selecting their county council from a district voting to an at-large voting system and the Attorney General had refused to clear that under the Voting Rights Act. They are required to go and get clearance from the Department of Justice. If they cannot get clearance, then they go to court and challenge it and say they are entitled to clearance.

They had basically two arguments. As I recall, one was that they were not required to pre-clear because they had already had it once before or something of that sort. We ruled against them on that. That was sort of a factual legal issue. The other thing they had to establish was that the at-large system was not adopted with the intent or the effect of diluting black voting strength and we ruled, on the evidence, that they had failed to prove that it did not have that intent or effect and so we ruled against the Sumter County Council and for the blacks who wanted a districting system again instead of an at-large election system.

Senator HATCH. That is right and have you had an opportunity to study the views of Justice Powell on the Voting Rights Act?

Judge BORK. No, I have not.

Senator HATCH. Well, let me just go through it. Now, keep in mind, I thought he was a great judge and justice.

Judge BORK. Oh, I think there is no doubt about that.

Senator HATCH. I think most people conclude that he was so this is not by way of criticism of him, but merely to show the position that you have. It may be of interest to the committee to realize that Justice Powell, unlike you, Judge Bork, has continually criticized expansive interpretations of the Voting Rights Act. In fact, Justice Powell voted against minority plaintiffs in 17 out of 25 voting rights cases that he decided.

I think I have concluded, or I am beginning to conclude, that my critical colleagues might not have confirmed Justice Powell if he were sitting in your shoes today. But, in fact, our memory may be hasty, but Justice Powell was opposed by some selective civil rights groups when he came before the Senate in 1971. After all, he favored many narrower constructions of the Civil Rights laws than you have.

Judge BORK. Yes, but I think, as we both agree, Justice Powell is a great justice and I think it should be said that these are matters about which reasonable men can differ.

Senator HATCH. That is my point.

Judge BORK. In interpreting those statutes. I do not want to contrast myself with Justice Powell in order to show that I am a greater defender of civil liberties. These are legal issues and reasonable men can differ.

Senator HATCH. I agree. But it is a useful experience to have you contrasted. The reason I am doing it is because the argument was first made that we have to have balance on the Court and therefore, to lose Justice Powell and to get somebody who may be more conservative—which I do not think is necessarily the case here—I think it is a fallacious argument. I think these matters, if you really look at the facts and your actions, which speak louder than the words of some of those who have been critics of you, you find that you stand in very good stead with regard to some of the criticisms that have been lodged against you.

Let me just continue a little bit more. Could you describe the *Palmer* v. *Shultz* case? Now, that concerned gender discrimination in the Foreign Service.

Judge BORK. Was that the one in which we used statistical evidence to show discrimination?

Senator HATCH. This was the one where you granted summary judgment to the Government in a suit by a female Foreign Service officer, alleging discriminations in promotions. It was an Equal Pay Act case. You voted against the Government and reinstated that particular Equal Pay Act case.

Judge BORK. Just a second here, Senator, so I can refresh myself a little bit.

Senator HATCH. It was the one where you based your decision solely upon statistical evidence.

Judge BORK. Oh, yes. That was a recent case.

Senator HATCH. Yes. In fact, there was *Ososky* v. *Wick* as well. *Ososky* v. *Wick* was a similar case where you also voted to reverse another district court case and applied the Equal Pay Act to the Foreign Service's merit system. In both of those cases, you found inferences of intentional discrimination which could be based solely on statistical evidence. Now, the reason I am pointing this out is these are hardly cases where you could be shown to be walking in lockstep with this administration.

You ruled against the Government in both cases and you ruled against the Government on the basis of arguments that the President himself would probably not approve. So, it is clear that you were making no special efforts to impress President Reagan when you made those decisions.

Judge BORK. I probably was not making an effort to impress him either, when I held that the man had a first amendment right to put up a poster in the subway ridiculing him. He may not have liked that.

Senator HATCH. That poster has just gone up, by the way. Well, let's turn to *Laffey* v. *Northwest Airlines*. This concerned the applicability of the Equal Pay Act to airline stewardesses. In that instance, you found that female stewardesses may not be paid less than male pursers.

Judge BORK. Since the jobs were essentially equivalent.

Senator HATCH. That is right. Now, the airlines were, by you, found to have discriminated against females in that particular case, against women. The Supreme Court refused certiorari in that case, in essence, allowing that particular decision by you to stand. Women out there should not be afraid of Judge Bork because your actions speak louder than the criticisms of your critics. These are cases of record.

Judge BORK. Not only that, Senator, but I do not know where the criticism comes from because I have never spoken or written hostilely about women.

Senator HATCH. That is for sure and that is what bothers me about some of the things that have been stated here. They state these broad-brushed generalities but apparently, have not read your cases or have not looked at what you have done or have not seen what your actions have been. In other words, in the hysteria of being afraid of having somebody they brand "conservative" on the Court, it seems to me there is a wholesale misrepresentation of what you stand for and what your actions have really been. You have to resent that. I resent it. I think it is an abomination and yet that is the type of rhetoric you are getting in this manner.

To return to your record on the bench, we could examine case after case which would show an inclination to uphold civil rights. Let me take just one other case and that is the case of *Emory* v. *Secretary of the Navy*. That involved the application of civil rights review to the Navy's promotion decisions, if you will recall that case.

Judge BORK. I do. It was recent.

Senator HATCH. Well, you reversed a district court's opinion in that case. Why don't you tell us about it.

Judge BORK. That was a black naval officer, a captain as I recall, who had left the Navy and then he sued, claiming that while he was in the Navy, he was denied promotion to admiral because the promotion board was all white and he did not get—similar to a claim that they select an all-white jury and so forth. This case was dismissed by the district court, as I recall, because he had, by leaving the Navy, he had taken himself outside the pool from which admirals are drawn. We reversed because he was claiming an action in the past, when he was still in the pool, of racial discrimination. So we reversed the district court and told him to reinstate the lawsuit.

Senator HATCH. That was the appropriate thing to do. You stated that "the military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated." I submit, that is hardly the language one would expect from one who has been accused of closing the courts to civil rights claimants. It is another case that shows that you have really upheld civil rights claimants. Your opinion, which of course, reversed judges sitting on the lower court who sincerely decided the case as best they could.

Judge BORK. Oh, sure. That was a motions panel. It would have been very easy just to affirm without opinion.

Senator HATCH. Sure. But your opinion opened up, it seemed to me, the military to judicial scrutiny.

Judge BORK. Well, I do not think opened it up any more than it properly is and has been. We disavowed any intention of trying to litigate whether somebody should have been promoted or not, except where he claims his promotion was denied him for unconstitutional reasons.

Senator HATCH. Well, but once again it seems to me that the accusations do not justify the squaring with the reality of your actions or your actual judicial record. It is interesting to note how many of these cases, the *Palmer* case, the *Wick* case, the *Emory* case, were cases in which you voted to reverse a lower court which had ruled against civil rights plaintiffs. I find that a striking consideration. The special interest groups opposing you, purport to review your record based only on a small fraction of the cases that you have heard and these were the non-unanimous cases. They only comprise about 14 percent of your total cases.

Judge BORK. Yes and I do not know how many of those were civil rights cases, come to think of it.

Senator HATCH. Well, that is right. Those cases that I just described were all excluded upon review because the three-judge panels were unanimous, despite the fact that the lower court had ruled the other way. Again, it shows the bigoted bias on the part of those who did the reviews of your record. It shows how they have tried to scuttle your nomination, I think, for very inappropriate reasons. They have ignored what your record really is. That bothers me a lot and it has got to bother anybody who is fair in this country. It certainly has got to bother you.

If you look at other cases, such as *Norris* v. *D.C.* where you rejected a district court's attempt to dismiss a plaintiff's complaint of mis-treatment or *Doe* v. *Weinberger* where you ruled against the Government and ensured that a homosexual was accorded full due process rights. Those are important cases. They may be just everyday affairs to you, where I think you came out very, very well against your critics. In fact, I think in all your cases, you came out pretty doggone well against your critics.

Your critics have not come out well in these hearings, nor have they come out well given your answers, nor have they come out well on the facts. They have distorted the facts. They have misused statistics. They have distorted your opinions. Why are they doing this? They cannot attack your intellect. They cannot attack you as a good judge. They cannot attack your ethics. They cannot attack your work effort. I guess the only way they can do it is unfairly.

That is really what it comes down to and when it is attacked that way, when you are attacked that way, that is what I call pure and simple politics. That is really what is involved here. I think that is what is coming out. I think your actions speak a lot louder than their words and frankly, you have consistently voted to preserve fundamental constitutional rights. I do not think there is any question about that. You agree with that, don't you?

Judge BORK. I agree with that.

Senator HATCH. Well, I think anybody would who reads the record.

Judge BORK. I think the reaction suggests that I should disagree in order to be provocative.

Senator HATCH. I am glad you can honestly agree because the fact of the matter is, your record speaks louder than the criticisms of your critics. I think your testimony is a powerful rebuttal. Your record is a powerful rebuttal to those who would contend that you are a judicial activist or that you would bend legal principles to meet your political needs or ideology or objectives. When you had the opportunity to do that in the busing case, you rejected it. You did what was right.

You rejected employing the *Katzenbach* case, which was right there for you. It was a Supreme Court decision. You could easily have done it and you could have gotten rid of something that conservatives have felt was wrong in America for a long time, including some liberals who feel it is wrong in America. And you could have done it in a whole wide variety of other cases.

The CHAIRMAN. Excuse me, Senator.

Senator HATCH. Yes.

The CHAIRMAN. Do you think you could have done that and been constitutionally consistent with the requirement to follow precedent?

Judge BORK. Could have done which?

The CHAIRMAN. That was not my question though. My question was——

Judge BORK. Oh, I see. *Katzenbach* v. *Morgan* was a precedent. I was not a judge at this time. I am not talking about my role as a judge.

The CHAIRMAN. Oh, I thought you were talking about your own opinion.

Judge BORK. No, I was writing something in support of a bill that would have not eliminated, but would have reduced the amount of busing and it would have been easy, in that argument, to say the bill is constitutional because *Katzenbach* v. *Morgan* says you can change the Constitution by statute. I just rejected that approach, explicitly, in the argument.

Senator HATCH. I would also like to place in the record several articles relative to the events of October 20, 1973, a news article by Milton Viorst and an extract of a book by Benvenista, an article by Evans and Novack and several other articles on that subject, if I could, Mr. Chairman?

The CHAIRMAN. How long is the extract of the book, though? Could we just have that——

Senator HATCH. It is about 5 or 6 pages.

The CHAIRMAN. Oh, fine. I thought you were going to put a whole book in there. Following the admonitions of the ranking member. He always cautions me against spending taxpayers' money to that extent.

Senator HATCH. I may be just as concerned about taxpayers' money as you.

The CHAIRMAN. I am not suggesting you are not.

Senator HATCH. But certainly not as much as the——

The CHAIRMAN. Without objection, they will be in the record.

[Material follows:]

2007

Department of Justice

ORIGINAL

DEPARTMENT OF JUSTICE

- - -

PRESS CONFERENCE

OF

HONORABLE ROBERT H. BORK.

ACTING ATTORNEY GENERAL OF

THE UNITED STATES

ACCOMPANIED BY

MR. HENRY PETERSEN, ASSISTANT ATTORNEY GENERAL

WITH

MEMBERS OF THE PRESS

- - -

4:15 o'clock p.m.

October 24, 1973

Deputy Attorney General's Conference Room

Washington, D. C.

- - -

Acting Attorney General Robert H. Bork responded to questions on the following topics at his press conference on Wednesday, October 24, 1973.

SUBJECT	PAGE
Possible court fight with White House over data	6
Commitments from the White House regarding additional evidence	7, 18, 19, 22, 23, 29, 30
Court of Appeals ruling over tapes	8
The agreement offered to Archibald Cox	8, 9, 10
Appointment of a new Special Prosecutor	15, 16
Special Prosecutor appointed by Congress	21
Procedures and mechanisms to restore public trust	15, 16, 20
Status of Special Prosecutor Cox's staff	16
Political alignment of Special Prosecutor Cox's staff	17, 24
Rehiring of Cox	17
Nomination of Mr. Bork to be Attorney General	19
Resignation of the Acting Attorney General	19
Role of Solicitor General in suits against White House	20
Ethics of Solicitor General litigating against White House	21
Operation of Regulation of Departmental Succession	23, 26
White House notification of court compliance	23
Watergate investigation parameters	24
Watergate related probes	24, 25
Personal reputation on Watergate probe	25, 26
Tenure as Acting Attorney General - 30-day rule	26
Acting Attorney General's authority to fire Cox	27, 28
Justice Department resignations	28
Procedures for obtaining evidence	28

Assistant Attorney General Henry Petersen responded to questions on the following topics at press conference:

SUBJECT	PAGE
Status of the Watergate investigation	11
White House access to investigative files	12
Petersen's April 15 meeting with the President	13
Testimony before Kleindienst hearings	14
Appointment of a Special Prosecutor	14

ACTING ATTORNEY GENERAL BORK: This is a rather impromptu press conference and I have no prepared statement. do have a list of points that I want to talk about. I may ramble a bit and I may leave out a point, but I am sure your questioning will clarify that.

What I want to discuss with you is why I obeyed the President's order to discharge the Special Prosecutor, Archiba Cox, what my intentions are with respect to the Department prosecutions and with respect to the Department of Justice in general.

I suppose I can best start by discussing the events of last Saturday. Until late last Saturday afternoon, I was n involved in these matters at all. I had, upon two or three occasions, I suppose, discussed jurisdictional problems concerning the Special Prosecutor Force with Elliot Richardson, and upon occasion, perhaps two occasions, with Archibald Cox and so of his staff. But I did not know the details of what the jurisdictions were. I was involved in discussing them with Elliot Richardson to help clarify his thoughts.

I came to the office that Saturday with no idea of wh was taking place. I was not involved in the negotiations about the compromise offer, and, in fact, I was in my office working on appeal recommendations. And, at the moment that I left the office, I was, in fact, writing a letter to a third grade class on the importance of Bill of Rights Day. I went down the hall to watch Professor Cox's press conference, and then Mr. Richardson called me in to his office and for the firs time, he filled me in on what was taking place. At that stage, I think matters were fairly fluid. We discussed a variety of possibilities. William Ruckelshaus was in the office, as were some of Mr. Richardson's aides.

As the afternoon wore on, it became clear that Mr. Richardson would be asked to discharge Mr. Cox. Mr. Richardso said he could not do it because of the special commitments he had made to Mr. Cox and to the Senate.

He asked Mr. Ruckelshaus if he could do it. Mr. Ruckelshaus said he could not.

I think that was the first moment when I realized I might be called upon to do it. And I was asked if I could.

After thinking for a moment, I decided that I was not in the special position, which I think Mr. Richardson found himself and Mr. Ruckelshaus found himself. And I told Mr. Richardson that I could, in fact, discharge Mr. Cox if that was the President's order, but that I thought I should discharg him and then resign my own position. This was somewhat selfish, I am afraid, since I did not want to be perceived as a man who did the President's bidding to save his job. Both Mr. Richardson and Mr. Ruckelshaus urged me, at that point, that if I di do it, not to resign because the Department deserved continuit

Let me also say that I did not obey the President's order out of any political or personal animous towards Mr. Cox. Mr. Cox has a reputation for great integrity and great ability, and from my observation of him, I have no reason to doubt those judgments that the world has made of him.

I did it because it was apparent at the time I was called upon to make the decision that the decision of the President to discharge Mr. Cox was final and irrevocable. It was going to be done. I also believe that the President has the right to discharge any member of the Executive Branch he chooses to discharge. I further thought that if I did not do i but resigned, or was discharged, the pattern I set after Ellic Richardson and William Ruckelshaus had refused would probably lead to mass departures in the Department of Justice. The Department would be left in a chaotic condition and badly crippled.

I did not want to see the harm go any further in the Department than the resignation of two extremely able men. An I am, in fact, now doing my best to see that it does not go an further.

I then went to the White House where I signed the letter discharging Mr. Cox. My next act, realizing the positio I was in, was to call Henry Petersen and ask him, with as much persuasiveness as I could muster, to stay with us, because I think Henry Petersen is indispensable to the Department at this stage. His reputation for ability and integrity is

precisely what we needed, and I personally needed him for adv
and counsel and for strength.

Now, that was the sequence of events. Let me say a few words about my intentions for the Department. I am an Acting Attorney General. I am not nominated and confirmed Attorney General, and therefore, I view it as my task simply to keep the Department going on an even keel and to make it as effective as possible for as long as we can until a new Attorney General is nominated and confirmed. I don't plan any major structural changes. I don't plan any personnel changes. I plan to carry out the policies initiated by Elliot Richardso
and William Ruckelshaus, and I have asked all the personnel in the Department to stay and help keep the Department going i
this extraordinarily difficult time.

About the prosecutions. The President gave me a letter and also said orally that he expected vigorous prosecutions. I believe that and there will be vigorous prosecutions. We will go for whatever evidence we need for complete investigations and successful prosecutions.

I have met with Henry Petersen and with the members o
the former Special Prosecution Force who are now members of the Criminal Division of the Department of Justice. Mr. Petersen and I told them that we wanted them to remain intac
and that we wanted them to continue working. In fact, we ask
them very urgently to continue working because their knowledg

of the evidence of the files, their credibility with the witnesses, is indispensable to these prosecutions. I am going to press hard. No man in my position could conceivably afford not to press hard. I intend to walk out of this job with my reputation unimpaired. And that is the way it is going to be.

In closing, I want to say this. I got to know William Ruckelshaus fairly well, but not as well as I did Elliot Richardson; and I came to admire Mr. Ruckelshaus a great deal. I worked more closely with Mr. Richardson. And I must say, in all my life, I have never worked with a man I liked better or whose talents I thought more highly of. Their loss to the Department is an extraordinarily severe blow. And I think there isn't a member of the Department who doesn't regret it.

Now I think Mr. Stewart has the first question.

MR. STEWART: Dr. Bork, the former Attorney General set a great value on restoring public confidence in the Justice Department, and that being so, he said the Special Prosecutor would be absolutely unfettered in going after the evidence.

Now, you have said that you will go wherever the case leads, but will you tell us now that if it's necessary to take the White House to court once again, once again to get certain documentary evidence, that you are ready to do that?

ACTING ATTORNEY GENERAL BORK: I am ready to follow any procedure by agreement or otherwise, that is essential to get the evidence these investigations and prosecutions require.

QUESTION: If you have to sue the President of the United States, will you take that step?

ACTING ATTORNEY GENERAL BORK: If we have to use judicial processes, which I have no reason to believe we will have to, but if I have to, no procedure is ruled out that is essential to get the evidence.

QUESTION: Do you have a commitment from the White House to that effect?

ACTING ATTORNEY GENERAL BORK: The only -- I have two kinds of things. One is the President's statement to He said Saturday night that he thought I was a man who believ in the law and he was expecting me to carry it out vigorously

Since then, in contacts with the White House, I have not had time to regularize any procedures, but it is my clear understanding, my clear impression when we were talking that I will not be hampered in this investigation.

QUESTION: Mr. Bork, you will not be what?

ACTING ATTORNEY GENERAL BORK: Be hampered.

QUESTION: Specifically, the President said in discharging Archibald Cox, rather he said on Friday night th Archibald Cox was ordered not to go after White House docu involving Presidential conversations.

Now, specifically, will you go after White House documents involving Presidential conversations?

ACTING ATTORNEY GENERAL BORK: If the law entitles us to any item of evidence, I will go after it.

QUESTION: Well, would you be a little more specific about that? You mean if --

ACTING ATTORNEY GENERAL BORK: Well, the Court of Appeals opinion, which I have read once and haven't -- and not thinking I would have to study it with the closeness I will now have to study it -- the Court of Appeals opinion is a very particular opinion, and it says when these circumstances are present. It doesn't say, give a blanket right to everythin no matter what without a showing of relevance, without a showing of need and so forth.

There is no evidence that we need and we are legally entitled to that I will not seek.

QUESTION: Would you have rejected the agreement that the President was urging on Archibald Cox?

ACTING ATTORNEY GENERAL BORK: Had I been --

QUESTION: Archibald Cox.

ACTING ATTORNEY GENERAL BORK: I might not have because that agreement applied only to the Grand Jury proceedin And if it were determined by Judge Sirica that a verified, authenticated, verbatim transcript was adequate for Grand Jury purposes, I think I would have agreed to it because that's all

I needed it for.

The problem would come at a later stage, as Mr. Cox pointed out. What kind of a transcript may or may not be sufficient for full trial before a petit jury, but that is a little bit academic now -- I shouldn't use academic in a perjorative sense.

QUESTION: Mr. Bork --

ACTING ATTORNEY GENERAL BORK: It's a little bit academic now because the transcripts are not being made, as I understand it.

QUESTION: Mr. Bork, there is --

QUESTION: Mr. Bork --

ACTING ATTORNEY GENERAL BORK: Wait, wait. Now, how do we -- yes.

QUESTION: Mr. Bork, the condition of the President's concession to have Senator Stennis filter these tapes to the Grand Jury was that Mr. Cox not ask for any other statement or document that he was pressing for and had been pressing for for four months.

Would you take that kind of a deal?

ACTING ATTORNEY GENERAL BORK: No, I think I was referring merely to the idea of using an authenticated transcript. It would depend, of course, upon what I thought the need for those documents was.

QUESTION: Well, what about the whole deal?

Would you take that kind of a deal or not?

ACTING ATTORNEY GENERAL BORK: The total deal?

QUESTION: Yes, the total deal presented to Mr. Cox. Would you take it or leave it?

ACTING ATTORNEY GENERAL BORK: No, I could only accept an arrangement that gives the Department of Justice all the evidence the people in charge of the prosecution think is necessary for the investigation and for indictment if called for, and for successful prosecution, if that is called for.

QUESTION: Well, would you have taken it or left it?

ACTING ATTORNEY GENERAL BORK: I have -- you know, I don't know what those documents are. I didn't know anything about that case before Saturday, and I must say I know only a little more now in its general outlines. I don't know what those documents are. I don't know what the need asserted for them was. I would not accept -- I can only answer you in a general term. If I had thought those documents were proper for the Grand Jury investigation, I would not have accepted any deal that precluded me from getting them.

QUESTION: Could we ask Mr. Petersen the same general question, please?

He has somewhat more familiarity with the documents.

(General laughter.)

ASSISTANT ATTORNEY GENERAL PETERSEN: I don't know how you know that. I have been out of the case since May.

QUESTION: But it was 90 percent complete when you left, sir.

(General laughter.)

QUESTION: But it's 80 now.

ASSISTANT ATTORNEY GENERAL PETERSEN: Once again yo are overwhelmed with your own learning.

If you knew what was there when we left, we had Watergate prosecution, political corruption cases. Watergate prosecution, per se, the break-in, the coverup was 90 percent complete. What is now known as the Watergate complex as a result of Mr. Cox's effort, and it is a multi-pronged investigation. That investigation is not 90 percent complete. So the vehicle has changed since then.

So I am not prepared to answer in detail with respec to the evidence. When I left the case I frankly lost a lot of interest in it. I am back in it.

I can tell you as I told the Prosecution Staff, we are not prepared to give advisory opinions either to you or to them, to the American public. We are not prepared to lay down any threats, express or implied to anybody, witnesses, White House, other governmental agencies. I can only reiterat what Mr. Cox has said. We expect a thorough, professional job We expect to press for evidence where it is needed, where it is necessary, and where it will be helpful in the prosecution of the case, where it is called for in terms of professional discharge of our responsibilities.

Now, I don't think it serves any purpose to go back to what we would have done had we been Mr. Cox on Saturday. Mr. Cox is a very able person and I respect him. But I would like to think that given the events of the past few days that we, you, we, the White House, the American people, the Specia Prosecution Force and the Criminal Division can start anew. The crises that we face tomorrow, that are necessary, will be real enough without rehashing those of yesterday.

QUESTION: Mr. Petersen?

ASSISTANT ATTORNEY GENERAL PETERSEN: Yes, ma'am.

QUESTION: Will you and/or the Acting Attorney General permit the White House access to your files and your evidence that you inherited from Mr. Cox?

ASSISTANT ATTORNEY GENERAL PETERSEN: Well, I never have had to permit the White House access to anything I have had. That is a very strange question, if I may say so. The White House response --

QUESTION: [Inaudible.]

ASSISTANT ATTORNEY GENERAL PETERSEN: Well, I do. I mean, you asked it and I am answering. I think it is a str question. That is not part of the White House's responsibili

QUESTION: But in the past, sir, they have asked to see [Inaudible.].

ASSISTANT ATTORNEY GENERAL PETERSEN: That's not correct.

Now, if you want to testify, you are welcome to come up here. That is not correct.

QUESTION: What did you tell the President on Apri 15th, Mr. Petersen?

QUESTION: John Ehrlichman.

ASSISTANT ATTORNEY GENERAL PETERSEN: Pardon?

QUESTION: What did you tell the President on April 15th of this year?

ASSISTANT ATTORNEY GENERAL PETERSEN: Ultimate fact and I gave him advice with respect to -- pardon?

QUESTION: You're not giving him access to the evidence and the facts?

ASSISTANT ATTORNEY GENERAL PETERSEN: Well, there's a difference. You know, I didn't intend to come up here and conduct a class in law, but there is a difference between evidenciary fact and ultimate fact. I advised the President with respect to ultimate fact. I advised him with respect to proposed courses of action. That is quite a bit different than giving him evidenciary detail. Both the President and I agree that he should not have Grand Jury information. He did not get it.

QUESTION: Mr. Petersen, in point of fact, did [redacted] not testify in the ITT investigation on April 11th, 1972, and that testimony is now held by the Special Prosecution?

ASSISTANT ATTORNEY GENERAL PETERSEN: No, I did no testify in the ITT investigation. I testified in the Kleind hearings, and I did not testify with respect to the ITT matt I testified with respect to an action which I had recommende the Attorney General of the United States take with respect t one of his employees, namely the United States Attorney for the Southern District of California. That was a peripheral aspect of it.

I recused myself from that investigation until that aspect of it was completed. That aspect of it was completed when it was examined for potential perjury.

Now, the other aspects of it that may be open have nothing to do with the testimony with respect to United States Attorney Harry Stewart. So I feel under no obligation to recuse myself.

QUESTION: Mr. Petersen, Elliot Richardson and William Ruckelshaus have said they favor appointment of a Special Prosecutor, saying that the appearance, the appearanc of justice requires it.

What is your thinking on this?

ASSISTANT ATTORNEY GENERAL PETERSEN: Well, once again I have to qualify my answer. I think most of you are familiar with my testimony before the Congress in which I indicated that I had objected to and recommended against hiri of a Special Prosecutor because I thought that it was a reflection on the capability of the Department of Justice to perform its obligations.

I came to recognize that however I might feel, that that course of action was inevitable. Once again, I was not right. The President and others, Mr. Richardson, Mr. Kleindienst did recommend and a Special Prosecutor was appointed.

I would hope that the investigation can proceed with confidence in the criminal justice system, with confidence in Mr. Bork and me, with confidence in the Special Prosecution staff. We have a high obligation to ourselves as professionals and we have an even higher obligation to those professionals work for us. And we intend to discharge that responsibility, whatever the consequences?

ACTING ATTORNEY GENERAL BORK: May I just add a word to this?

I recognize, as does Mr. Petersen, that the American public must perceive that the integrity of the Department of Justice and of the criminal process is unimpaired, as well as our assuring you that that is true, and we have under consideration a variety of procedures or mechanisms by which that perception may be encouraged or may be made -- the trust may be given to us.

QUESTION: Mr. Bork, what are those --

ACTING ATTORNEY GENERAL BORK: I am not going to discuss the variety of procedures we have under consideration right now, but I realize that our assurance that we are going t press vigorously may not be enough. I don't know how anybody could imagine that a man standing where I am now would dare do anything else but press vigorously, if you have any idea, any sympathetic imagination.

But, in addition to that, we have under consideration procedures or mechanisms to make that fact apparent to the public.

QUESTION: Well, Mr. Bork, would these mechanisms fall short of appointment of a Special Prosecutor as we know a Special Prosecutor?

ACTING ATTORNEY GENERAL BORK: They may or may not. I've got a variety of alternatives in mind.

QUESTION: Is a prosecutor one of the considerations in mind?

ACTING ATTORNEY GENERAL BORK: It has, let us say, crossed my mind.

QUESTION: Will the Special Prosecution staff stay together as an entity?

Will the head be under Mr. Petersen, and who will that head be?

ACTING ATTORNEY GENERAL BORK: Well, right now and so far as I am concerned, that head is Mr. Ruth. They will stay together as an entity because I think their effectiveness depends upon that. Well, we have asked them to stay together, encouraged them to stay together and not to leave. I trust th they won't. But I don't know.

Yes?

QUESTION: Mr. Bork, the White House has publicly voiced its doubts about the political alignment of Mr. Cox's staff.

Are you going to retain that entire staff as it now is?

ACTING ATTORNEY GENERAL BORK: I have no idea personally what the politics of the members of that staff are and I don't really care what the politics of that staff are so long as they behave themselves as competent professionals who are doing a job the way a competent professional does it, and I am sure they will.

I happen to have lived most of my life in a milieu in which nobody around me agreed with me politically, and that doesn't bother me.

QUESTION: Mr. Bork, since the President fired Mr. Cox for trying to enforce an order that the President has now accepted, why can't he rehire Mr. Cox?

ACTING ATTORNEY GENERAL BORK: I don't regard that as a very viable suggestion from anybody's point of view.

QUESTION: Why not?

ACTING ATTORNEY GENERAL BORK: Well, after an episod like that, I doubt that it would be the thing to do. You can' run time backwards like a motion picture.

QUESTION: Well, the President changed his mind on one thing. Why can't he change it on Cox?

ACTING ATTORNEY GENERAL BORK: Well, you're free to ask him if you would. I don't know whether he would or not. I —

QUESTION: Mr. Bork?

ACTING ATTORNEY GENERAL BORK: Yes.

QUESTION: Mr. Bork, you and Mr. Petersen both seem be saying that you do not feel bound by the President's order to Mr. Cox not to continue further legal action to obtain other White House documents.

Have you been given -- have you been told anything by anyone at the White House that leads you to believe you are not bound by that?

ACTING ATTORNEY GENERAL BORK: To tell you the truth, it didn't occur to me that I was bound by it because the order was not directed to me. It was directed to Mr. Cox, and all the indications I have so far, and the President's expression to me was that he wanted a full and vigorous prosecution. That seems to me to mean that I am free to give a full and vigorous prosecution.

QUESTION: Well, he said that to Mr. Cox, who said he would have a perfectly free hand during the testimony on the Hill. There he comes again.

How, is it changed now? Are things changed that much now?

ACTING ATTORNEY GENERAL BORK: Well, I'm not going to I think debate or discuss the President's relationship wit Mr. Cox. As I understand it, Henry Petersen and I are free t press forward vigorously, and that is the way we intend to proceed.

QUESTION: Mr. Bork, should the President choose yo to be Attorney General, would you accept the appointment?

ACTING ATTORNEY GENERAL BORK: I doubt it. I can't even see who is asking the question. I doubt it very much. The job has lost a great deal of its attractiveness to me the last 72 hours.

(General laughter.)

QUESTION: Mr. Bork, why did you say that you had planned to resign after firing Cox?

ACTING ATTORNEY GENERAL BORK: Well, frankly, I gues that I was feeling that I would be perceived as a man who wou do something like that just to save his job, and I -- my first thought, I'm afraid, was a little selfish in that sense because I didn't want to be perceived that way.

QUESTION: It wasn't based then on a disagreement with the President's desire to get rid of Mr. Cox?

ACTING ATTORNEY GENERAL BORK: I explained to you m only -- no. It was based upon a desire not to be seen as an organization man who follows orders no matter what. After I talked to Bill Ruckelshaus and Elliot Richardson, I thought better of it.

QUESTION: Mr. Bork, you said the idea of appointing a Special Prosecutor had crossed your mind.

Are you reviewing any names right now?

ACTING ATTORNEY GENERAL BORK: I don't want to discuss that. I am reviewing lots of ideas, and if I begin to speculate about the ideas I am reviewing, it will give them certainty or importance they don't yet deserve.

QUESTION: Well, let me ask you about your role as Solicitor General?

Suppose you do decide there is some evidence you need, and the White House says you don't, and you go to court, who do you argue for as Solicitor General? Who does your office argue for?

ACTING ATTORNEY GENERAL BORK: Well, I assume if that ever took place, that Charles Alan Wright and I would be debating.

QUESTION: Mr. Bork, there are moves in both Houses of Congress to recreate the Office of the Special Prosecutor.

Will the Justice Department oppose those moves?

ACTING ATTORNEY GENERAL BORK: In what form do they wish to recreate it?

QUESTION: The Senate plans to introduce a measure which would create a Special Prosecutor appointed by and responsible to Judge Sirica.

ACTING ATTORNEY GENERAL BORK: Let me say this, and now I would like to speak as a professor of law, which I still am as of the last word from New Haven —

(General laughter.)

ACTING ATTORNEY GENERAL BORK: — rather than as the Acting Attorney General. It seems to me that appointing a Special Prosecutor responsible either to courts or to the legislative branch poses severe constitutional problems. I think prosecution is an executive branch function by the constitution. I think furthermore that just in practical terms, it would be terribly unfortunate if we ever arrived at a situation in this country where every branch of the government had its own Department of Justice and we all litigated with each other.

QUESTION: Well, sir, as a matter, aren't there some ethical problems, that is legal ethics, in you as an employee of the President litigating against the President in court?

Can you serve — can you litigate against your own employer within the canons of legal ethics?

ACTING ATTORNEY GENERAL BORK: Yes, within the canons of legal ethics. I think the problem — I trust it will not come to the question of having to litigate. I have no indication that it will come to that. The problem for me is really no different, if it should come to that, than it was for Mr. Cox because he, too, was an employee subject to the direction of the President, as Mr. Cox freely admitted.

QUESTION: But Attorney General Bork, he was an employee with particular special guarantees, and --

ACTING ATTORNEY GENERAL BORK: Well, I understand myself to have a guarantee that I am free to prosecute a vigorous investigation.

(Voices.)

ACTING ATTORNEY GENERAL BORK: I beg your pardon?

QUESTION: This is not a guarantee that has been shared with the Congress or voiced by the President, and you are the man who fired General Cox.

ACTING ATTORNEY GENERAL BORK: Now, wait a minute. Which guarantee has not been voiced by the President?

QUESTION: The guarantee to you.

ACTING ATTORNEY GENERAL BORK: Well, it was in the letter that appeared in the papers to me. He said he expected the Department to continue a vigorous investigation and prosecution. I regard that as a --

QUESTION: But he did not say that you were free to conduct the prosecution without any oversight from him.

ACTING ATTORNEY GENERAL BORK: I understood my directive to be to pursue investigations and prosecutions the way I thought they ought to be done, and the way Henry

Peterson thought they ought to be done, and the way other people involved think they ought to be done. That is the way I understand that.

QUESTION: Mr. Bork, can you tell us if at any time since you were named Acting Attorney General, between that time and the time that the President changed his mind and agreed to follow the appellate court ruling on the tapes, you indicated to the White House that yourself or anyone on your staff here would be reluctant to resume control of the investigation unless the tapes were released?

ACTING ATTORNEY GENERAL BORK: There are a couple of things in that I want to get. In the first place, I was not named Acting Attorney General. Let's get that -- there seems to be some misconception that because I discharged Mr. Cox I was named Acting Attorney General. Nothing could be further from the truth. I became Acting Attorney General by operation of the succession regulation.

And that is when I recieved the directive, because I came into that spot. Now, I was told shortly before the President's Counsel went into court that they indeed intended to announce full compliance, so that the question of the role the Department would play never had to be announced. We had in court, if I recall correctly, Henry, we had both Henry Ruth and Phil Lacovara, and we were going to try to see, before we learned that full compliance would be announced what position was going to be taken so that we could frame a position.

It is, obviously, an extraordinarily complicated matter. We had very little time to try to face it, and both Mr. Petersen and I have -- Mr. Petersen has been out of touch with it; I had never been in touch with it, so that we were framing positions and thinking about the problem as rapidly as we could. But it didn't come to that, so that's as much as I can say about it.

QUESTION: Mr. Bork?

ACTING ATTORNEY GENERAL BORK: Yes.

QUESTION: Yesterday General Haig said at the White House that while they had doubts on the White House staff about the partisanship of the Special Prosecutor's staff, they had no such doubts about Mr. Cox. He went on to say that there was a feeling among the White House staff at a high level that the Cox investigation had been "roaming off the reservation."

Now, you have told us that you have full powers to pursue the prosecution, but do you have any kind of definition what the reservation is?

ACTING ATTORNEY GENERAL BORK: For the moment --

QUESTION: The ITT case, for example, the Rebozo $100,000 gift, varied influence and so on, all the dirty tricks, are those on your reservation as you construe it?

ACTING ATTORNEY GENERAL BORK: Well, as I understand it, and I understand it perhaps not well enough to speak authoritatively, if it has to do with Watergate related matters or Presidential campaigns and so forth, the things that led to the setting up of the concerns and the related concerns that led to the setting up of the Special Prosecutor's force in the first place, that is still within the ambit of the investigations and possible prosecutions.

Now, it is a little bit of an artificial question, I suppose, because the Department of Justice has authority for the enforcement of all the criminal laws, and whether some other kind of thing that one might imagine came up or not, I wouldn't think we would have to get into a debate whether that belonged under this prosecutor or that prosecutor. The Department of Justice is going to enforce all the criminal laws.

QUESTION: Mr. Bork, we know what it is that you hope to do, we know what it is that you want to do. You have expressed that here. Now tell me what your pledge is should the White House attempt to prevent you from doing all this you want to.

ACTING ATTORNEY GENERAL BORK: I can only say that I am not going to walk out of this job, out of this town as the man who in any way compromised investigations or prosecutions.

QUESTION: How are you going to make good on that vow?

ACTING ATTORNEY GENERAL BORK: You can use your imagination, I think.

QUESTION: Mr. Bork, how much time do you think you have as Acting Attorney General?

ACTING ATTORNEY GENERAL BORK: Pardon me?

QUESTION: How much time do you think you have before you will be replaced with a full time Attorney General?

ACTING ATTORNEY GENERAL BORK: It hadn't occurred to me.

QUESTION: Are you bound by the 30 day rule?

ACTING ATTORNEY GENERAL BORK: The Office of Legal Counsel tells me that the Department of Justice is not when the successor comes in from inside the Department.

QUESTION: Mr. Bork, why did you say awhile ago that you didn't anticipate litigation in this matter of --

ACTING ATTORNEY GENERAL BORK: Well, because I anticipate cooperation.

QUESTION: Mr. Bork, did you act under the Justice Department regulations in setting up the Special Prosecutor's Office when you fired Mr. Cox, and that is, that he could only be fired for extraordinary improprieties?

ACTING ATTORNEY GENERAL BORK: That was the Attorney General's regulation, which is --

QUESTION: Did you repeal it before you fired him, or fire him underneath that regulation?

ACTING ATTORNEY GENERAL BORK: You know, there were a list of things cited there, but I think that is a legalism which even I would not be guilty.

QUESTION: What do you mean a legalism?

ACTING ATTORNEY GENERAL BORK: Because I think if an Attorney General, a man is Acting Attorney General, takes an action, whether or not you think that another regulation is still binding, which is also issued by the Attorney General, the action obviously amends the Attorney General's regulation.

QUESTION: Don't you have to act under the regulatio while it is still in effect?

Can you break that law, which it is, the regulation --

ACTING ATTORNEY GENERAL BORK: It is an Attorney General's regulation. Now, I --

QUESTION: You disregard it, is that right?

ACTING ATTORNEY GENERAL BORK: No, no.

QUESTION: What is your position?

ACTING ATTORNEY GENERAL BORK: My position is that I had the lawful right to discharge Mr. Cox pursuant to a Presidential directive.

QUESTION: Without regard to extraordinary improprie

You didn't find any extraordinary improprieties, is that correct?

ACTING ATTORNEY GENERAL BORK: I had really very little knowledge of Mr. Cox's activities. Mr. Richardson tells me he was guilty of no extraordinary improprieties. I believe Mr. Richardson.

QUESTION: Mr. Bork, in your opening statement you spoke of wanting to keep people on board, no personnel changes.

Has an Assistant Attorney General or other ranking members of the Department said to you they would like to resign or are considering resigning?

ACTING ATTORNEY GENERAL BORK: No. I think there were some people who initially at least — and I hope it was only initially -- were a little uncertain because the events were so rapid and so startling. I have urged them all as a matter of obligation to the Department, not to me certainly, I'm very new here, as a matter of obligation to the Department and the continued effectiveness of this Department, which is very important, to please, if they could, stay in place and keep this place running.

QUESTION: Mr. Bork, do you have some sort of arrangement with the White House to obtain this evidence that is spoken of without litigation, without even filing a law suit or asking for a subpoena?

ACTING ATTORNEY GENERAL BORK: I have proposed that we have regularized procedures, and that has been agreed to in principle, as I understand it.

QUESTION: Would you explain those?

ACTING ATTORNEY GENERAL BORK: No, because I have been running from place to place and I haven't drafted any regularized procedures, but I will if we can -- if things will calm down.

Right now I seem to be Attorney General, Deputy Attorney General and Solicitor General, and it is not working too well --

(General laughter.)

ACTING ATTORNEY GENERAL BORK: But as soon as I have a chance to get down, we will try to make some proposals about regularized procedures.

QUESTION: These are procedures for turning over of the documents, for --

ACTING ATTORNEY GENERAL BORK: Well, for obtaining evidence that is needed. That's right.

QUESTION: From the White House, right?

ACTING ATTORNEY GENERAL BORK: If we need evidence from the White House, then I would like to have some agreed upon procedures whereby we can get them.

QUESTION: Mr. Bork, aside from the letter that you have from the President about vigorous prosecution, did you at any time sit down and talk with the man and discuss the possibility that you might have to be vigorous enough to sue him?

ACTING ATTORNEY GENERAL BORK: No, I talked to him

Saturday night, and his statement to me on this precise subject was, he said, I understand that you are devoted to the principl of law, and I want you to carry out these investigations and prosecutions fully. And I said, that I will do. And that was all we said. It was not a time to begin negotiating procedures.

QUESTION: Mightn't you have raised the warning that you might be put in a position where you would have to --

ACTING ATTORNEY GENERAL BORK: Well, I think that must be apparent to any reasonable man in that situation, that once I go into this position I have to have the evidence and the freedom necessary to carry out the job successfully. I am sure nobody could have misunderstood that. I am sure the President didn't misunderstand that.

QUESTION: Well, there will be in the near future in camera hearings before Judge Sirica, possibly later this week or next week, during which the White House will claim that at least one of the nine subpoenaed tapes involves national security.

Now, there are provisions under the Appeals Court Order for the Special Prosecutor to go in and argue against th White House if he wishes. There no longer is a Special Prosecutor, so who from the Justice Department will represent --

ACTING ATTORNEY GENERAL BORK: I can't give you a specific name, but I think it's important that Judge Sirica have the issues explored thoroughly on both sides. It should be somebody who is thoroughly familiar with the case and with the applicable law, and I am not going to state which man that is right now.

VOICE: Thank you, Mr. Bork.

(Whereupon, the press conference was concluded.)

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FOR IMMEDIATE RELEASE October 20, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

October 20, 1973

Dear Mr. Bork:

I have today accepted the resignations of Attorney General Richardson and Deputy Attorney General Ruckelshaus. In accordance with Title 28, Section 508(b) of the United States Code and of Title 28, Section 0. 132(a) of the Code of Federal Regulations, it is now incumbeht upon you to perform both the duties as Solicitor General, and duties of and act as Attorney General.

In his press conference today Special Prosecutor Archibald Cox made it apparent that he will not comply with the instruction I issued to him, through Attorney General Richardson, yesterday. Clearly the Government of the United States cannot function if employees of the Executive Branch are free to ignore in this fashion the instructions of the President. Accordingly, in your capacity of Acting Attorney General, I direct you to discharge Mr. Cox immediately and to take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force.

It is my expectation that the Department of Justice will continue with full vigor the investigations and prosecutions that had been entrusted to the Watergate Special Prosecution Force.

Sincerely,

RICHARD NIXON

Honorable Robert H. Bork
The Acting Attorney General
Justice Department
Washington, D. C.

FOR IMMEDIATE RELEASE - October 20, 1973

Office of the White House Press Secretary

October 20, 1973

Dear Mr. Cox:

As provided by Title 28, Section 508(b) of the United States Code and Title 28, Section 0.132(a) of the Code of Federal Regulations, I have today assumed the duties of Acting Attorney General.

In that capacity I am, as instructed by the President, discharging you, effective at once, from your position as Special Prosecutor, Watergate Special Prosecution Force.

Very truly yours,

ROBERT H. BORK
Acting Attorney General

Honorable Archibald Cox
Special Prosecutor
Watergate Special Prosecution Force
1425 K Street, N.W.
Washington, D.C.

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THE WHITE HOUSE
WASHINGTON

October 24, 1973

MEMORANDUM FOR AL HAIG

FROM: LEN GARMENT

This is the product of this morning's discussion among Bork, Bryce, Fred and myself. It could be used as an opening statement by the President tomorrow. The principal substantive item is the proposal for an advisory committee.

cc: Fred Buzhardt
Ron Ziegler
Bryce Harlow

10/24/73

I frankly recognize that we have reached a crisis of confidence that words alone cannot dispel. There are deep suspicions in the country concerning the conduct of the American government with respect to the conduct of the investigations into Watergate and related matters that only resolute action can quiet. I believe those suspicions to be unfounded and to rest upon a misunderstanding of what we have proposed and what we have done. But I also know that I must do far more than explain the reasonableness of the compromise I proposed last week or the reasons why I could not accept flat defiance of my orders by a member of the Executive Branch.

Instead, I appear before you tonight to answer questions about the actions I have taken and the actions I am now taking in order once and for all to dispel suspicions and make it possible to get on with pressing national business.

You all know the action that I have taken. On Tuesday I ordered my attorneys to appear in court and announce full compliance with Judge Sirica's order as modified by the Court of Appeals. In doing that I gave way on a deeply held principle of Presidential confidentiality and I must hope that I have not done irreparable damage to the office and to the necessary confidentiality that all Presidents of the United States have needed and that all future Presidents will need if they are to govern effectively.

But there is a consideration greater even than the crucial principle of confidentiality and that is the continued effectiveness and credibility of the government of the United States, both at home and abroad. That is always of paramount importance and in these times of international crisis with the ever-present possibility of major-power confrontation, the effectiveness and credibility of the American government is indispensable to survival.

That is why I ordered full disclosure to the court of the material it sought. The court will now decide what material the grand jury needs in order to proceed with its decisions concerning the appropriateness of indictments.

But I also recognize that that step is not enough. What is necessary is to reassure the American people that the processes of American justice remain intact and with their integrity unimpaired. I know that it does and that the Department of Justice will proceed rapidly and even-handedly to investigate and, where called for, to prosecute all the matters formerly handled by the Special Prosecutor. But my confidence alone is not sufficient. The American people must see that justice is being done. Toward that end I propose two steps.

First, I am directing the Department of Justice to appoint as a special prosecutor a man of unimpeachable integrity and of experience in the field of criminal investigation and prosecution. He must be a man whose reputation and, even more, whose actions will show Americans of all political views that these prosecutions are free of partisan zeal and political considerations of any nature whatsoever.

Second, in order that that special prosecutor may have the counsel and, to be perfectly candid about it, the protection he needs from political attack, I will appoint a special advisory committee of lawyers with national reputations to oversee the investigations and prosecutions. I will, furthermore, ask the American Bar Association, to approve the names I submit for membership on this committee before they are appointed.

This committee will have complete access to the materials developed by the investigations and will have the power to order that indictments be brought or that they not be brought. It will, moreover, have the power to require that evidence be sought or that it not be sought. Probably, there will be very few cases of conflict between a responsible and experienced prosecutor and an equally responsible and experienced committee, but it is vital to the American public's perception of the course of justice that the committee be there to counsel and, if the case should ever arise, to control.

These measures are extraordinary, but extraordinary measures are required, and I am fully prepared to take them.

THE WASHINGTON POST--Oct. 31, 1973

Senate Democrats Ask Independent Special Prosecutor

By Lawrence Meyer
and Martin Weil
Washington Post Staff Writers

The Senate Democratic caucus overwhelmingly approved a resolution last night calling for an independent special prosecutor to continue the investigation and prosecution "of criminal actions arising out of the Watergate affair and all of its related activities."

The resolution, sponsored by Sen. Sam J. Ervin Jr. (D-N.C.), chairman of the Senate select Watergate Committee, was approved following a 2½-hour meeting in which a wide variety of proposals for continuing the Watergate investigation were reportedly discussed.

The Democratic caucus' vote came on the eve of the resumption of the Watergate committee's hearings. The committee will open its investigation into campaign financing with testimony from Berl Bernhard, 1972 presidential campaign manager for Sen. Edmund Muskie (D-Maine).

Ervin's resolution was approved after Senate Majority Leader Mike Mansfield (D-Mont.) had opened the discussion by bringing up the future of Ervin's committee in conjunction with President Nixon's action on Oct. 20 ordering the dismissal of Special Watergate Prosecutor Archibald Cox.

"Now," Mansfield said in a statement he released and read to the caucus, "it is no longer possible, in my judgment, to contemplate the shutdown of the Ervin committee. On the contrary, I would hope and expect that the Senate would consider forthwith the extension of the committee, with a mandate enlarged to include all the matters which were under consideration by the special prosecutor's office in the Justice Department at the time of the summary dismissal of Mr. Archibald Cox."

President Nixon announced last Friday night that acting Attorney General Robert H. Bork would appoint a new special prosecutor who will have "independence" this week.

Mr. Nixon also said, however, that the new special prosecutor would not have access to presidential documents—the issue that ultimately precipitated the firing of Cox. Bork reportedly has insisted that whoever he appoints must have access to whatever evidence he needs to investigate and prosecute in the Watergate affair and other matters coming under his jurisdiction and that no procedural restraints should be placed on his actions by the White House.

Mansfield, who received a standing ovation after he spoke, told the caucus that the Ervin committee is presently the only "duly-constituted and equipped (body) to continue an independent, impartial inquiry into the Watergate affair. That will remain the case unless and until there is at least designated a new special prosecutor whose powers are as broad and whose integrity are as great as that which surrounded Archibald Cox."

Mansfield also endorsed legislation introduced by Sen. Birch Bayh (D-Ind.) and sponsored by a majority of the Senate calling for the creation of a special prosecutor by act of Congress, with the prosecutor to be appointed by the courts.

The effect of the Ervin resolution, which directs Mansfield to consult with minority leader Hugh Scott (R-Pa.) "with a view to the creation of the office of an independent prosecutor," is to endorse the concept of Bayh's legislation without taking up—for the moment at least—the question of extending the life and expanding the jurisdiction of the Ervin committee, which is now required to file a report and end its business by February 1974.

Mansfield, who was the prime force behind the creation of the Ervin committee, told a reporter that he favored giving the committee a new, long-term mandate "if we don't get the right kind of a special prosecutor."

Mansfield was described by one knowledgeable Senate source as being "fully in accord" with the resolution that the caucus passed. This source said the resolution, coupled with Mansfield's statement, could be read as a message to President Nixon that he should modify his position on the powers of the special prosecutor. "The problem's not going to go away. I think that's the signal," this source said.

A senator present at the caucus disagreed, however, that the caucus action carried any implied threat to President Nixon but rather was aimed at lining up support for a move to override a veto of a special prosecutor bill passed by Congress if Mr. Nixon does not go along and sign it. This senator said that Mansfield's suggestion that the Ervin committee be given more time and more authority was not discussed.

Ervin, who was understood to be opposed to extending the life of his committee, said after the caucus that the Senate still had four months to act on extending and expanding the probe if the need arises.

According to reliable sources Mansfield did not tell Ervin about his proposal prior to presenting it to the caucus. The resolution that Ervin finally presented for a vote—the only resolution put up to the caucus on the subject—"just sort of evolved" after 2½ hours of discussion, according to one source. The Ervin resolution was accepted with only a few voices heard voting against it, according to one senator.

During a morning executive session of the committee, the committee authorized Ervin to introduce a bill that would clearly give the United States District Court here jurisdiction to hear a suit by any congressional committee to enforce a subpoena it had issued to anyone, including the President.

The legislation is designed to overcome a ruling by Chief United States District Judge John J. Sirica in the suit brought by the committee seeking to enforce its subpoena of five White House tape recordings relating to the Watergate fair.

Sirica dismissed the suit earlier this month, ruling that he had no jurisdiction over it. Ervin said he hoped that the bill could be passed by the Senate "within 48 hours" without referring it to committee and that the House of Representatives would approve the measure promptly in order to expedite the committee's suit, which is now before the United States Court of Appeals.

Sen. Howard H. Baker (R-Tenn.) vice-chairman of the committee, that the power of a committee to issue a subpoena is an "idle power" if the committee cannot enforce its subpoena in court.

Besides dealing with the issue of the tapes, the legislation also is understood to be adequate to resolve the difficulty the committee is having obtaining President Nixon's bank records from the Key Biscayne bank of Charles G. (Bebe) Rebozo, Mr. Nixon's close friend. Rebozo hasn't responded to a subpoena from the committee for the records.

The committee will resume its hearings today with the testimony of Bernhard, former Muskie campaign manager. Bernhard will be followed by Clark MacGregor, former director of the Committee for the Re-election of the President.

Bernhard and MacGregor were described yesterday as "transition witnesses" who will help move the committee from the second phase of its hearings, concerned with so-called campaign "dirty tricks," into the third and final scheduled phase of campaign financing.

The committee announced that it had applied for limited immunity from prosecution for three prospective witnesses — Robert Lilly, Robert Isham and John Meier.

Lilly and Isham are officials of the Associated Milk Producers Inc., a diary farmers' cooperative that gave more than $200,000 to President Nixon's re-election campaign prior to the implementation of an increase in government price supports for milk. Meier is a former employe of billionaire recluse Howard Hughes, whose contributions in 1969 and 1970 of $100,000 to Mr. Nixon through Rebozo are being investigated by the committee.

Following a morning executive session of the committee, Ervin and Baker discussed with reporters the meeting that they had had with President Nixon at the White House on Oct. 19 when he proposed his arrangement to turn over partial transcripts of the tapes to the committee.

Although their remarks were set in a conciliatory context with both senators expressing hope that the offer from Mr. Nixon would be reinstated, Ervin and Baker both stressed that they had made no agreement to accept the offer on behalf of the committee. "It was a proposal, not a compromise or an agreement," Ervin told reporters.

Ervin said he and Baker told Mr. Nixon that they would recommend to the committee that it accept the offer but that they made it clear that they have no authority to accept the offer for the committee.

Both senators recalled again that they had been called hurriedly to the White House from out-of-town speaking engagements—Ervin in New Orleans and Baker in Chicago—and that they had had no opportunity to consult with their staffs before the meeting.

Although Baker said in response to a question that "I do not feel that we were used by the White House," both senators made it clear that when they met with Mr. Nixon they were not told that a similar offer had been made to Cox and that he had not accepted it.

From a political point of view, that knowledge could have been significant since Mr. Nixon asserted at his press conference last Friday night that "Mr. Cox was the only one" who rejected the proposal.

Ervin said yesterday that "We took the position that we had nothing to do with Mr. Cox's investigation," and that during the White House meeting "we were told that they would contact Mr. Cox to work out a suitable agreement . . . We were never asked to approve any agreement to which Mr. Cox was a party," Ervin said.

Asked if he thought Cox had been correct in refusing to accept less than total access to the tapes and other documents that he was seeking, Ervin responded that the requirements of Cox's investigation and the committee's are different.

NEW YORK, SUNDAY, OCTOBER 28, 1973

Nixon Plan on Prosecutor Is Opposed by Mansfield

Senator Wants Watergate Aide Named by Courts—Ford Believes President Regrets His Attack on News Media

Special to The New York Times

WASHINGTON, Oct. 27 — President Nixon's position that the new special Watergate prosecutor will be named by the Administration rather than the courts drew continued opposition today from Democrats in Congress.

"No soap" was the comment that Senator Mike Mansfield, the Senate majority leader, made about the President's announcement last night at his news conference.

In another development stemming from the news conference, Representative Gerald R. Ford, the Vice President-designate, said that he believed that Mr. Nixon, "on second thought, probably wished he hadn't" made such a vigorous attack on the news media. The President had characterized some recent news reports as "outrageous, vicious, distorted." [Details on Page 47.]

And in Chicago, the American Bar Association declared that it could not accept an appointment of a prosecutor by Mr. Nixon and called on Congress to create an independent "Office of Special Prosecutor."

The continuing controversy over the successor to Archibald Cox as special prosecutor came as public opinion polls reported that Mr. Nixon's popularity rating had fallen below 30 per cent for the first time.

Mr. Nixon said last night that Acting Attorney General Robert H. Bork would name a new prosecutor next week, and that the appointee would have independence and the Administration's cooperation.

Mr. Mansfield, a Montana Democrat, said, however, that he would support a bill that calls for a court-appointed special prosecutor to guarantee the prosecutor's independence. The bill has 53 co-sponsors, Democrats and Republicans.

Senator Mansfield said, "It has to be a special prosecutor who had the same kind of authority that Archibald Cox had."

Representative Thomas P. O'Neill, the House Democratic leader, said in a statement that he did not believe that the new prosecutor "will be acceptable to the Congress and the American public under the terms the President outlined."

After six days of national turmoil that followed the dismissal of Mr. Cox, Mr. Nixon

Nixon's Plan for Prosecutor Opposed by Mansfield

Continued From Page 1, Col. 2

agreed last night to appoint a special prosecutor through the Justice Department.

Independence was clearly the key issue. Attorney General Elliot L. Richardson resigned and his deupty, William D. Ruckelshaus, was dismissed because the independence of Mr. Cox to pursue the Watergate inquiry wherever it led had been curtailed by the President.

Mr. Cox had sought to obtain Presidential tape recordings and documents that the White House refused to yield, asserting that they were confidential. Mr. Cox went to court. The President lost in United States District Court and in the Court of Appeals. He then tried to force a compromise on Mr. Cox. When Mr. Cox refused to accept it, Mr. Nixon dismissed him.

The Acting Attorney General, Mr. Bork, has indicated that he, too, will resign if the new special prosecutor is not given independence of action.

The adverse reaction of Mr. Mansfield and Mr. O'Neill followed similar comments by other Democrats immediately after Mr. Nixon's news conference. But some comments were favorable to the President.

Mr. Ford, the House minority leader whom Mr. Nixon has nominated for Vice President to replace the resigned Spiro T. Agnew, described the President's proposal for a new prosecutor as a fair compromise.

"My uderstanding is that responsible guidelines would be established for the prosecutor to keep him from irrelevant areas," Mr. Ford said in an interview.

He said that he felt the President was bending over backward to be cooperative, and that the special prosecutor proposed by the President would be "adequate for the present circumstances."

The data indicating further slippage in Mr. Nixon's popularity came from the latest Gallup Poll, taken Oct. 19-22. The Gallup organization said that the data had not yet been fully analyzed, but that so far they indicated an approval rating of 29 per cent for the President.

It said that the final figure could be as low as 28 per cent or as high as 30 per cent, which was Mr. Nixon's rating in the last previous national poll, taken Oct. 5-8.

1,500 People Questioned

In the latest poll, about 1,500 people were asked the following question in personal interviews: "Do you approve or disapprove of the way Nixon is handling his job as President?" The polling was done in the period in which Mr. Nixon dismissed Mr. Cox and Mr. Richardson resigned but before the President announced his decision to turn the tapes over to the Federal court.

As recently as mid-June, Mr. Nixon had an approval rating of 45 per cent, with 45 per cent voicing disapproval and 10 per cent having no opinion.

Those questioned in the poll were also asked: "Do you think President Nixon should be impeached and compelled to leave the Presidency or not?" Thirty-one per cent answered yes, 55 per cent no and 14 per cent had no opinion.

A poll on the same point in Aug. 3-6 showed 28 per cent for impeachment and 61 per cent against. One in June 22-25 showed 19 per cent for impeachment and 69 per cent opposed.

NEW YORK, MONDAY, OCTOBER 29, 1973

Nixon and Bork Reported Split on Prosecutor's Role

Difference Over Access to Documents Could Delay Appointment

By JOHN M. CREWDSON

Special to The New York Times

WASHINGTON, Oct. 28—An apparent conflict between President Nixon and his Acting Attorney General, Robert H. Bork, over the independence of a new special Watergate prosecutor could delay the naming of a replacement for Archibald Cox unless it is resolved in the next day or two.

President Nixon announced at a news conference Friday night that Mr. Bork would appoint a new prosecutor early this week, but he added that the White House had no intention of providing him with "Presidential documents" such as those Mr. Cox had requested.

Mr. Bork, on the other hand, has let it be known that he believes strongly that whoever takes the job from which Mr. Cox was dismissed a week ago "ought not to have any strings on him from anybody."

Cox Asks Guarantees

Mr. Cox maintained in a television interview today that it was "essential" that his replacement have statutory guarantees of freedom and independence from the President.

But Alexander M. Haig Jr., the White House chief of staff, declared in a separate television interview that the White House intended "to appoint a special prosecutor with the kind of independence the President described on Friday."

Mr. Bork, who is on leave as a professor at the Yale Law School, said specifically, in an interview with The New York Times, that he thought anyone placed in charge of the Government's Watergate investigation should have the option of subpoenaing, as Mr. Cox did, Presidential documents to which he was entitled and that were needed as evidence in a prosecution.

"Have I communicated to the White House my feeling that the special prosecutor ought to be free? The answer is yes," he said, adding that no "reputable man with a reputation to maintain" would accept the post without such assurances.

Possibility of Quitting

In the interview, Mr. Bork also raised the possibility that he might resign from the Justice Department "if a special prosecutor were set up and his independence were interfered with."

"My position is untenable unless these investigations and prosecutions are handled correctly," he said.

Elliot L. Richardson chose to resign as Attorney General a week ago rather than dismiss Mr. Cox for his refusal to obey an order by Mr. Nixon not to pursue in the courts his quest for the nine White House tapes.

To do so, Mr. Richardson said, would have violated his pledge to the Senate when he was confirmed as Attorney General last May that the special prosecutor would have full authority to challenge in court claims of executive privilege by he President.

William D. Ruckelshaus, Mr. chardson's former deputy, was discharged by the President a short time later for also refusing to dismiss Mr. Cox.

Mr. Bork, who as Solicitor General was next in command, agreed to carry out the order. He has said he had planned to resign immediately afterward but was persuaded by Mr. Richardson to stay on "because the department needed continuity."

If the conflict between the Acting Attorney General and the White House over the special prosecutor's role eventually leads to Mr. Bork's resignation, the effect on a Justice Department shaken by the loss of its top officials would do still further damage to morale and efficiency.

Mr. Bork was reportedly consulting with top White House aides over the weekend on possible nominees for special prosecutor and on the guarantees to be provided to him in seeking Presidential materials, but it could not be learned whether any resolution had been reached.

Not Petersen

Mr. Bork also expressed the hope that he "would be able to prevent" the appointment of a person who he did not believe was suited for the job, and he implied that he would resign if he were overruled.

"These prosecutions have to be carried on correctly, and if I thought they were not going to be because of the person chosen, I couldn't tolerate that," he said before the President's announcement at his news conference last Friday night.

He also said he had suggested "five or six names" to the White House who met his prerequisites for the job — previous experience as a prosecutor, something Mr. Cox did not have, and someone who is not now within the Government.

Mr. Bork declined to name his choices, but they reportedly do not include Mr. Richardson, Mr. Ruckelshaus or Henry E. Petersen, the Assistant Attorney General, who has temporarily taken control of the department's Watergate case. One or two, he said, are Democrats, and none of them is from Yale.

General Haig, the White House chief of staff and one of the officials with whom Mr. Bork is believed to be consulting over the appointment, said today that he did not believe a new prosecutor "will have to make a pledge of any kind" not to seek additional White House tapes or other confidential documents.

Would Have Checked Gifts

"Nor do I think he should," General Haig continued, "and if he were the type that would feel encumbered in that way, he's perhaps not the man that we would want."

Mr. Nixon agreed last Monday to surrender the nine original recordings of conversations between him and his aides to the United States District Court here. His decision came two days after Mr. Cox was discharged for refusing to acquiesce in the President's order barring him from seeking the tapes through the courts.

The former special prosecutor and Harvard law professor conceded today that his subpoena for the nine recordings had been "only the first step in seeking a great deal of important evidence from the White House."

Had he remained in office, Mr. Cox said, he would have also challenged the President's assertion of executive privilege in refusing to release certain information concerning campaign contributions from big dairy industry cooperatives that critics have linked to a 1971 increase in milk-price supports.

Mr. Cox emphasized, on the National Broadcasting Company's "Meet the Press" television program, that he had no hard evidence that the White House was concerned about some of the aspects of his investigation.

"But," he added, "I gathered the impression from the Attorney General that he was occasionally subject to calls" from the White House over the scope of the Cox inquiry.

In its issue on sale tomorrow, Time magazine reports that Mr. Cox was dismissed after the White House challenged his determination to pursue four sensitive avenues of investigation, including a program of "national security" wiretaps on Government officials and newsmen.

The three other areas objected to, according to the report, involved a 1970 operation that raised $4-million for Congressional and gubernatorial candidates, the handling of anti-Nixon demonstrators during the 1972 Presidential campaign, and the activities of the White House's special investigations unit known as the "plumbers."

Predicts Approval

Senator Birch Bayh, Democrat of Indiana, appearing on the American Broadcasting Company's "Issues and Answers" program, predicted that Congress would approve a resolution introduced last week that would authorize the appointment of a special Watergate prosecutor by the courts.

The measure, which has gained 53 co-sponsors in the Senate, was endorsed yesterday by the American Bar Association in a resolution, passed by the organization's board of governors, calling on Congress to create an independent "office of special prosecutor."

General Haig said today that although the Nixon Administration welcomed the views of the Bar Association, "no President can run this great republic by being the victim of a viewpoint of a particular advocate of a particular point of view."

"I don't think President Nixon is going to feel encumbered by that recommendation," General Haig said on the Columbia Broadcasting System program "Face the Nation." But he added, "He might not ignore it, either."

President Nixon said at his news conference that the new special prosecutor could expect "independence [and] total cooperation" from the White House except for being denied documents, recordings or other materials "involving a conversation with the President."

Information from such materials would be provided if it was "needed," Mr. Nixon went on, but he did not explain how a determination of need would be made.

Mr. Bork's position, judging from his public and private statements, appears to be that only the documents or tapes themselves might prove to be admissible as evidence in a criminal proceeding growing out of Watergate, and that the prosecutor should have the latitude to obtain such materials under these circumstances.

Mr. Cox, who as prosecutor had no statutory authority to subpoena such materials, said today that he would prefer that an independent prosecutor, authorized by Congress, be appointed by the courts rather than the President, even though in either case his autonomy would be guaranteed by law.

Feels Less Certain

However, he conceded that he was less certain about the constitutionality of a Congressionally authorized prosecutor who was appointed by the court.

On Friday, Mr. Bork expressed strong reservations about the effort in Congress to set up a prosecutor ultimately answerable to anyone except the President, on the ground that criminal prosecution ought to be a function of the executive branch.

But Mr. Cox suggested that there would be no real problem if Mr. Nixon and Congress both moved to appoint their own special Watergate prosecutors.

"I think Congress could easily legislate the Presidential appointed one out of existence, that would surely be constitutional," he said.

Asked whether he might succumb to sentiment in Congress to take back his old job if it were re-established by law, Mr. Cox, who was packing today to leave for an extended vacation in Maine, conceded that "I suppose if I were pressed that I would have to consider it."

But he added, "It would be unwise for anyone to offer it to me, and unwise for me to take it."

Connally Reaction

AUSTIN, Tex., Oct. 28 (UPI)—Former Treasury Secretary John B. Connally said today that President Nixon owed the country a better explanation than he gave for dismissing Archibald Cox and Mr. Nixon should have turned over the Watergate tapes months ago. He spoke on a state press panel television show "Capital Eye."

MILTON VIORST

A Retraction on Bork

Robert H. Bork — who became acting attorney general on Oct. 20 when he alone was willing to take the responsibility for firing Archibald Cox as special prosecutor — is not a very happy man these days.

I confess I committed an injustice when, during the tumultuous weekend of the great Justice Department purge, I angrily wrote a column suggesting that Bork performed his execution of Cox as an act of personal opportunism — or, at least, in conformity with the Nixonite ideology of political expediency.

I'd like to take it back. I have since found out that Bork met with the then attorney general, Elliot Richardson, and his deputy, William Ruckelshaus, on that fateful Saturday afternoon and the three of them agonized over how to respond to the crisis in the national interest

Richardson, insisted that, because of a personal pledge to Congress, he could not follow Nixon's order to fire Cox, and therefore had to resign. Ruckelshaus said he considered himself subject to the same imperatives.

Furthermore, it was clear that at least three of the assistant attorneys generals — Thomas Kauper in Antitrust, Stanley Pottinger in Civil Rights and Henry Peterson in Criminal — would also resign, out of loyalty to Richardson and Ruckelshaus, in preference to firing Cox.

What's more, the senior members of the staff of these three sections said that, if their chiefs left in protest, they too would resign. At that moment, the Justice Department was at the brink of thorough decimation.

A lesser man than Elliot Richardson would, at such a demonstration of support from his subordinates, have reflected on the sweet revenge he had within his grasp against the man who commanded him to perform an act he considered both dishonorable and harmful to the country. But not Richardson.

That's why it's so infuriating to read of Nixon's assertions to recent White House visitors that Richardson reneged on an agreement to fire Cox and then lied — later amended to "misstated" — to the press to cover up his change of heart.

In fact, the only misstatement Richardson may have made was to omit any disclosure of his opportunity to counterattack against Nixon — by bringing the Justice Department, and perhaps the entire administration, down with him.

Instead, he and Ruckelshaus met that evening with Bork — who, as solicitor general, was then the No. 3 man in the department — and implored him to execute Nixon's order. They argued that, reprehensible as the order may be, the structure of the department had to be preserved intact.

Bork was troubled by the dilemma. He was known as, ideologically, the most conservative man in the department. He was also known to have expressed reservations about Cox's mandate — which led me, mistakenly, to assume he was enthusiastic about suppressing this mandate. But he also admired Richardson and believed Richardson correct in the stand he took.

Surely, Bork had no sympathy with Nixon's effort to circumvent the prosecutorial process by dismissing the prosecutor. But, being a classical conservative, he was impressed by the argument that the institutions of government, first and foremost, had to be upheld. So he did what Burke and Hamilton would have done. he took the responsiblity for firing Cox.

Having fired Cox, however, Bork defied the White House on the very next business day by declaring — in clear contradiction to a statement by presidential assistant Alexander Haig — that the special prosecutor's office would not be disbanded.

In the confusion of those first days, he told Cox's staff to stay on, to keep its autonomy of the Justice Department and to remain in its separate downtown office suite. He then began to promote the appointment of a successor to Cox, and helped force the selection of a new special prosecutor.

Through all of this, Bork has not been happy. A quiet and a private man, he was tempted only last June to leave the faculty of Yale Law School by the prospect of arguing the fine points of law as the solicitor general before the Supreme Court. Instead, he has found himself in the middle of a cyclone, running the Justice Department as acting attorney general, while trying to be solicitor general on the side. For him, it's not been fun.

But he's been holding the Justice Department together, and he believes in the correctness of what he's doing. Any suggestion I made to the contrary, I hereby take back.

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PAGE A-15

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STONEWALL

THE REAL STORY
OF THE WATERGATE PROSECUTION

BY **Richard Ben-Veniste**

AND **George Frampton, Jr.**

SIMON AND SCHUSTER
New York

Jill Volner had left Washington early that evening for the wedding of a close friend in New York, hoping that nothing would occur overnight. Frampton called her hotel from the Special Prosecutor's office to reassure her that the office apparently still existed. When she arrived in the hotel lobby at about 2 A.M. a uniformed desk clerk came rushing across the lobby, calling, "Mrs. Volner, Mrs. Volner, you have messages." Volner was perplexed, since the hotel staff had no reason to know who she was. The message from Frampton, slightly garbled, read: "FBI has seized your office; everything OK."

In fact, there continued to be confusion for days about our precise status. It remains unclear whether Nixon's failure to fire us all and issue a formal regulation abolishing the entire office was intentional, or whether it was an oversight or just a muffed job. There have been reports that the President really thought he was getting rid of everybody, or that he imagined that by chopping off the head the body would die. Reports have surfaced that he instructed Bork to fire Ruth, Lacovara and Ben-Veniste as well as Cox but that Bork refused on the ground that that would be an outright obstruction of justice, an attempt to emasculate the entire investigation. Bork has said it didn't come to that, but has admitted that Alexander Haig regaled him with the alleged "bias" of the Cox staff.

The President's failure once again to do his dirty work artfully would come back to haunt him. It was the same pattern we had seen over and over again in the White House containment of Watergate—equal measures of corrupt intent on the one hand and incompetence on the other.

The reaction in the nation which began to erupt within minutes of the first news broadcasts was as astonishing to us as it must have been to the beleaguered White House. Thousands and thousands of unsolicited telegrams and telephone calls began to pour into Washington—to the White House, to our office, anyplace people could think of to direct them. Many had seen Carl Stern of NBC and Nelson Benton of CBS first reporting the news of the Massacre as they stood breathless and shaken on the White House lawn. Both networks prepared for ninety-minute specials later in the evening. Reporters and network cameramen rushed to the Ruckelshaus and Richardson residences, badgering them for some statement or explanation. Democratic senators immediately issued vehement and outraged counterattacks, calling the President's action "reckless" and saying that it "smacked of

Senator **Hatch**. Perhaps the true test of a good judge is whether he can adhere to the law when the facts are really sensational. A judge with less dedication to the law may sometimes be tempted to decide a case in a way that might get local attention or national attention.

With that introduction, I would like to just examine with you one that has just recently been examined here. That is the *Oil, Chemical and Atomic Workers Union* v. *Cyanamid* case. As you know, that case involved the sterilization of female employees in a plant where lead levels would endanger a fetus. Could you give us a fuller picture of the facts of that case?

Judge **Bork**. Well, that was a case in which there was a particular department in the American Cyanamid Company where they could not get lead levels in the air down. They had them down as low as they could get them. At those levels, there was a threat to do serious damages to fetuses.

Now, everybody conceded that the company could have said women of child-bearing age are hereby fired. That was conceded. Or the company could have said women are transferred to another department. What the company did was give women a choice: You can be transferred to another department at a lower paying job; or if you want to, surgical sterilization is available to you.

The company did not do it. They just explained that there was that option.

Now, the question was simply a statutory question of whether offering the choice, the option, was a hazard in the workplace. When I was discussing this case with Senator Metzenbaum, I said that OSHA, the Occupational Safety and Health Administration, said it was not a hazard. I was wrong about that. The Occupational Safety and Health Administration said it was a hazard. It was the Occupational Safety and Health Review Commission that reviewed OSHA's decision that rejected that and said it was not a hazard.

We affirmed OSHA on the grounds of offering a choice; no force, no coercion, just offering a choice for the women who really wanted to keep those jobs. It was not a hazard. That was a unanimous panel. There was no attempt that I can recall; certainly, we did not rehear it en banc so apparently the full court did not regard it as an outrageous decision or a troublesome decision. The Secretary of Labor did not appeal, did not try to go to the Supreme Court.

It was a sad choice these women employees had to make. It was very distressing. The only question was, should they be given a choice? And is giving them a choice a hazard? We did not think it was under the act.

Senator **Hatch**. That had been reviewed by the Occupational Safety and Health Review Commission?

Judge **Bork**. Yes.

Senator **Hatch**. Who are experts in the field.

Judge **Bork**. Yes, and we owed them some deference, too, in their interpretation of the law.

Senator **Hatch**. Sure. Well, it does seem to me that this sterilization policy might have been sex discrimination that is actionable under title VII.

Judge **Bork**. We said in the opinion it might be.

Senator **Hatch**. Okay.

Judge BORK. But that was not before us.

Senator HATCH. I presume the reason that is so is because only female employees had to go through this process or procedure.

Judge BORK. That is right. We did not decide that case because that was being litigated elsewhere, but we said it might be.

Senator HATCH. You did say it in the opinion, and you did consider that issue, is what you are saying? You did not consider the issue, but you said it in your opinion that it might be?

Judge BORK. Yes.

Senator HATCH. In other words, the union had already sued under title VII, and they had settled that suit?

Judge BORK. That is right.

Senator HATCH. Okay. So this was the second suit based upon the same facts?

Judge BORK. Yes, but under a different statute.

Senator HATCH. Now, the principal criticism that I have heard about your opinion in this case is that you accepted the administrative law judge's determination that it was economically infeasible for the employer to reduce the lead levels to a degree necessary for fetal safety.

Judge BORK. Well, you are supposed to accept their decisions of fact unless there is clearly no substantial evidence for them.

Senator HATCH. So it is not unusual for a hearing judge to rely on an expert's opinion?

Judge BORK. At the court of appeals level, we do not redetermine facts unless there is no substantial evidence in the record.

The CHAIRMAN. Would the Senator yield for a clarification on my part?

Senator HATCH. Yes.

The CHAIRMAN. Judge, so I understand the case, and maybe others, was the plaintiff in the case the Secretary of Labor? Did the Secretary bring the case?

Judge BORK. Well, I am trying to think. No, it was the union—the Secretary of Labor did not file a brief.

The CHAIRMAN. The Secretary of Labor argued the same position the union was arguing? That is all I am trying to figure out.

Judge BORK. I do not quite recall, Senator.

The CHAIRMAN. Do you know, Senator Hatch?

Senator HATCH. The Oil, Chemical and Atomic Workers Union.

The CHAIRMAN. Yes, my question is, was the Secretary of Labor taking the same position?

Judge BORK. No, I think no.

The CHAIRMAN. I am just curious.

Judge BORK. I have a note here, which I agree with. In some cases, the Secretary of Labor will bring an appeal where he agrees with OSHA, the Occupational Safety and Health Administration, and disagrees with the Commission which has reviewed OSHA.

The CHAIRMAN. So OSHA came along and said this was a hazard. The Commission that reviews OSHA said it is not a hazard. The Court agreed with the Commission that it was not a hazard.

Judge BORK. Right. The Secretary of Labor could have appealed from the Commission decision but did not, and did not file a brief. If the position the Commission, the panel, took was so unacceptable, it is hard to see why the Secretary of Labor would not have appealed.

The CHAIRMAN. But had you, the Court, concluded that eliminating lead was economically feasible, on the one hand, or that this was coercion, either of those two things, then the company would have lost and the plaintiffs would have won.

Judge BORK. That is correct.

The CHAIRMAN. All right.

Senator HATCH. Right. But the important thing is how does the judge determine technical, scientific questions like this except by relying on experts?

Judge BORK. We did not rely upon the experts directly. We relied upon the finding of the administrative law judge who had heard the experts or had heard the evidence.

Senator HATCH. Right. In other words, she took the evidence, she took the experts, and she then found the facts to be as they were stated in the case, and you relied on it as an appellate judge.

Judge BORK. Yes. I do not recall that anybody challenged that factual finding.

Senator HATCH. No, I do not think anybody did in that matter.

The CHAIRMAN. Let me ask a question again, just to try to get the facts. I am trying to understand this.

When the administrative law judge's finding came to the court, the circuit court, was there evidence, even though she rejected it, that it was economically feasible?

Judge BORK. That I do not recall, Senator.

The CHAIRMAN. Thank you.

Senator HATCH. Now, let me ask you this: Were you alone in this case or were you joined by another colleague?

Judge BORK. I was joined by two other colleagues, one a visiting district judge from California and one Justice Scalia, then Judge Scalia.

Senator HATCH. Scalia again. That guy seems to get you in trouble.

Judge BORK. I am going to speak to him about this whole thing.

Senator HATCH. You had better stay away from him. On second thought, maybe we had better get you there so you can have a good influence on him on the Court.

I think one further point. The company was charged with preventing any women of child-bearing age from being exposed to lead. Now, could the company have been charged with a legal violation if it had simply fired all the women in that department?

Judge BORK. No, not under this statute. If they had said any woman of child-bearing age is hereby discharged, there would have been no challenge. It would not have been a hazard under the act. Or if they had said that they would—and the union conceded this, the argument. If the company had said that only sterile women will be employed, there would have been no argument about hazardous policy. It was merely the fact that the company said, you have got to leave this place; if you do not want to, there is the option of sterilization. That is all that happened.

Senator HATCH. So, in fact, the only reason the company was involved in the lawsuit at all or was sued was because it gave the women a choice of having an operation or leaving work. So, again, there is a situation where I think the actual facts are distorted by people who are critics of yours, and I think that is one of the things that you just have to take into consideration as you look at this nomination. I hope our colleagues will do that.

Now, as I understand it, I am just about out of time.

The CHAIRMAN. Yes, you are, but I have interrupted you a couple times. If you want, take a few more minutes. If the next line is going to be more than 5 minutes or so——

Senator HATCH. Let me see if I can get through it in 5 minutes because I think it is important for you. I think what I have been trying to do in these various days is I have been trying to bring out just how important your record is and how the facts speak louder than words, the words of your critics, and how unjustly you have been treated by certain groups in this society and, I might add, I think even by people who are judging this matter, even in the Senate. I think some of them have not looked at these matters and have not looked at them carefully. I think you deserve that type of treatment for this type of a position, and it really should not be a political decision. It ought to be made in a rational way. Maybe we ought to use the rational basis test to do it, and there would not be any question.

Perhaps the most prized right enumerated in the Constitution is the first amendment. The Congress shall make no law abridging the freedom of speech. Those who stretch to find some reason to oppose your record and have tossed allegations about this right into their junk heap of criticisms, it seems to me, have not looked at your record again. Because our legal tradition on the first amendment places a very high burden on prior restraints or attempts to censure speech.

Now, what are your thoughts with regard to the doctrine against prior restraints?

Judge BORK. Oh, it is a well-settled doctrine. I think it goes back to Blackstone or something like that. It is a centuries old doctrine, and it more recently was upheld in *Nehr* v. *Minnesota,* I think by Chief Justice Hughes. It has been applied in the *Pentagon Papers* case and so forth. The doctrine is essential to a free press.

Senator HATCH. Your record on this point, again, is even stronger than your words, because you, in fact, decided the case that you mentioned just a few minute ago with interesting political implications that included a prior restraint. That was *Lebron* v. *Washington Metropolitan Area Transit Authority* case. In that case, you said that the Metro Authority violated Mr. Lebron's first amendment rights by refusing to let him post extremely critical posters about President Reagan in the subway cars.

Now, as a personal matter, did you find the posters in question belittled and mocked President Reagan and were sometimes offensive and even misleading?

Judge BORK. Well, we found that you could tell what it was. He had taken two photographs—one of President Reagan and his advisers laughing and pointing, and one of some poor people—and he put them together so that President Reagan and his advisers appeared to be laughing and pointing at the poor people who were in misery. It was not misleading in the sense that if you looked at it you could tell it was not one photograph. Maybe some people would mistake it for one photograph, but if you looked at it with any care, you could tell it was not one photograph.

But Judge Starr agreed that it was not misleading and, therefore, could not be barred. Judge Scalia in this case did not get me into trouble; he agreed that you could not let an agency impose a prior restraint. I agreed with both of them. I agreed it was not misleading, really, and also that you could not impose a prior restraint.

Senator HATCH. Here is another illustration where you did not let your personal feelings enter into the decision of a legal question like that. In my mind, that single case speaks volumes about your fidelity to the rule of law and the meaning of the first amendment.

One of the criticisms we have heard concerning your first amendment views is that you suggested over 15 years ago that the first amendment should not cover more than political speech, thus leaving artistic and scientific speech without protection. Now, you have made it clear that that is not your current opinion; is that right?

Judge BORK. Well, yes. It certainly cannot be confined to political speech. Where the spectrum ends as a theoretical matter, I do not know. I have not rethought it. But I would have a much broader view of it as theoretical matter, but I accept and do not question the current position of first amendment law.

Senator HATCH. I wish I had the time to go through all of your cases on this, but let me just mention a few. In the commercial speech case, in *Williamson Tobacco* v. *FTC,* that is where you held that the first amendment prohibits the FTC from restricting or giving prior approval to some advertising speech. Your opinion, it seems to me, made it clear that you would not tolerate even the slightest degree of censorship. Again, I would say actions speak louder than words, because you were certainly protecting more than political speech there, and you oppose censorship.

By the way, my records indicate that Justice Scalia and Judge Edwards also joined you in that unanimous opinion; is that right?

Judge BORK. That is correct.

Senator HATCH. Okay.

The CHAIRMAN. Orrin, we are about ten to 12 minute over now, and we are going to have to break for lunch.

Senator HATCH. Just give me one more minute, then.

The CHAIRMAN. Okay.

Senator HATCH. Let me just go through these cases.

The critics overlooked your opinion governing scientific speech. In *McBride* v. *Merrill-Dow Inc.,* you upheld scientific speech in a libel case. I will just say that much about it.

In the *Ollman* case, you filed a concurring opinion which dismissed a defamation suit against columnists Evans and Novak. Of course, it would be interesting to describe your reasoning in that particular case.

You could just go on and on. Let me just bring out a case of *CCNV* v. *Watt.* You joined a dissent in the case concerning the demonstrators who were camping out in Lafayette Park. That is an interesting case.

Well, you could go on and on. I think the point I am trying to say is that even when these involved conservative issues, you ruled on the side of free speech.

Judge **Bork**. Yes.

Senator **Hatch**. Time after time after time. So, again, let me just end with this comment: The thing that really comes home to me as I read your record, as I read your cases, as I look at what you have done is that your actions do speak louder than words. As a judge, you have been right down the line in some of these areas where they are trying to criticize you, and they are misquoting you and they are mischaracterizing your decisions and they are ignoring some of your decisions that really make your case as they try to, I think, mischaracterize some of your other decisions.

So let me just say this: I hope the American people pay attention to these hearings because I think you have made a very good case for yourself. I think you have shown that you are——

The **Chairman**. I was not laughing at the judge making the case. I think you are making a very good case, but people are getting very hungry.

Senator **Hatch**. That is fine. I am going to make one more——

Judge **Bork**. I must say, Mr. Chairman, I am always hungry for this kind of talk.

Senator **Hatch**. You are hungry, too.

The **Chairman**. Your staff back there are going, When are we getting back?

Senator **Hatch**. I can see that I have overstayed my welcome. You have made a good case for yourself. You have made a good case for yourself by your actions, and I just submit to the American people that, by gosh, it is time they look at those actions and they also scrutinize the criticisms. If they do, they will find that most of the criticisms that are lodged against you, if not all of them, are really severely wanting.

Thank you, Mr. Chairman. Thank you for your time.

The **Chairman**. Unless you would like to comment, Judge, we will recess until 2 o'clock.

[Whereupon, at 12:43 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The **Chairman**. The hearing will come to order, please. We will continue with the questioning on half-hour rounds with those Senators who wish to continue to question. I will continue to withhold my half-hour. I will probably interject myself in here somewhere along the line, depending on who is here.

Our next questioner is the Senator from Massachusetts, and then we will go to Senator Simpson. The Senator from Massachusetts, Senator Kennedy.

Senator **Kennedy**. Thank you very much, Mr. Chairman.

Judge Bork, I know there has been a great deal of discussion already about your conduct in Watergate when you fired Archibald Cox, the Watergate special prosecutor. I want to put the facts in perspective, and then we would welcome an opportunity for you to respond.

In *Nader* v. *Bork*, District Court Judge Gesell ruled that you broke the law when you fired Mr. Cox. The decision was later vacated on other grounds. The question is, what conclusion can we draw from the fact of the decision and the fact that it was later vacated? You argue that it now has no legal effect at all. It is as though the judge had never decided that you broke the law. But the only judge who ever considered the question did conclude that you broke the law. You can take the opinion out of the law, but you cannot take it out of the history books, and you cannot even take it out of the law books.

It seems to me the analogy is a bit like a baseball game. Let us say a player makes a serious error in the first inning and the official scorer rules that he made the error; then in the second inning, the rains come down and the game is called because of the weather. Under the rules of baseball, the error does not count in the season statistics for the player, but everybody in the stadium knows that he has made a serious error.

In Watergate, Mr. Bork, everybody knows that a federal judge ruled that you broke the law when you fired Archibald Cox during the very dramatic period in our country's history.

I would welcome whatever comment that you would like to make.

Judge BORK. Well, Senator, I am afraid that it is not true that everybody knows that I broke the law. The fact is at worst I acted before rescinding a regulation put out by the Attorney General for the Department. Even on that view of the case, Archibald Cox referred to that as, at most, a technical defect.

But, in addition to that, Senator, the district court relied upon cases that do not apply; that is, cases in which a department head issued a regulation and then violated it. In this case, the department head issued a regulation, and it was revoked by the President of the United States when he issued the order. There is no case involving that situation, so I do not think in any sense the very strong terms, the "broke the law," applies to that case.

Senator KENNEDY. The only judge that ever ruled on it—and there is only one that did rule on it—a very respected judge ruled that you did break the law. I understand your difference with that judge and the logic of his opinion.

Judge BORK. May I say, in addition, Senator, that I tried to appeal that case, and the people who had brought the case were the ones who asked that it be dismissed. And I never got my chance to review that ruling on appeal, which I very much wanted.

Senator KENNEDY. Well, it became moot, obviously, because Mr. Cox did not desire to remain in the special prosecutor, so eventually it became moot. But I think when we had a number of discussions on this issue in question, it was left somewhat up in the air. I think that it is important that we have some perspective.

You indicated that the only potential rationale for believing that you broke the law was because of the technical aspects of the law; that the regulations themselves were not repealed. Do you not think a Supreme Court nominee must be scrupulous to obey even the most technical aspects of the law, particularly where the stakes for the country were so incredibly high?

Judge BORK. The stakes for the country were high but not in the sense you mean, I think, because from the beginning I was determined that the investigations would go forward and, if justified, result in prosecutions. So there was no stake for the country in my discharging Mr. Cox before revoking the regulation. Had I revoked the regulation, first there would not even have been this discussion. But as I have said before, the President revoked the regulation in his order, and no case holds that he may not do that.

Senator **Kennedy**. Well, the letter itself did not actually say that he revoked the regulations, did it?

Judge **Bork**. It said abolish the office of special prosecutor.

Senator **Kennedy**. We do not want to leave the record to suggest that he said in his letter that he hereby revoked the regulations. He said abolish the office.

Judge **Bork**. He said exactly, Senator, "I direct you to discharge Mr. Cox immediately and to take all steps necessary to return to the Department of Justice the functions now being performed by the Watergate Special Prosecution Force." That is a statement that "I am telling you to revoke the regulation," and as a presidential order, there is no case that says the President may not do that.

Senator **Kennedy**. Well, the one judge that ruled on the legality of that found that it was illegal.

Judge **Bork**. One judge who ruled on it said so. I respectfully disagree with him, and I think the cases he relied upon are a different kind of thing altogether. And as I repeat, Mr. Cox himself, who chose not to sue, said that it was, at most—at most—a technical defect.

Senator **Kennedy**. Judge Bork, you have testified in these hearings that you see no constitutional basis for a number of landmark decisions by the Supreme Court upholding some of the most fundamental rights and liberties of the American people. In the course of these hearings, you have expressed your strong disagreement with such decisions as the poll tax case, *Harper* v. *Virginia Board of Education;* the one-man, one-vote, *Reynolds* v. *Sims* decision, the decision invalidating racially restrictive covenants; the decision striking down segregated schools here in the District of Columbia; the important decision recognizing that American citizens have a right to privacy, free from intrusion of government; and key decisions protecting the freedom of speech.

Now, notwithstanding your strong criticisms of these and other cases, you have asked us to accept your statements that you would not lightly or easily vote to overturn these precedents. But in a number of past speeches while you have been a judge, you have had some less reassuring things to say about your philosophy and your respect for precedent.

In 1982, you told the National Review, and I quote, "My own philosophy is interpretivist, and I must say that this puts me in a distinct minority among law professors. By my count, there were in recent years perhaps 5 interpretivists on the faculty of the 10 best known law schools, and now the President has put four of them on courts of appeals. That is why faculty members who do not like much else about Ronald Reagan regard him as a great reformer."

Did you really believe in 1982 that you were only one of five professors in the ten best law schools that saw the light?

Judge **Bork**. Senator Kennedy, that was an after-dinner speech, and it was a joke. The full quotation goes something to the effect that there were five of us and President Reagan has put four of us on courts. That means that some of my colleagues who do not like much else about President Reagan regard him as a great reformer of legal education. There was quite a laugh when I said that. It was a joke.

Senator **Kennedy**. Well, we will put the whole statement in, and I hope members would read it because you list actually the names of the judges themselves and where they are. It appears to me much more than just a passing comment.

Judge **Bork**. Senator, you are referring to the National Review article?

Senator **Kennedy**. Yes. I stand to be corrected. Which has the judges' names?

The judges' names are not in that speech. They are in a different speech where you make a similar reference. I would include those.

Judge **Bork**. In the similar speech, Senator, what I said was that there were new people coming along who wanted to interpret the Constitution according to original understanding and I named them. I did not say there were only five in the world. This in the National Review came from an after-dinner speech I gave, and that was a laugh line.

Senator **Kennedy**. We will include in the record the other talk where you did list the ones that you were referring to.

[Speech follows:]

ROBERT BORK

THE STRUGGLE Over the Role of the Court

WHATEVER ONE THINKS about the performance of courts today, a subject upon which I shall have nothing to say here, it is quite clear that there have been times in our history when courts have gone well beyond their proper constitutional sphere. When that occurs, democratic government is displaced and the question is how to restore a proper allocation of powers. Absent a constitutional amendment, a general means to ensure that courts stay within the limits the Constitution provides for them can only be intellectual and moral.

That may seem a weak control. It does not seem so to me. Intellectual criticism in the short run may be quite ineffective. In the long run, ideas will be decisive. That is particularly true with respect to courts, more so perhaps than with any other branch of government.

Courts are part of a more general legal-constitutional culture and ultimately are heavily influenced by ideas that develop elsewhere in that culture. It is not too much to say, for example, that the Warren Court was, in a real sense, the culmination of a version of the legal-realist movement that dominated the Yale Law School years before. Similarly, the outcome of a present debate taking place in the law schools will surely affect the courts of today and the future.

A new struggle for intellectual dominance in constitutional theory is under way at this moment. The struggle is about the duty of judges with respect to the Constitution. It is taking place out of public sight, in a sense, because it is carried on almost entirely in the law schools and in the law reviews. But that doesn't mean it won't affect our entire polity in the years ahead. The ideas that win hegemony there will govern the profession, including judges, for at least a generation and perhaps more.

Let me sketch the nature of the debate. The contending schools of thought are called, somewhat unhappily, "interpretivism" and "noninterpretivism." In popular usage, "interpretivism" is often called strict construction. And "noninterpretivism" is what we loosely refer to as activism or imperialism.

John Hart Ely, then of Harvard Law School, described them this way: Interpretivism is the tenet "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or are clearly implicit in the written Constitution. . . . What distinguishes interpretivism"—or, if you will, strict construction—"from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution." Noninterpretivism—or activism, if you will—advances "the contrary view, that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."

The noninterpretivists, in a word, think that in litigation which is nominally constitutional the courts may—indeed should—remake the Constitution. These theorists are usually careful to say that a judge should not simply enforce his own values. And they variously prescribe as the source of this new law, which is to control the judge, such things as natural law, conventional morality, the understanding of an ideal democracy, or what have you.

There is a curious consistency about these theories. No matter from which base they start, the professors always end up at the same place, prescribing a constitutional law which is considerably more egalitarian and socially permissive than either the written Constitution or the state of legislative opinion in the American public today. That may be the point of the exercise.

My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. Just how much of a minority may be seen by the fact that a visitor to Yale who expressed interest in debating my position was told by one of my colleagues that the position was so passé that it would be intellectually stultifying to debate it.

By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals. That is why faculty members who don't like much else about Ronald Reagan regard him as a great reformer of legal education.

If the theory of noninterpretivism—that judges can draw their constitutional rulings from outside the document—

Judge Bork, a former Solicitor General and the former Alexander M. Bickel Professor of Public Law at Yale, is a judge on the U.S. Court of Appeals for the District of Columbia Circuit. This article is excerpted from a speech he gave in Washington to the Judicial Reform Conference sponsored by the Free Congress Research and Education Foundation.

achieves entire intellectual hegemony in the law schools, as it is on the brink of doing, the results will be disastrous for the constitutional law of this nation. Judges will feel justified in continually creating new individual rights, and those influential groups which form what might be called the Constitution-making apparatus of the nation—that is, the law professors, the courts, the press, the leaders of the bar—will support the courts in doing this. It will be very hard to rally public opinion against groups so articulate and in control of most of the means of communication. It will be particularly hard since much opposition will be disarmed by being told that this is what the Constitution commands. We are a people with a great and justified veneration for the Constitution.

The hard fact is, however, that there are no guidelines outside the Constitution that can control a judge once he abandons the lawyer's task of interpretation. There may be a natural law, but we are not agreed upon what it is, and there is no such law that gives definite answers to a judge trying to decide a case.

There may be a conventional morality in our society, but on most issues there are likely to be several moralities. They are often regionally defined, which is one reason for federalism. The judge has no way of choosing among differing moralities or competing moralities except in accordance with his own morality.

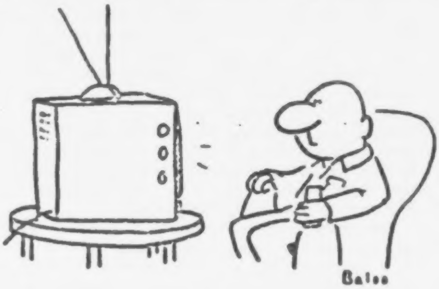
There may be immanent and unrealized ideals of democracy, but the Constitution does not prescribe a wholly democratic government. It is difficult to see what warrant a judge has for demanding more democracy than either the Constitution requires or the people want.

The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.

Noninterpretivism, should it prevail, will have several entirely predictable results. In the first place, the area of judicial power will continually grow and the area of democratic choice will continually contract. We will have a great deal more constitutional law than the Constitution itself contains.

Rights will be created, and they will often conflict with one another, so the courts will find that they must balance them in a process which is indistinguishable from legislation.

There is a good example of this. Recently, a federal court of appeals had occasion to consider a state statute which required a wife to consult her husband before having an abortion. The husband was given no control over the decision, merely a sort of due-process right to be heard. Naturally, someone claimed that even that violated the Constitution. The court of appeals said that it had to balance the wife's right to privacy against the husband's right to procreation.



"In a surprise move today, the Supreme Court impeached itself."

Neither of those rights is to be found anywhere in the Constitution. The court upheld the statute, but the point is that a court, without any guidance from the Constitution, or any source other than its own views, had to make an accommodation of values and interests of a sort that used to be entirely the business of the legislature. That will become the general situation if noninterpretivism becomes dominant.

Another result of this theory, which, as I say, is the dominant theory of the law schools—at least it appears to be winning the debate at the moment—will be the nationalization of moral values as state legislative choices are steadily displaced by federal judicial choices. This is directly contrary to the theory of the Constitution, which is that certain moral choices specified in the document are national, but that unless Congress defines a new national consensus, all other moral choices are to be made democratically by the people in their states and in their cities.

Every time a court creates a new constitutional right or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished

Finally, there will occur what I have called the gentrification of the Constitution. The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media—is not composed of a cross-section of America, either politically, socially, or morally. If, as I have suggested, noninterpretivism leads a judge to find constitutional values within himself, or in the values of those with whom he is most intimately associated, then the values which might loosely be described as characteristic of the university-educated upper middle class will be those that are imposed.

There is nothing wrong with that class, but there is also no reason why its values should be imposed upon everybody else. If that happens, then the Constitution will have been gentrified.

Perhaps I've said enough to show why I think this dominant philosophy in the major law schools must not be allowed to go unchallenged intellectually. But I want to make two last points about the rhetoric of its adherents.

Noninterpretivism—activism—is said to be the means by which courts add to constitutional freedom and never subtract from it. That is wrong. Among our constitutional freedoms or rights, clearly given in the text, is the power to govern ourselves democratically.

Every time a court creates a new constitutional right against government or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished. Freedom cannot be created by this method; it is merely shifted from a larger group to a smaller group.

G. K. Chesterton might have been addressing this very controversy when he wrote: "What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people."

The claim of noninterpretivists, then, that they will expand rights and freedom is false. They will merely redistribute them.

What is perhaps even more troubling is the lack of candor—and I think it can only be called that—which so often characterizes the public rhetoric of constitutional scholars who subscribe to this theory.

Professor Paul Bator of Harvard put the point very well at the Federalist Society meeting at Yale. He explained that there are two different kinds of arguments that the constitutional in-group uses, depending on its purposes at the moment.

On Monday, while we are arguing for a result in court that would be hard to justify in terms of the written Constitution, we say things like: "Oh well, any sophisticated lawyer understands that the text of the Constitution is really not very clear, its history is often extremely ambiguous, and in many areas simply unknown. That being so, why shouldn't the court just do good as we define the good?"

But on Tuesday, after the decision has been made, we find ourselves talking to a different and much larger group, people who are not constitutional theorists and who may be enraged at what the court has done. These tend to be regarded by the constitutional cognoscenti as the great unwashed. To them, we do not mention the ambiguities, the uncertainties that underlie the decision. We certainly don't mention the political basis for the decision. Instead, we say to them, "Why, you are attacking the Constitution." That, of course, is not what the critics are doing.

"Here's Split End and the Fringes to sing their hit single, 'Baby, you can't leave me now, even though we ain't had no marriage vows, 'cause you got a job which I need to pay the rent—so don't split, Baby, I ain't gonna live in no tent.'"

If noninterpretivism is to be respectable, its scholars must stop talking this way. When they address the public, they should say, frankly, "No, that decision does not come out of the written or historical Constitution. It is based upon a moral choice the judges made, and here is why it is a good choice, and here is why judges are entitled to make it for you."

We do not mention the ambiguities that underlie the decision. We certainly don't mention the political basis for the decision. Instead, we say, 'Why, you are attacking the Constitution'

That last is going to be a little sticky, but that is what honesty requires. Until the public understands the basis by which constitutional argument moves, there will be little chance for the public to decide what kind of courts it really wants.

These concerns are not new. There is a great deal of dissatisfaction with courts today. It is important, in some sense, to recognize that those concerns, that kind of anger is as old as our Republic. Americans have never been entirely at ease with the concept of judicial supremacy, and they have also never wanted to try democracy without any judicial safeguards.

Thomas Jefferson spoke feelingly of the dangers of judicial power: "The Constitution, on this hypothesis [of judicial supremacy], is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent is absolute also. . . . Independence can be trusted nowhere but with the people in mass."

But Alexander Hamilton spoke with equal feeling on the necessity for safeguards enforced by independent judges when he said: "There is no liberty if the power of judging be not separated from the legislative and executive powers. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Both Jefferson and Hamilton had powerful points. It seems to me that only a strictly interpretivist approach to the Constitution, only an approach which says the judge must get from the Constitution what is in that document and in its history and nothing else, can preserve for us the benefits that Hamilton saw, while avoiding the dangers that Jefferson prophesied. □

"The Crisis in Constitutional Theory: Back to the Future"

The Philadelphia Society
April 3, 1987

I have been looking at your program and I am impressed. Any Society that can get through a program billed as "Constitutional Government: The Design, The Reality, The Prospect" in one day is an intellectual force to be reckoned with. The list of speakers can be compared only with the batting order of the 1927 Yankees. When I read it and realized I was leading off, I was tempted to bunt just to get on base.

The title of my talk is "The Crisis in Constitutional Theory: Back to the Future." Anybody who uses the word "crisis" after dinner had better be prepared to prove that there is one before he undertakes to rescue you from it. There are few things more annoying than being rescued gratuitously.

The "crisis" is that constitutional theory, and hence the future of constitutional law, appear to be at a tipping point. The American ideal of democracy lives in constant tension with the American ideal of judicial review under the Constitution. This tension arises from what has been called the Madisonian dilemma.

The United States Constitution creates a Madisonian system, one that allows majorities to govern wide and important areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. To trust the one is to court tyranny by the majority. To trust the other is to ensure tyranny by the minority.

It has come to be thought that the resolution of this dilemma is primarily the function of the judiciary, and ultimately and most especially, of the Supreme Court.

That is an awesome responsibility and judges require a strong theory of how to go about discharging it. In Alexander M. Bickel's words, judges must achieve "a rigorous general accord between judicial supremacy and democratic theory, so that the boundaries of the one [can] be described with some precision in terms of the other."

Have we achieved that accord? Most certainly not. Instead, we have lost what we had. Though occasionally violated in practice, in the last century and for half of this, it was unquestioned dogma that judges were to interpret the Constitution according to the intentions of the men who ratified it. When Justice Joseph Story discussed the constitutional role of courts, he stated, as self-evident, there being no opposing theory, that "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."

We know from reading their opinions that many of today's judges do not think themselves bound by original intent, and now we have judges saying so openly, to the apparent approbation of the press and certainly of most law professors. The professors are quite explicit that the intentions of the founders are ultimately irrelevant. You will have difficulty, I think, naming even one full-time professor at a major law school who writes in favor of original intent. The five professors who once did have all been appointed to the federal bench by the present administration. That is why I often say that, while my colleagues at Yale do not like much else about Ronald Reagan, they regard him as a great reformer of legal education.

The central question of constitutional theory is the legitimacy of power. I will attempt to demonstrate that no philosophy of judging that is not based on original intent can confer legitimate power upon the judiciary.

The non-originalist or non-interpretive theorists now dominate constitutional debate. It is well to understand them for they attempt to justify what some courts are, in fact, doing. These theorists contend the judges must create new rights by pursuing moral philosophy, or sensing the morality of our society, or reading the words of the Constitution for the meaning they have to us rather than the meaning they had to the founders.

How can that conceivably be justified? The answer comes in two parts. The first is one of relative institutional capacities; courts are simply better than legislatures in dealing with principles of long-run importance as opposed to immediate problems. Alexander Bickel said: "[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."

Professors, apparently, have very romantic notions about judges' lives. But were we to assume that courts have superior capacities for dealing with matters of principle, it does not follow that courts have the right to impose more principle upon us than our elected representatives give us. Governmental decisions involve a mix of, or a tradeoff between, principle and expediency. By placing decisions in the legislature, the Constitution holds that the mix or tradeoff we are entitled to is what the legislature provides. Courts have no mandate to impose a different mix merely because they would arrive at a tradeoff that weighed principle more heavily.

The second step in the argument is that the courts' commands are not really final and hence not undemocratic, or at least not fatally so. It is true that an outraged people can, if it persists, overturn a Supreme Court decision. Given the number of decisions to be scrutinized, however, the political process would exist in a state of permanent convulsion. As we know from history, it may take decades to accomplish the reversal of a single decision. In the meantime, the American public must live with it. The theory assumes, as one of my clerks put it, that in the long run none of us will be dead.

What is the point of all this scholarship -- I use the word generously -- devoted to replacing text and history with moral philosophy in constitutional adjudication? If you look at the new rights these theorists would create -- rights that lead to a society far more egalitarian, socially permissive, and morally relativistic than the one we have or any that the American electorate wants -- the answer is clear.

As John B. McArthur put it: "Noninterpretivists are eager to discard written systems of law, including that based on the Constitution, because written law is the barrier between law and politics. If the judicial process can be reduced to political choice, then the noninterprevists' views will be heard along with other views. When text-based methodologies are rejected, the Constitution, formerly the trump card in the political debate, can be excluded from discussion."

Why this desperation to abandon the historical Constitution? Because the political values of the non-originalist professors are far different not only from those of the Constitution but from those of the American people. The trick is to appropriate the veneration we feel for, and the obedience we give to, the actual Constitution for non-originalist political results. As Herbert Schlossberg said, the intellectual class "has found a vehicle for giving its values the force of law without bothering to take over the political authority of the state." Judges who behave as the non-originalists wish upset the Madisonian balance and impose the tyranny of the minority.

Why should we care what that lowing herd of independent thinkers, the legal academics, think and write in journals that, by and large, only they read. Because, as the very existence of this Society and this program shows, we believe that ideas have consequences. The teaching of non-originalism in the law schools means that generations of law students, many of whom will be coming onto the federal bench in the years ahead, have been trained to believe that judges may, indeed should, remake the Constitution. What used to be a shameful secret, and is now just beginning to be admitted, may one day be universally and proudly avowed as the judge's duty.

Forty years ago no one could have imagined the extent to which, in area after area, judges would claim ultimate power over our lives. If the non-originalists' teaching has its intended results, forty years on the nation may be governed by judges to a degree that seems unimaginable today.

This debate between originalism and non-originalism, long hidden in the academic world, is now going public. For that we must thank Justice Brennan and Attorney General Meese, who have made the question of original intent one of national discussion. Unfortunately, that discussion is too often guided by that most venerable maxim of constitutional analysis: "Magnopere interest cujus bovem confossum esse," or "It makes a big difference whose ox is gored." (If you don't like the translation, see my clerk.) It is essential that we keep bringing the debate back to the basic issue.

The central question in constitutional theory is said, the legitimacy of power. A judge is unelected, unaccountable, and unrepresentative, and has no source of legitimate power other than law. That means that any intelligible and legitimate theory of constitutional adjudication must rest on the idea that the Constitution is law -- not moral philosophy, not the values judges and professors hold dear -- but law. What does it mean to say that the words in a document are law? One thing it certainly means is that the words constrain judgment. They compel the obedience of judges every bit as much as they compel the obedience of legislators, executives, and citizens.

Constitutional guarantees not only have contents, they have contours that set limits. The fact that there are edges to the Constitution's guarantees means that the judge's legitimate authority has limits and that outside the designated areas democratic institutions govern.

There are those in the academic world who deny that the Constitution is law. A year or two ago I made this argument at a small conference and an eminent constitutional theorist said to me: "Your notion that the Constitution is law must rest upon some obscure philosophical principle with which I am not familiar." He was intelligent enough to see that if the Constitution is law, the non-originalists' party is over. Indeed it is.

If the Constitution is not law, what authorizes a judge to set at naught the judgment of the representatives of the American people? If the Constitution is not law, why is the judge's authority superior to that of the President, Congress, the armed forces, the departments and agencies, and that of everyone else in the nation? Why should anybody obey us? No answer exists.

The only way the Constitution can constrain judges is if the document is interpreted according to the intentions of those who ratified it. That is the way judges deal with all other forms of law; any other approach makes the judge the ultimate legislator.

The philosophy of original intention has been parodied as meaning that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless. Since we cannot know how the framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

There is a version that is adequate to the task. Dean John Hart Ely has described it:

> What distinguishes interpretivism [or originalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there -- because the situation is not likely to have been foreseen -- is generally common ground.

In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. Courts perform this function every day when they apply a statute, a contract, a will, or, indeed a Supreme Court opinion to a situation the framers of those documents did not foresee.

Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's free press clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the commerce clause to state regulations of interstate trucking.

Does this version of intentionalism mean that judges will invariably decide cases the way the framers would if they were here today? Of course not. But many cases will be decided that way and, at the very least, judges will confine themselves to the principles the framers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the framers intended it. That is better than any non-intentionalist theory can do. If it is not good enough, judicial review under the Constitution cannot be legitimate. I think it is good enough.

What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations this will be known, and revered, as "Bork's wave theory of law reform." It will be known and revered, that is, unless some wiseacre develops a quantum theory of law reform.

What I have discovered is that courts make law before they have any adequate theory of what they should be doing. They are forced by the urgencies of litigation to give answers before anyone knows the questions. Matters are made worse by the legal technique of reasoning by analogy. Only theory can tell you which characteristics of a situation are relevant so that you know which situations are analagous for your purposes. Without a theory, the judge will find false analogies and move the law in harmful directions.

It is at this point that the first wave of theorists appears in the law schools. It is their function to shoot the wounded and make matters worse. They start from the deformed notions judges have created and extrapolate them. A rich, erudite, and mindless literature grows up. The courts then begin to adopt the extrapolations. The future of the law begins to look extremely bleak.

But eventually, to some people, the fact that the law and its theorists make little sense begins to become apparent. The result is not only meetings of the Philadelphia Society and good dinners but a second wave of theory. The second-wave theorists return to first principles. They ask what the purpose of the law is, what legitimates the courts' behavior, and they begin to construct better theories of how courts should decide cases. Since the second-wave arguments are much better, they slowly come to dominate the intellectual world, the new ideas slowly percolate through to the courts, and the law is on the road to respectability.

These reflections were prompted by the history of antitrust law, which in its use of highly general provisions and its open texture, resembles much of the Constitution. At the beginning, courts were forced to decide cases for which neither they nor the economics profession were prepared. Law that, in retrospect, looks very odd began to grow up, law that was based on an inadequate understanding of the limits to the judge's role and on what can only be described as folk economics. Judicial economics is to economics as judicial writing is to a sonnet.

It was at this stage that the first wave of antitrust theorists hit. They wrote books and articles about the political and social values that should influence antitrust judges. They wrote books and articles about barriers to entry, leveraging monopoly power from one market to another, vertical foreclosure, oligopoly behavior, market failure, and much more, most of it arrant nonsense. But, in addition to achieving tenure and consulting fees, these theorists encouraged the courts to even greater policy fiascos. The law came to suppress as much competition as it preserved.

Then the second wave began to gather. This is not the time to tell the story of what has been called the Chicago school of antitrust. I need only say that a thoughtful and intensely rigorous economist, Aaron Director, was invited into Edward Levi's antitrust course. He began to question, and to train a few interested students to question, the shibboleths of antitrust. This was the germ not only of antitrust reform but of the law and economics movement.

When I first started at Yale I thought the situation of the law was hopeless, that the intellectual content of antitrust was corrupt beyond redemption and would be kept that way by political forces hostile to the free market. That accounts for the tone of much of my early writing -- sarcastic and confrontational. I thought if you couldn't win, at least you could cause pain on the way out.

The fact is I underestimated the power of ideas. That is a very natural error for a professor. If you sit in enough faculty meetings, you are very likely to underestimate the power of thought.

But the second wave Director's students started grew and achieved a theory of the goal of antitrust based on separation of powers concepts, and new, much more plausible views of business behavior and the law's proper role in the market. Scholarship was gradually transformed and so widely has its influence spread that it became possible for people like Bill Baxter, Jim Miller, and Dan Oliver to be appointed to head the Antitrust Division and the Federal Trade Commission and to survive politically in a way that would have been impossible even ten years previously. The battles are not over yet and I am far from claiming that the economic phenomena of the market are fully understood. But matters are immeasurably improved and antitrust has been recaptured for a free market rather than an interventionist, statist philosophy.

I suggest to you that we are witnessing the beginning of the second wave in constitutional theory. The courts addressed what they regarded as social problems after World War II and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from the academies, in sympathy with the courts politically, began to construct theories to justify what was happening. So was non-originalism born. That wave has become a tsunami and its intellectual and moral excesses are breathtaking. Like the first-wave theorists of antitrust, these theorists exhort the courts to unprecedented imperialistic adventures.

But the second wave is rising. When I first wrote on original intent in 1971 one of my colleagues at Yale told a young visiting professor not to bother with it because the position was utterly passe. And so, indeed it was. But it was more than passe; it was, I think, the future as well. On that side of the issue there are now, to name but a few, Judges Ralph Winter and Frank Easterbrook, Professor Henry Monaghan, and former professor, now Chief Justice of the High Court of American Samoa, Grover Rees. There are many more younger people, often associated with the Federalist Society, who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years, for the second wave to crest, but crest it will and it will sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea.

The struggle for possession of antitrust was crucial because antitrust's ideas and symbolism go to the heart of capitalist, free-market ideology.

The intellectual struggle for possession of the ideas and symbolism of the Constitution is equally, or more, crucial, for constitutional theory goes to the heart of the American ideology of balanced democratic order and individual freedom.

We have come a long way into scholarly intellectual corruption and judicial imperialism. We have come a long way from the founders' vision of a Madisonian system. But we are going back to the future. Constitutional theory will return to Story's assumptions about original intent. But now we go back with a far more sophisticated, and hence a stronger and more durable, philosophy. That is the one, and the only, blessing for which we must thank our friends, the non-originalists.

Senator KENNEDY. Let me just continue. Next, you told us in these hearings that your views are changing in a number of controversial areas, but you told the "District Lawyer" in 1985 when you were a judge, and I quote,

> It is always embarrassing to sit here and say, no, I have not changed anything, because I suppose one should always claim growth. But the fact is, no, my views have remained about what they were. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you are likely to know a great deal. So when you become a judge, I do not think your viewpoint is likely to change greatly.

Then you told the Federalist Society in 1987, and I quote,

> An originalist judge would have no problem whatever in overruling a non-originalist precedent because that precedent, by the very basis of his judicial philosophy has no legitimacy.

Finally, Mr. Bork, there is an audio tape of remarks which you made at Canisius College in Buffalo on October 8, 1985. With the Chairman's permission, I would like to have the committee hear an excerpt from the tape which contains your answer to a question about your views on your respect for precedent. We have heard you testify about your position on this issue in these hearings, and I think it would be helpful to the committee to hear the actual manner in which you commented on the issue in 1985.

First, we will hear the question and then we will hear from Mr. Bork.

The CHAIRMAN. Let me ask this. Judge Bork, yesterday I gave you a transcript of a speech. I assume it is the same.

Senator KENNEDY. Yes.

The CHAIRMAN. If there is no objection, then——

Judge BORK. May I ask what the first piece you referred to was? You referred to the 1987 Federalist Society, Senator, and then you referred to a Canisius College question?

Senator KENNEDY. This is a question and answer.

Judge BORK. But what was the first thing you referred to before that? I think there was some writing.

Senator KENNEDY. "District Lawyer."

Judge BORK. "District Lawyer."

Senator KENNEDY. If we could hear the question.

[Audio tape played.]

> Question. If I can follow that up. Now, the relationship between the judge, the text, and precedent, what do you do about precedent?
>
> "Mr. Bork. I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons. One is historical and traditional. The Court has never thought constitutional precedent was all that important—the reason being that if you construe a statute incorrectly, the Congress can pass a law and correct you. If you construe the Constitution incorrectly, Congress is helpless. Everybody is helpless. You're the final word. And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it. Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says, "Well, I respect precedent," what you have is a ratchet effect, with the Constitution getting further and further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. I don't think precedent is all that important. I think the importance is what the framers were driving at, and to go back to that.

Senator KENNEDY. Judge Bork, in light of what we have just heard, how can anyone have confidence that you will respect the decisions of the Supreme Court with which you disagree?

Judge BORK. Well, I will tell you why, Senator. Let me go down the items you have mentioned. I will address that specifically and at some length because it is a difficulty. Let me start down the items you mentioned.

You mentioned the "District Lawyer," an answer about where I said it is embarrassing to sit here and say I have not changed. The question was, "Has your view of the possible usurpation of political functions by courts changed since you ascended to the bench?" Not all my views; my views about courts taking over areas that belong to the legislature.

And I said,

> It is always embarrassing to sit here and say, no, I have not changed anything because I suppose one should always claim growth. But the fact is, no, my views have remained about where they were. After all, courts are not all that mysterious, and if you deal with them enough and teach their opinions enough, you are likely to know a great deal.

The CHAIRMAN. If the Senator will yield and Judge, because we have been over this several times. You made a distinction at the outset of your answer. Would you repeat the distinction you were making about what you were referring to, so I understand it?

Judge BORK. All right. The question was,

> Before you ascended to the bench, and indeed, in lectures and writings even since that time, you have been among the people who have challenged the role of what you and they have called the "imperial judiciary." Has your view of the possible usurpation of political functions by courts changed since you ascended to the bench, either become stronger or perhaps more diffuse?

And I said no, my view of courts taking over political functions had not changed.

The CHAIRMAN. So the answer relates to courts taking over political functions?

Judge BORK. That is right. It does not relate to all other views of mine. In no way am I saying I have not changed any view of mine. Just that one aspect.

The CHAIRMAN. One more thing. What did you mean and what do you think they meant by "political functions"?

Judge BORK. I think I meant and I think they meant functions that belonged to the legislature under the Constitution. And I said no, my view—that that is not proper—have not changed.

The CHAIRMAN. Thank you very much.

Judge BORK. Now, in the Federalist Society speech, you have the original notes there, Senator. I do not know if you do, but the committee has them. I had some typed remarks, not much but a few, and somebody before me spoke and I scribbled in the margin about an originalist judge, et cetera, need not worry or something about overruling a non-originalist decision because a non-originalist decision has no legitimacy. In the next paragraph, which was the typed part of my speech, I then gave an example of non-originalist decisions that should not be overruled.

That was a commerce clause decision, not in conformity with the original intent of those who drafted the commerce clause, but that clause has been expanded so much it cannot be cut back and I said that in the next paragraph, so I was certainly not saying you could overrule anything. Now, as to this tape you just played, Senator, generally what I said there is correct and the reason for it is this and it is the reason that every judge has given.

If there is an incorrect constitutional interpretation, the legislature cannot change it. The political forces of the nation are helpless unless they can amend the Constitution. If there is an incorrect interpretation of a statute, the legislature can correct it. That is why it has always been true that the doctrine of stare decisis or a doctrine of precedent has always applied more severely in statutory fields than in the constitutional field.

I learned that in my first year in law school in a course taught by Edward Levi, who had just written an article in a book called "Introduction to Legal Reasoning" in which he points out that the Court has always felt that way. Now, that is a perfectly standard view.

The CHAIRMAN. Again, for clarification, Judge, again I apologize for being slow on this. The distinction again being a constitutional decision based upon statutory interpretation?

Judge BORK. No, no, the distinction has always been that courts are more respectful of precedent in statutory fields than they are in constitutional fields.

The CHAIRMAN. Give us an example of each so we all know what you are talking about.

Judge BORK. Well, to get a constitutional decision such as in a case we have talked about. The court decided *Plessy* v. *Ferguson*, establishing the rule of separate but equal for the races, in about 1896, I believe. The Congress could do nothing about that, really.

The CHAIRMAN. That was constitutional versus statutory?

Judge BORK. That was a constitutional decision.

The CHAIRMAN. That is all I am trying to make sure of.

Judge BORK. Yes. The Congress could do nothing about that.

The CHAIRMAN. I understand that.

Judge BORK. And the Court overruled it in *Brown* v. *Board of Education*. Now, this is a standard view. For example, I will show you Justice Brandeis. He is talking about stare decisis is not a universal, inexorable command. In most matters, he says however, it is more important that the applicable rule of law be settled than that it be settled right.

Then he says, and this is from a case, *Burnett* v. *Colorado Oil and Gas:*

> This is true, even where the error is a matter of serious concern, provided correction can be had by legislation, but in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decision. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Then, just one more quotation. Justice William O. Douglas said in a case:

> The judge remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men, long dead and unaware of the problems of the age in which he lives, do his thinking for him.

Now, those quotations are no stronger than what I said, but what I said, Senator, it is to be remembered, was in a give and take, question and answer session after a speech. It was a quick answer. It was not a prepared statement. Now you have other speeches and interviews of mine, in the past, and I have stated the matter more fully.

And in the same year as that speech, in the "District Lawyer" interview, I said—it is the same year as the speech which you played—there are some constitutional decisions around which so many other institutions and people have built, that they have become a part of the structure of the Nation. They ought not to be overturned, even if thought to be wrong.

The example I usually give, because I think it is a non-controversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations and so forth, have been built up around that broad interpretation of the commerce clause that it would too late, even if a justice or a judge became certain that broad interpretation is wrong, as a matter of original intent, it is too late to overturn it and tear it up.

I said the same thing in the "Federal Society" speech to which you have referred so that aside from a quick answer at a college one night after a speech, I have been fully consistent, in these hearings, with what I have said before and I have told you the same thing about the commerce clause, the legal tender cases, the equal protection clause, in the first amendment and so forth, that I have told you about that precedent.

Senator **Kennedy**. I just mention here, to continue on, the next question in the "District Lawyer" article about the subject of prudential restraint, where people have relied on precedents. You were asked whether "your view would be that a justice is entitled, as part of his responsibilities, to re-examine a constitutional question de novo?"Your answer was "I think that is true of a justice and true of a lower court judge unless he is bound by Supreme Court precedent. After all, there are a lot of considerations that go into it. But at bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent."

Now, in the course of these hearings, on Tuesday, in evaluating precedent—included that in the record—you pointed out that we should make sure the decision was incorrectly decided and then determine whether governmental and private institutions have grown up around that prior decision.

In the Canisius College speech, you made the unqualified statement,

> I don't think that in the field of constitutional law, precedent is all that important and if you become convinced that a prior court has mis-read the Constitution, I think it's your duty to go back and correct it. I don't think a precedent is all that important.

Those statements speak for themselves. Your own words cast strong doubt upon your adherence to precedent that you think is wrong.

Judge **Bork**. Senator, you and I both know that it is possible, in a give and take question and answer period, not to give a full and measured response. You and I both know that when I have given a full and measured response, I have repeatedly said there are some things that are too settled to be overturned. The Canisius College thing was not my speech. That was a bunch of students questioning me afterwards.

It is not the kind of thing that ought to be weighed against my more considered statements when I am not just engaging in give and take. We all make statements that are not fully balanced in a give and take. You mentioned something from the "District Lawyer" which I, at the moment, cannot find.

Senator KENNEDY. It is the next question down after the last one. The only point I want to make, Judge, is that I think it is important to understand that this is not just an off-handed legal question. The question of judicial restraint has been something that you must have been thinking about for years. I for one would not accept the concept that a person that has been teaching, a professor, who has been dealing with these issues for a long period of time, that this is just an off-handed comment about legal theorem.

You have been thinking about it. You have worked at it. It is your life. You made the statements and we have read a series of statements, rather than just this one, and this body has had an opportunity to listen to your voice and how you characterize that. It seems to me that your series of statements make an extremely convincing case as to what your real beliefs are with regard to precedent, and that is going to have to stand.

We have your other testimony and people are going to have to evaluate that against what you have said as a judge. A great deal, in the course of these hearings, has been made—let's not go back over the old years; let's go and consider what he has said as a judge. We have used these examples, a series of statements that all reinforce themselves.

The fact remains, you were sitting as a federal judge at this very time of the Canisius remarks. I think that federal judges are expected to understand, or be able to give a pretty good definition, of how they are going to respond to precedent.

Judge BORK. The only aspect that I addressed in that question, Senator, the only aspect that I addressed was the distinction between the theory of precedent or stare decisis in a constitutional context and a statutory context. That is the only time you can say I did not go on to say something more. In the Federalist Society speech, which you quoted, I did, in the next paragraph, say of course, there are some decisions that are so rooted you cannot turn them over.

In "The District Lawyer"—in which I still have not found what I said—but you quoted me as saying at bottom, the judge's obligation is to the Constitution, which is, of course, true. But right before that, I said a lot of considerations go into whether to overturn or not, which is what I have said here. So with a single exception, I think, of one after-speech question and answer session, I have consistently said what I have said here.

Senator KENNEDY. Well, I think the record will speak for itself. I have no further questions of the nominee. I would like to just use the remaining 2 or 3 minutes for a comment. I think Mr. Bork has claimed that he is only applying neutral principles, but there is something wrong with neutral principles if the result is that Congress and the courts must be neutral in the face of discrimination because of race, they must be neutral in the face of discrimination against women and in the face of gross invasions by the Government of individual citizen's rights to privacy.

Above all, a Supreme Court Justice must be fair, but in life-time of writings on the public record, Mr. Bork has shown his bias against women and minorities and in favor of big business and Presidential power. It is small comfort to minorities to know that some years after the Civil Rights Act was passed over his opposition, Mr. Bork changed his mind and said that it had worked all right. But if you had had your way, Mr. Bork, no one would ever have known how the Civil Rights Act would work.

Mr. Bork is against the one man, one vote decision of the Supreme Court, which says that everyone's vote should count equally and the same. He would allow majorities to write laws that give greater weight to some people's vote than others and that is the very opposite of democracy. Mr. Bork asks us to judge him on his record, as a judge, but in his own speeches, as a judge, he has shown little respect for past decisions of the Supreme Court.

Again and again on the public record, he has suggested that he is prepared to roll back the clock, return to more troubled times, uproot decades of settled law in order to write his own ideology into law. And in these hearings this week, he has asked us to believe that he can make a U-turn in these areas of fundamental importance. The question all of us are asking is who is the real Robert Bork and what risks are we taking for the future if he becomes a Justice of the Supreme Court with the last word about justice in America.

The White House strategy, in these proceedings, has been clear. Mr. Bork's balloon was losing altitude in the Senate, and he has been rapidly jettisoning the baggage of a lifetime in opposition to individual liberty and equal justice. President Reagan has failed to achieve his ideological agenda in Congress and is not entitled to achieve it by an ideological nomination to the Supreme Court that could reverse the progress of the past and tilt the country far beyond the end of his term.

America is ready to move forward with the Supreme Court, not backward. But Mr. Bork is out of step with the Congress, out of step with the country, out of step with the Constitution and many of the most fundamental issues facing America. Mr. Bork is a walking constitutional amendment and he should not be confirmed by the Senate.

Judge **Bork**. Senator, if those charges were not so serious, the discrepancy between the evidence and what you say would be highly amusing. I have not asked that either the Congress nor the courts be neutral in the face of racial discrimination. I have upheld the laws that outlaw racial discrimination. I have consistently supported *Brown* v. *Board of Education* in my writings long ago. I have never written a word hostile to women.

I have never written a word hostile to privacy. I have complained about the reasoning of one Supreme Court case. I have never written a word or made a decision from which you can infer that I am pro-big business at the expense of other people. And as far as Presidential power is concerned, I have very rarely dealt with that, but when I have, it is on constitutional principles and upon occasion, as in the pocket veto matter, you will find me squarely opposing Presidential power.

I have no ideological agenda and if I did, it would not do me any good because nobody else on the Court has an ideological agenda and I do not intend, if confirmed, to be the only person up there, running around with a political agenda. In fact, nothing in my record suggests I have a political or ideological agenda.

Senator KENNEDY. Well, Mr. Chairman, I think my time is expired and I think the record speaks for itself. We have had an opportunity to review those items in previous questioning and the members will have to make their own judgment.

Judge BORK. I agree with that, Senator Kennedy.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman. Mr. Chairman, I have shared with you that I practiced law for 18 years and have legislated for 24 and I have enjoyed that thoroughly. In these last 4 days, I have become totally convinced of what I thought was inadequacy, but has actually proven to be a great, remarkable asset. I never wrote any books. I wrote a lot of briefs. There are no written speeches of Al Simpson. I knew I was on the right track years ago.

The CHAIRMAN. I think you will find a bunch of them are taped, Al. I am finding that out right now. [Laughter.]

And not all of them turn out to be mine either. [Laughter and applause.]

Senator SIMPSON. Well, next question please. That is typical of your grace in this situation and like you and I like that. You need that. Keep your humor, it sure throws the rest of them off. They do not know what the hell to do with it. But, I never wrote any stuff. I worked hard and I worked hard to be a great lawyer and I work hard to be a great legislator or statesman. I work hard because I do not like to make an ass out of myself. There really is nothing else in it for me.

And when you said this morning—it was very moving—when you said something to the effect—and it was just two or three words, so I must be pretty close to it—that you did not want to go down in history or to be disgraced in history, that you have said and stated your position absolutely clearly and if anyone could believe that you are going to go on the Supreme Court and not do it all differently, you would be disgraced in history. Isn't that what you said?

Judge BORK. I did indeed. I should make an additional point. I also took an oath, when I came in before this committee, to tell the truth and I take an oath very seriously and that is what I have done is told the truth.

Senator SIMPSON. Well, I think that is something for people to hear very clearly. Indeed, you did take an oath and you take that oath very seriously and you have a belief in a higher being and that is what makes the oath worth taking. That is how that works. That ain't corny. That is the way that is.

But again, back to writings. It was curious to me and it has been like a law school seminar in some situations to hear you and my fine friend from Pennsylvania discussing certain areas of the law in a highly honed way. For me to listen to this is educational and very fascinating how you get into it and both can bat it around—

and others. And Senator Metzenbaum with his antitrust. Having never written a book—this fellow said he had written in the area of probate—he wrote a very provocative book called "The Role of the Decedent in Estate Planning." I could have written a book like that and I thought that that is the only title I could have probably gotten away with.

But, I had an awful lot of fun practicing law in a profession that I dearly loved and I wrote some awfully stupid letters. People still bring them to my attention. I tried some really goofy cases, losers, total losers. In pro bono—we really did not get going on pro bono until I was about 3 or 4 years into the practice, about 1963. Somebody said, you know, we ought to do some pro bono. We said, well we will so the Park County Bar Association said we will do, you know, blank hours a month, each of us and check the book.

I do not know how many lawyers did it that way. We did. We thought we were pro bono automatically. We were charging 10 bucks an hour for our work. So, pro bono was not what it is now.

That again is kind of what this whole thing is about. We are judging you on the basis of September 18th, 1987, when they forget everything that was swirling around in 1964 and 1971 and 1980, whenever. That's, I think, total distortion.

Back to that extraordinary case, the "illegal" case, that you did something illegal. Well, I tell you, I used to use Black's law dictionary only when I was in extremity. The word "vacate" in Black's law dictionary says "To amend, to set aside, to cancel, or rescind; to render an act void; to vacate an entry of record or judgment." It is not synonymous with "suspend," which means to stay enforcement of judgment or decree—to put an end to.

I hope we can put an end to what must be another goofy case where the party that won didn't want to go any further with it.

Now, you don't have to be a real wizard to know that must be a real turkey. And it was vacated. And that ought to be the end of that, surely.

So I guess what we, who support your nomination—I guess we kind of come out and say, ah, that's crazy, how can that be? But, obviously, that isn't enough, because those on the other side say highly dramatic things: you have shocked my senses, you have left me limp, I cannot believe what I have read, you have stunned me.

Well, I tell you, why wouldn't someone in America be alarmed to see the distortion of your record. How would anyone not, any sensible American not be disturbed if they read your record? The word "poll tax" is immediately equated with racism. I think we all ought to get awfully tired of that; that case had nothing to do with racism, nothing. The words "poll tax" have a marvelous connotation—no, a hideous connotation of racism. And you would have trashed it in a minute, would you have not, if it had anything to do with racism?

Judge BORK. Of course, the basis of my discussion of that case was that it had nothing to do with racism and therefore it was a little hard to follow some of the reasoning. I should say—I've just been handed the opinion in that case, Senator, and Justice Hugo Black dissented from that ruling that the poll tax was automatically unconstitutional, even when there was no racism. And in his dissent, he said:

"It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law, as written or as applied, is being used as a device or a mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the district court below, and with my brothers Harlan and Stewart, that this record would not support any finding that the Virginia poll tax law the Court invalidates has any such effect.

That is, any such discriminatory effect. Hugo Black said that very plainly, and, indeed, the Court did not claim that there was any racial animus in that poll tax.

Senator SIMPSON. Yet that has been presented day after day, hour after hour, on the hour—in fact, they all are presented on the hour, or on the half hour—the same ones; and they always have the charged word "anti-black," "racist," "sterilization of your fellow human beings," "contraceptives," "homosexuality," "sexual preference," "women's rights." You know, really, what a bizarre exercise. It must be something for you to observe—and you are observing it, you are living it.

How do you feel about it all?

Judge BORK. Senator, I have not yet had time to gather my thoughts on the entire matter. Let me say that it is not terribly enjoyable.

Senator SIMPSON. No, I think not, but I think it will be concluded shortly. And it's been a very fair hearing—and a good one, and you like it somewhere down in there.

Judge BORK. Oh, Senator, I love it. [Laughter]

Senator SIMPSON. All right, now, several Senators have gone through the list of your actions and views and cases and amicus briefs, and the full-page newspaper ads have continued in harsh and hysterical tones, and repeated and supplemented your, "record", which is really so grossly distorted, from prior writings and speeches. And, you know, when I ask who these groups are, I never really can find out; it's really getting to be a phantom kind of a networking operation now—they are running out of gas, or money, and nobody really takes any responsibility. I wasn't going to use the word "credit"—that would be a disservice.

But other items in these listings and in these advertisings are not only unfair, in my mind—and in some cases outrageous; they are dishonest—I will use that term—and they are lies—I will even use that term, because that's more perfunctory and more real, and one that I'd love to stick with: lies. And those are words that people know, words like "lie."

Going over this list that we have heard this morning—and I've had my list over the last 3 days—on what you have done on the court, which are not anything more than things of the record, which are precise and irrefutable; they are in the statutes, in the law books. So when we get to what is the point, what kind of a Justice will this man be as a Supreme Court judge, it is quite helpful to see what he was as an appellate judge. And I am not going to go through the cases that have already been reported about female Foreign Service officers entitled to the same pay as similarly employed male officers—you did that; holding that intentional sex discrimination can be inferred solely on statistical evidence—a marvelous pro-civil rights decision; female stewardesses may not be paid less than male pursers with similar jobs; two cases on title 7, which were liberally construed, which in effect kept the courthouse door open for aggrieved people who claimed employment discrimination—that hasn't been quoted before, and that's *Nordell* v. *Heckler* and *Tyrell* v. *U.S. Postal Service*—you kept the door open, other people were trying to shut it on blacks and others; the senior military officers case and the promotion decision on the black officer—you did that, you opened that door for him; the South Carolina vote where there was an at-large election without first proving that the change would have no discriminatory effect against blacks—you did that, you opened that door, that isn't something you talk about on a podium or sing about—you did it. That's not the view of a judge who is hostile to women and minorities; it sounds to me like a very compassionate man.

I hope the people of America are seeing that in you, a judge who has expanded civil rights during every bit of his writings and decisions instead of pinching it down and shutting it off. The earlier Robert Bork, you know, who wrote all those provocative law review articles—well, that's you, too. Theory, I read that yesterday what you said about as you opened and prefaced those remarks in that law review article, and how you ended it.

What was interesting to me was that when you were Solicitor General you filed several briefs supporting the rights of minorities and rights of women when you didn't even have to, didn't you?

Judge BORK. True.

Senator SIMPSON. Why did you do that?

Judge BORK. It seemed to me that it was in accordance with the law.

Senator SIMPSON. Was it in accordance with your belief that minorities needed protection? Was it in accordance with that, too?

Judge BORK. Yes, it is, Senator, but I should say that if the law isn't there, my beliefs aren't going to influence what I do—the law has to be there.

Senator SIMPSON. That's pretty clear. You get a lot of flak on that, but that's what the system is supposed to be all about.

So then you filed an amicus brief urging and arguing that single-sex schools are unconstitutional and illegal—that was a Philadelphia case. You filed these because you felt it was the right thing to do under the law. We've all heard several times--and yet it keeps coming back up when they talk about you as being a racist, that you alone took a pretty firm stand in your original law firm and stopped the prejudice against a Jewish lawyer in the firm.

Then you filed another brief—and you mentioned on your first day, Section 1981, which is an old statute—I don't remember the date of it, but I know if we had ever put the right English on the cue ball on that one years ago we could have saved a lot of time in the civil rights laws, wouldn't you agree?

Judge BORK. That's entirely true.

Senator SIMPSON. You bet. So 1981, Section 1981, is a most important civil rights statute. And you filed a brief which said it was the most important one prior to the Civil Rights Act of 1964.

Judge BORK. I didn't say it prior to 1964, that's right; I said the statute was the most important one before the 1964 one.

Senator SIMPSON. When applied to racially discriminatory private contracts.

Well, Gordon Humphrey has reviewed some of those, Orrin Hatch has reviewed some of those.

You filed another amicus brief, successfully arguing the 14th amendment gave Congress the complete power to remedy State or local violations of the amendment. Now, that one decision right there is probably the most critical one of getting things done under the civil rights law, is that not correct?

Judge **Bork**. I think so.

Senator **Simpson**. That one has escaped people, apparently—*Fitzpatrick* v. *Bitzer*. That was absolutely essential to the federal elimination of racial discrimination, is that not true?

Judge **Bork**. I guess so. Senator, I don't have that—I'm afraid I filed so many briefs in my time——

Senator **Simpson**. I'm sure that's true. But, in any event, it was essential—and you did that. Then you represented the position of unions—you went through those other cases. And no one has really presented any honest evidence of you doing these heinous things in this country, and that really—well, that galls me—I'm not going to ask you what it does with you. Because I believe in fairness. You know, you can play this game of politics—and I love it, I can bat around in it, chew up in it, snarl, and then go off and have a light glass of ale with some guys who I vote with 5 percent of the time—but that's fun for me, because that's the way I practiced law.

So to hear these things said about you—the best and most attractive phrase, it just seems wierd, absolutely wierd, to hear that when the cases are there. I think it shows how much we are talking past each other with regard to you. I hope we are somewhere listening in this process and that our colleagues on the floor will be listening, because it would be a great disservice to talk past each other as regards you. And if it's not being heard, that would be indeed too bad. And if that happens and goes on, they will not know about you.

I was interested again in that issue of precedent and overruling and so on. I don't know how you can get any more clear than that—I really don't—because in the same article that is being used to drum you about the head and shoulders, this "District Lawyer" article—you said it all in there, that, you know, if things had been built up, regulations and governmental institutions and private expectations had been built up around that, it's too late, even if a justice or judge became certain that broad interpretation is wrong in the matter of original intent, to tear it up and overturn it. That's what you said. And then at the end of that article you said "If the Justices have become convinced that a decision cannot be squared with the Constitution, they ought to consider overruling it. But the Court should be careful"—these are your words—"If a particular decision has become the basis for a large array of social and economic institutions, overruling it could be disastrous." You said that, didn't you?

Judge **Bork**. Yes, I certainly did.

Senator **Simpson**. In the same article that was referred to moments ago—I believe; maybe it was a different one, but it was certainly from the "District Lawyer."

Judge **Bork**. That's the same article—same interview.

Senator **Simpson**. Here's a statement, call it "Guess Who" time.

> He is a dangerous radical. The general opinion is that he is a very able lawyer, a man of keen intellect, but that, as a matter of intellectual honesty, he is not entirely trustworthy. He will distort the Court's decisions for generations; he will take his seat equipped with a variety of preconceived notions and firmly held opinions relating only remotely, if at all, to the questions of law, but rather to the questions of a purely political nature concerning social issues.

Now, that was a comment about Justice Louis Brandeis. The year was 1916.

Did you think he panned out all right?

Judge BORK. I certainly did.

Senator SIMPSON. In the end?

Judge BORK. I certainly did. He's become one of the giants of the Court.

Senator SIMPSON. He made the grade.

Judge BORK. That's right.

Senator SIMPSON. He is not disgraced in history, is he?

Judge BORK. Certainly not, certainly not. The names of Holmes and Brandeis, I suppose, will live as long as our jurisprudence does.

Senator SIMPSON. Well, they will be to all of us who love the law and practiced it and to the people who it affects—and that's everybody else. That was a comment about Justice Brandeis.

How about this one? "He has a record of continued hostility to the law, of continual war on the Constitution. He has already taken sides with the executive branch. He would be but their echo." The National Organization of Women warned that if he were confirmed, "justice for women would be ignored or further delayed, which means justice denied."

That is a comment about Lewis Powell. What do you think of that one?

Judge BORK. They appear to have missed the mark rather substantially.

Senator SIMPSON. I think so. One more—and a final one.

> We opposed his confirmation not solely because of his consistent opposition to women's rights, but, more importantly, because he has demonstrated that his legal opinions on women's issues are based on an apparent personal philosophy and not on the facts and laws and cases before him. Thus he lacks the fairness and the impartiality requisite for appointment to the Supreme Court of the United States.

That's about Justice John Paul Stevens. What do you think about that comment?

Judge BORK. Just as the comment about Justice Powell, when I said they missed the mark very substantially, I was being a bit wry; they missed the mark by 180 degrees.

Senator SIMPSON. Well, indeed they have, and they have fired all the grapeshot in their cannon at you, and they missed it just as badly. And I think history will bear that out.

I'm interested in another thing—oh, I know one I wanted to cover. Back to the issue of equal protection. How much time do I have, please? Forget it, they are not going to keep track.

The CHAIRMAN. Just keep going.

Senator SIMPSON. The issue of equal protection——

The Chairman. About 6 or 7 minutes, Senator, but, if you need more time, take it.

Senator SIMPSON. You noted that the military draft—I think this is important, I want you to hear this little scheme here.

Judge BORK. All right.

Senator SIMPSON. Heh, heh, heh. [Laughter.]

That the draft was a good example of a case where distinctions based on race were improper, but distinctions based on gender were not improper. Now, I should point out to you—I know this is hideous—that a majority of the Senators agreed with the finding of the Supreme Court on that, and your example, that gender-based distinctions are acceptable in certain rare circumstances. On June 10, 1980, the U.S. Senate itself voted to exclude women from President Carter's draft plan by a vote of 51 to 40. A number of people on this panel participated in that vote, six of us sitting right here, three Republicans, three Democrats, to exclude women from the draft.

Now, I just want to make a point that Congress was quite willing to make a gender-based distinction in this case, present criticisms and dire comments notwithstanding. I think that's kind of important to kind of touch on occasionally. That's real life.

The first amendment, that is a troubling thing. I cannot believe that anyone is going to try to blast you away on the first amendment. I do not know of anybody that has done more.

There should not be a person in this country to believe that you would not broaden it. You have said you would, and, as I say, your favorite guy that was doing the posters over there, that you allowed him to do that, has done some ever-new ones now. I want to get over and see them, and they are on the wall.

And you gave him all the ability to do that, to raise hell about this President, your President, his President, and he is doing it again. It is opinion, it is his expression, and, that is real life.

You did that, didn't you, in that case?

Judge BORK. Right.

Senator SIMPSON. I have read that case, and it is fascinating, and of course several have read about the fact that you must be willing to bear criticism, disparagement, and even wounding assessments. We all have been through that one. We have been there.

But I loved what you went on to say. You said:

> Perhaps it would be better if disputation were conducted in measured phrases, and calibrated assessments, and with strict avoidance of the ad hominem, better, that is, if the opinion and editorial pages of the public press were modeled on The Federalist Papers.
>
> But that is not the world in which we live, ever have lived, or ever likely to know, and the law of the first amendment must not try to make public disputes safe and comfortable for all the participants. That would only stifle the debate.
>
> In our world, the kind of commentary that the columnists have engaged in here is the coin in which the controversialists are commonly paid.

I like that. That is pretty gutsy, strong, fair, firm, protective of the first amendment, and people.

Well, I am going to conclude here, but I hope everyone sees the essence of what is happening here, the essence of this cause against Judge Bork. I do not want anybody to miss this.

The opponents of Robert Bork are the opponents of any kind of change in the Supreme Court in my view. They really wanted to halt Sandra Day O'Connor. They really did. But they could not really challenge that remarkable, steady, personable lady. They just could not do anything with her.

And she is a tremendous lady, and jurist. They really wanted to toss Rehnquist off the side of the ship. But as they frothed at the mouth there, they finally sobered up and realized he was already on the Court. That was a dazzling thing for them to decide, that finally, they thought, well, we will kick him off as Chief Justice but he is still going to be there, and then they are going to bring in somebody else.

That brought a note of sobriety to their cause. He was already on the Court. And with Scalia, they saw another bright, dedicated, articulate spirited man, and they had already spurted all the venom out of their glands with Rehnquist when he came along, and they were then exhausted from the attempt to land the fatal strike on Rehnquist and they slipped back to their lair, or den, whichever you wish——

Senator DECONCINI. Will the Senator yield just for a clarification.

Senator SIMPSON. Yes.

Senator DECONCINI. My recollection on the Sandra Day O'Connor, that it was the National Right To Life that testified in opposition to her. The president of that group is a friend of mine, and from Arizona. I had big arguments with her, and she came and testified here in opposition to Sandra O'Connor.

I just thought the record ought to show that. I know the Senator wants to know that all of those so-called radical groups are properly identified, and I do not consider that a radical group.

Senator SIMPSON. I will finish and then you can go on with your explanations. You know, you name them. I am just talking about the fact that there were groups. I do not consider that group a radical group.

What had they learned in the fray after they went through that exercise? They learned really only one thing as I see it.

They learned that you were next. They knew the minute—I think their worst fears were realized—that you are the "live" round that was coming at them the next time, and they went to work.

And when Scalia raised his right hand on his oath, they raised the stakes, and they said "Get Bork. He's next. Can't possibly miss him on the next selection. That's him."

And they put their researchers and their minions to work, and they readied their fund-raising apparatus, and they cranked up the networking, and hours and days of work in a non-unanimous decision venture. Every utterance. I mean, you know, when you are dragging stuff out of a question and answer session at a school in 1985, and then hearing it in—-you know—that took a lot of work. A lot of people have done a lot of work.

The CHAIRMAN. Senator, if I can interrupt you just on that point because I think it is very important.

I want the record to show that I went to Judge Bork yesterday, and gave him a full transcript, told him that that tape had been sent, unsolicited, to several people, apparently. I know I was sent a tape. And I did not want him to be caught unaware by anything. I had the tape transcribed, I gave it to him, told him I would not ask him any questions about that tape, and for a full day, to give him a full opportunity to look at it, and I am sure the tape was sent to other people by a student up there, as I recall.

I may be mistaken. So I just do not want you to think that all of a sudden, out of the heavens, came this——

Senator SIMPSON. No, no.

The CHAIRMAN. And then I was asked by a colleague whether or not it could be played. So I just did not want anyone to think that Judge Bork was not fully aware that (a) there was a tape and (b) he had a written transcript, and even outlined—I believe my staff even circled or pointed out for you where that point was.

Judge BORK. No, I was not caught by surprise, Mr. Chairman.

The CHAIRMAN. I am not suggesting you think you were.

Judge BORK. And I was not disturbed by it because it is an unexceptional remark, and it is the only time I did not add a qualification which I have added on every other occasion. So that does not bother me at all.

Senator SIMPSON. Mr. Chairman, I have before me, right here, the excerpt from the question and answer question. It was handed to me this morning.

The CHAIRMAN. I am not suggesting, Alan, in any way, that you should have known that. I just wanted everyone to know, though, that Judge Bork knew of that, and possibly, if I had thought about it, I should have handed the transcript to everyone.

But obviously, the most important person to be aware of it was Judge Bork, and that is all I meant to state. I am not trying to make any more of it than it is.

Senator SIMPSON. Mr. Chairman, I will conclude in 2 minutes, and I promise that, from these notes that were thoughtfully prepared by me, because I am trying to figure where it all started.

And as I say, it started when Scalia was approved in the most remarkable fashion. That was a remarkable confirmation hearing.

So then they set up their early-warning system: if Robert Bork is nominated it will be destructive, it will be contentious. And then they said this to the American people, after Judge Lewis Powell announced his retirement.

They said if Robert Bork is nominated it will be destructive, contentious, quote, "time-consuming"—whatever that connotation—we know what that means in the Senate. It will be a struggle. It will be a watershed, shifting the balance, and, there was a kind of a warning to our President that he should not do this.

When the President nominated you they detonated the package, they were ready to do that, and they did it in a way I think where the shards and the chunks from the explosion, you know, were destined to be a little hurtful and painful, and injure.

Because they really do not care about that. The personal anguish of that to you is not important to those kind, and yet they will tell you they represent the oppressed and the disenfranchised, and the powerless, and those who need care. But give them another human being to gnaw on and they will do it in a rather extraordinarily tough, mean, nasty fashion.

So what that they maligned your character, which is all we have in life. Your life style. Why wouldn't any thoughtful American be stunned, and deeply concerned in the full burst of all that, as they fired that around the United States? They were saying you were a racist, a sexist, one who would deny women their rights. A segregationist. A peeper at the keyhole. An invader of privacy. Insensitive to homosexuals, and in favor of mandatory sterilization of your fellow man and woman.

Who wouldn't be frightened by that, or deeply appalled and concerned?

Well, I think the American people are terribly fair. They hear, and they know, and you have been right there for four days, and the interested ones have been observing the process, and they have to see you and know your persona as a most extraordinary man, with a dazzling record. A creative, thoughtful man with an agile, adroit and facile mind.

And the American people, and our colleagues would, in my mind, Mr. Chairman, be ill-served, and very certainly cruelly shortchanged if you are to be rejected in these proceedings. Thank you.

The CHAIRMAN. Thank you very much.

I was going to question next but the Senate Majority Leader is here, and I will yield to him, and then to Senator Grassley, as I understand he may have questions.

And then I will take my turn. Judge, would this be an appropriate time to take a 5-minute break?

Judge BORK. I think if it is all right with the Majority Leader, I think it would be fine.

The CHAIRMAN. All right. We will break for 5 minutes and then come back.

[Recess.]

The CHAIRMAN. The hearing will come to order again.

Let me suggest to those who have been asking in the audience, and the press, and the witness, and my colleagues, that it is my intention to finish—I was going to say finish with you today, Judge Bork—that comes out sounding the wrong way. For us to finish today, and you need not, hopefully, have to come back after today, and move on with, quote, the public witnesses the beginning of the week.

The order will be Senator Byrd, Senator Grassley, and myself, and then I believe after that, Senator Specter, and we will go on down the line from there.

Having said that, I yield to Senator Byrd.

Senator BYRD. Thank you, Mr. Chairman.

I understand that Mr. Metzenbaum wants me to yield to him, briefly.

Senator METZENBAUM. I appreciate the courtesy of the Majority Leader.

Judge Bork, when we were talking about the *American Cyanamid* case, you said "They offered a choice to the women. Some of them I guess did not want to have children".

Apparently that testimony was heard by one of the women, because a telegram has just been received by the Chairman and myself which reads as follows:

> I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired. Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work, so I had no choice. It is incredible that a judge who is supposed to be fair can support a company that does not follow OSHA rules. This was the most awful thing that happened to me. I still believe it's against the law, whatever Bork says. Betty Riggs, Harrisville, West Virginia.

Judge **Bork**. That was certainly a terrible thing for that lady, and it was certainly a terrible choice to have to make. Of course the only alternative was that she would have been discharged and had no choice.

I think it was a wrenching case, a wrenching decision for her, a wrenching decision for us, but the entire panel agreed on—the OSHA review commission agreed with us, agreed that it was not a violation of the hazardous conditions provision of the statute.

The entire panel I sat on agreed. The full court, all eleven of us did not sit to reverse it, and I do not know if anybody appealed to the Supreme Court, but if they did, the Supreme Court did not take it.

Senator **Metzenbaum**. Judge, I do not wish to belabor the point, but I have since been informed, and I do not know if this is fact, that the lead level could have been reduced had the company been willing to expend the necessary funds. I am not certain that that is accurate.

Judge **Bork**. I am not either, Senator, because that was not in the case. The administrative law judge, as I recall, had found that the lead level could not be reduced, and we do not review factual findings unless there is no substantial evidence for it.

Senator **Metzenbaum**. I thank the Majority Leader for having yielded.

The **Chairman**. On this point, to be precise, did they not say that it could not be economically——

Judge **Bork**. Well, they probably meant it would close the plant, or close that unit, if they did it.

The **Chairman**. Yes.

Judge **Bork**. Which would also put the women out of a job.

The **Chairman**. The Senator from West Virginia.

Senator **Byrd**. Mr. Chairman, I thank you.

Judge Bork, I am sorry I have not been able to be present to hear the questions and the answers. I have watched whenever I could, but have been busy on the Senate floor, and I do have the tapes of the hearings thus far, and Mr. Chairman, I hope through the weekend to be able to watch the tapes and catchup with the committee in its work.

Judge Bork, I have stated before, and I will state today, that I am undecided as to how I will vote on your nomination.

There are those who may wish to categorize my vote, or pigeonhole it, or put it in whatever niche they wish, but I do not know how I would vote if I had to cast a vote today.

I have been in the legislative branch of our government now for 42 years, 35 years on Capitol Hill, 29 of which years have been in the Senate.

I have naturally, in that course of time, acquired a deep sense of dedication to the legislative branch, and so the few questions that I will ask will pertain to the subject of congressional standing.

I very much support the constitutional principle of separation of powers, very much support the constitutional principle of checks and balances, and particularly on these two bases, I have a great concern with respect to some of the developments that have occurred within the last few years.

And so I am going to ask just a question or two, or three. I understand that Senator Kennedy has already gotten into this area of questions.

But let me say that I would like to follow up on that discussion, and ask you whether the institutions of the House and Senate can bring a case in federal court, to determine what I conceive to be their constitutional rights with respect to the executive branch, let us say.

You spoke about this in the context of the case of *Barnes* v. *Kline,* in which the President had vetoed a bill, and the Senate sued to have a court declare that the President's pocket veto was invalid under the circumstances, and that the bill had therefore become the law.

The majority in your court found in favor of the Senate, but I believe you wrote a dissenting opinion on the grounds that the Senate did not have such standing to bring such a case.

I believe you have said in the course of that opinion, that, quote, "We ought to renounce outright the whole notion of congressional standing".

Have I correctly quoted you, Judge Bork.

Judge **Bork**. You have, Senator Byrd. May I say one thing about the case, however?

Senator **Byrd**. Yes.

Judge **Bork**. The majority did not find for the Senate. The majority created a new doctrine in our court, for some reason. In fact, our court is the only court that ever invented the doctrine of congressional standing. It does not exist in any other court and it only dates back to 1974. But, what the majority did in this case was say yes, the Congressmen have standing but, in the exercise of our discretion, we will not hear the case, which is yet another novel doctrine.

Senator **Byrd**. We will not what?

Judge **Bork**. Hear the case. They refused to hear the case. They said that Congress has standing, but we have equitable discretion—they called it various names—equitable discretion to refuse to hear it anyway, which is also a revolutionary doctrine, so they refused to hear it.

No, I am sorry. I take it back. I have got the wrong case. I am thinking of *Vander Jagt* v. *O'Neill,* in which the majority did invoke equitable discretion and refused to hear the case. That was a case in which Congressman Vander Jagt sued to get proportional representation on House committees. No, that is right. I take it back. In this case, *Barnes* v. *Kline,* which involved the same problem, the majority did hear the case on the pocket veto grounds.

Senator **Byrd**. And I believe that you yourself have been quoted as saying that pocket vetoes can be valid. Am I correct?

Judge **Bork**. They can be valid only in certain circumstances, Senator.

Senator **Byrd**. Or they can be invalid.

Judge **Bork**. They can be invalid. That is it. When I was in the Department of Justice as Solicitor General, Senator Kennedy brought a suit about a pocket veto saying it was not a valid pocket veto. The court I now sit on held that it was not a valid pocket veto. I did not ask the Supreme Court to review that because I thought it was an invalid pocket veto.

When the subject came up again in the Ford administration, I told Attorney General Levi that I would not—it was not a pocket veto—that I would not argue the case and would not appear on the brief because I thought it was an invalid pocket veto. I then prepared an extensive memorandum, which this committee has, saying that when Congress leaves an officer or somebody behind to receive a return veto, even though they are in adjournment, you must give a return veto and not a pocket veto.

President Ford was persuaded to say that for the remainder of his administration, he would not use the pocket veto if there was somebody here to receive a return veto. That was a clear case in which I advised the executive that he did not have a constitutional power the executive wanted, but that Congress could behave in this way.

Senator **Byrd**. Let me get back to the particular quotation that I mentioned earlier and I will repeat it. "We ought to renounce, outright, the whole notion of congressional standing." If that is still your opinion, Judge Bork, what is the basis for that position?

Judge **Bork**. Well, it is simply this, Senator. I am not hostile to congressional standing any more than I am to Presidential standing or judicial standing. The theory upon which that case—the standing was rested there was that the President was not carrying out a law and that interfered with congressional powers and therefore, they could sue. But, if that is true, I do not see why, if Congress overrides a Presidential veto and he says, that is unconstitutional, I do not see why the President cannot sue Congress.

In fact, in the *Chadha* case, which struck down the legislative veto in the Supreme Court—the President did not have to wait for that case if this governmental standing power is correct. The President could have sued long ago to strike down the legislative veto. And it is not just Presidential standing. It is judicial standing. If a judge feels that an act of Congress unconstitutionally interferes with his functions, he could sue Congress.

And, in fact, it even got worse than that because in the Seventh Circuit Court of Appeals, when they reversed two district court judges, and the district court judges appealed to the Supreme Court, not just the parties, the judges appealed on the grounds that their offices had been interfered with. So I am afraid what happens, if we allow standing to expand like that, is the courts will become the most important branch of government and will umpire disputes everywhere between themselves and the other branches and between the other two branches.

Now, in a case like the kind you are talking about, a private party can usually sue. That is, if Congress passes a statute, and the President fails to carry it out, such as an appropriation or something of that sort, usually a private party can say, wait a minute, I should have gotten that money but the President did not behave correctly, and he has standing. That does not put the courts into the middle of running the other two branches.

There is no preference for the executive branch, in my view, in this matter. It is simply a matter of not bringing all governmental issues into the courts right away as everybody sues everybody else between the branches.

Senator Byrd. This still leaves me troubled, though, Judge Bork. If you take the position that "we ought to renounce, outright, the whole notion of congressional standing." Let us confine this to the point that was being—the thrust of your statement, that point. Notwithstanding the fact that you say that this is not only with congressional standing, but also with the executive and the judicial standing.

It seems to me that to say that if this is recognized in one case, if standing is given, let's say, to Congress, then we open the door for all sorts of cross-currents of suits on the part of the executive, on the part of the Congress and on the part of the judiciary and all of that. It seems to me, most respectfully, that is carrying the matter to an absurd conclusion. You would use the terms reductio ad absurdum.

After all, this is the 199th year of the executive and the congressional and the judicial branches. Next year will be the 200th year, 1789 will not be the 200th year, that will be the 201st year. That is the first year in the third century. Well, in all of these centuries, I do not think this matter has been decided and I think you pointed that out. But it would seem to me that if there has been no conclusion by the Supreme Court, that Congress would have standing, or that either of the other branches would have standing.

There has been no decision by the Court or that they would not have standing. It seems to me that we would have already seen this enaction, one going at the other and certainly, there would have been more opportunities than we have seen, which have been of rather recent vintage, in which the Court would have had the opportunity to say one way or the other on this question. But, let's move on from that just a moment.

You also mentioned private parties. Suppose there is no private party that can show injury and let's take, for example, I do not know—perhaps we should not comment on the matter that is before the Senate right now in which the Nunn-Levin Amendment was voted on, which goes to the interpretation of the ABM Treaty and whether or not it should be the traditional interpretation of the broad. You may or may not have an opportunity to study that case and perhaps make a decision, render one on it.

But, let's put it in this context. Let's say that the Senate approves the ratification of a treaty that provides certain rights and obligations for our government in its embassy abroad and the foreign country's embassy in our country. And let's say that under the interpretation of that treaty, based on the counsel and advice and testimony of the State Department and the other executive witnesses before the appropriate committee, certain kinds of intelligence gathering could be engaged in, within the context of that treaty. And so the Senate, by two-thirds vote, approves the ratification of the treaty.

Now later, the President decides to reinterpret that treaty, let's say. He says, no, we cannot do this. We will not be able to do this intelligence gathering. Say it is a subsequent President and he interprets it differently. And so, the Senate, having been the party under the Constitution which had the role of approving the ratification of the treaty—the Senate does not ratify treaties. The Senate may approve the ratification of the treaties. The President ratifies treaties, after the Senate gives its approval.

But, let's say that the Senate just does not take umbrage, but that some vital matter to the security interests of this country, hangs on the action of the President in having reinterpreted that treaty. Now, why should not the Senate and the House, for that matter—the House does not have a role in approving the ratification of treaties, but the House has a role in appropriating the monies to carry out the objectives of the treaty.

Let's say the Congress or the Senate—let's narrow it to the Senate—the Senate wants to bring this case. There is no injured party. I, as a Senator from West Virginia, cannot say I have been personally injured and so I cannot fulfill that requirement of injury in fact, but are you, as the judge on the Supreme Court or on the circuit court in which this might be brought, going to deny the United States Senate standing to challenge the President's action in reinterpreting that treaty?

Judge BORK. It seems to me, Senator—well there are a number of points to be made in response—but we did not face a case in which the Senate, as such—I think this case was simply a number of Congressmen and I do not know if there is anything in this opinion about the Senate as such——

Senator BYRD. Well, I am going to your statement, "we ought to renounce, outright, the whole notion of congressional standing." Well, the Senate is one house of the Congress, as we both agree, so whether it is the Senate or both houses, is the Congress or is the Senate going to be denied standing in this case?

Judge BORK. Frankly, Senator, it depends in part upon a prior statement you made, or it may depend in part upon a prior statement you made. You said you did not think that allowing congressional standing led to Presidential standing or judicial standing.

Senator BYRD. I do not think I said that. I am sorry if you interpreted my saying that.

Judge BORK. Well, I am sorry if I did, too. I thought you had said that my statement that once you allow congressional standing, you have to allow Presidential standing and judicial standing and so forth was reductio ad absurdum, which I took to mean that you thought a line could be drawn between congressional standing and——

Senator BYRD. No, no.

Judge BORK. Well, in that case, it would be—I should also say this. There was no congressional standing or any other kind of governmental standing until 1974 in this circuit. It just did not exist and the country got along very well with the usual methods of combat between the executive branch and the legislative branch, which was Congress withholding appropriations, bargaining in various ways, or passing a statute. For example, in the case you cite, Congress could pass a statute invalidating that treaty or it could pass a statute that the President is directed to do this. It would have to override his veto, of course, but you could do that.

Now, Congressional standing, if the kinds of concerns——

Senator BYRD. Could I ask you a question?

Judge BORK. Certainly.

Senator BYRD. Suppose time does not allow Congress—the security interests of this nation are involved in this intelligence gathering somehow. Time does not allow for the passage of a bill or let's say that Congress passes that bill and the President vetoes it, says the heck with Congress. I am going to interpret this the way I want to.

Judge BORK. That is right. You would have to get a two-thirds majority then, to override the President or unless you could threaten the President with withholding some other thing that he wants.

Senator BYRD. Well, let's say we got the two-thirds majority and overrode him and he said, well, the heck with that. I am still going to interpret this, this way. Now, I am not an injured party there. I cannot show injured party, that I have lost anything as a result, but why shouldn't—if you said, as you said, "we ought to renounce, outright". That means emphatically, not ifs, ands or buts, without any exceptions, "the whole notion of congressional standing."

Judge BORK. Well, Senator, I do not think, from my experience, that you would get any greater speed litigating through a District Court or Court of Appeals or the Supreme Court, than you would trying to pass a statute or doing political battle with the President. And if the horrible consequences that I imagined would flow from recognizing standing in these cases do not, in fact, flow, then a large part of my objection vanishes.

Senator BYRD. You see, if the horrible circumstances do not, in fact, flow——

Judge BORK. If the horrible consequences, such as Presidents suing Congress and the Defense Department suing the State Department and so forth and so on, which sometimes looked like it might happen, and judges suing other judges and judges suing Congress—my concern there is you are making the judiciary the umpire and central branch of deciding questions, on a daily basis, between the other branches and between units of the other branches and so forth. The judiciary really becomes the dominant branch of government, which is really what I have been trying to avoid.

Senator BYRD. Judge Bork, the judiciary can throw this case out or that case out on its merits. But if this party, the third branch—the Senate—cannot even get inside the door, who is going to settle this case. And let's say the security interests of this country are involved. You are saying to me, as you said at the time I referred to in using this quotation, you ain't never going to get in this court.

Let's take the Panama Canal treaty, for example. I was the majority leader at the time of that—they are treaties, not treaty, but let's, for the sake of argument, refer to it as the Panama Canal treaty—was approved by the Senate. The only way we could get that treaty approved was to have an amendment, actually two amendments, one giving the clear rights to the United States to intervene at any time to keep that Canal open, after the year 2000, and the other was that the United States would go to the head of the line in the event of war.

Now, let's say—Mr. Reagan was very much opposed to those treaties, but we note that he has not done anything about negating them since he has been President. He has lived up to them. But let's say that he or a future President would say, I am not going to live up to that and we get into a war and he says no, personally I have never believed in it and I think I am justified in nullifying those treaties and I am not going to insist that our ships go to the head of the line.

Well, now that was one of the few bases on which some Senators, who sit at this table, voted to approve the ratification of that treaty. That was not just a majority. As I have understood you heretofore, you have said that in cases between certain litigants, that the majority will, or the legislature in that instance, should prevail. Here, we have not only the majority will, but the super-majority, which was required under the Constitution.

So, you have a super-majority in the Senate that approved the ratification of that treaty on the understanding that the administration—everybody interpreted it the same way and the other party interpreted the treaty in the same light and here we are now with a subsequent President who says, I am not going to observe that treaty. It is null and void as far as I am concerned. Now, let's say that security interests of the United States are very much in jeopardy there and the lives of men and women are in danger.

By virtue of the reinterpretation of that subsequent executive, who is going to be able to decide. As I said the other day, who would decide when doctors disagree? You have the executive branch, you have the legislative branch, they are in disagreement here. You had a super-majority in the legislative branch that said that it would be this way. Now, we have got to go to some umpire or referee to determine this in the interests of the United States.

Judge **Bork**. I certainly see the concerns you have, Senator, and I think they are well-founded concerns. The difficulty I have—it is not a difficulty, I just observe that it has never proved to be necessary to go to a court for a reason like that in our history so far. Now, Justice Powell did suggest—although he was not very fond of congressional standing—that if there was an absolute impasse between the President and the Congress, he would allow congressional standing. I do not know. I have never faced a case like that. But the difficulty is, additionally, that quite aside from any views on standing, in the *Goldwater* v. *Carter* case, four of the justices—that is, Justice Rehnquist, Chief Justice Burger, Justice Stewart and Justice Stevens, would have applied the political question doctrine and made the entire dispute, over the termination of the treaty, non-justiciable. If they are right, there are other doctrines that stand in the way and I have not decided those questions. I have no idea. But it may be that the courts are going to have difficulty with suits about that kind of thing, quite aside from any views of mine. But I would just simply observe that for 200 years, we have never found it necessary to have a court decide who is right about a treaty or something of that sort, between the President and the Congress. Maybe there will come a terrible emergency some day and I do not know what the courts will do upon that occasion. But certainly, Senator, I would suggest it should not be a routine matter that the Congress and the President and the judges and the various departments all sue each other in order to find out where everybody stands.

I am not trying to offer you any kind of alliation of my views. I have just never faced a case where there was a great emergency and the Congress and the President were at an impasse. I have just never seen such a case. But if I faced one, I do not know what I would do.

But I certainly, as I said, do not want that to be a routine subject of court litigation because the courts will sit just to decide what are essentially political questions all of the time.

Senator Byrd. Well, we are living in a fast-moving age and who would have known when I graduated from high school that we would have computers or that we would be talking about laser beams of SDI or any of these things. And the common law was made of precedent. There are Senate precedents. There comes a time when we set a precedent. We would not have precedents if they had not been new in the beginning.

So there may be some unforeseen need and I believe that the possibility of that need arising is probably greater than it was 50 years ago or 100 years ago. And so I think, as Mr. Justice Powell stated in the case to which you referred, by defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of power.

It seems to me that it would become necessary for the court at some point in time to give the Congress the standing because otherwise that case is never going to be decided by anybody and what you are saying—I say most respectfully—you are saying, let the Congress and the executive engage in guerilla warfare. Let them engage in guerilla warfare.

If the President wants to take such and such an action, let the Congress reject his next nominee to the Supreme Court or cut off the money. Congress controls the purse. And confrontation is what, I think, would ensue. It seems to me that could greatly damage the country.

Judge Bork. Well, Senator, we have, in my opinion, relied upon three different lines of Supreme Court precedent. Maybe the Supreme Court will reconsider those precedents but I consider them to be law.

Senator Byrd. You consider them to be law until such time as a subsequent—*Plessy* v. *Ferguson* was law but a subsequent Supreme Court decided that it was wrong in the light of different circumstances. So we have precedent. You consider that to be law.

Judge Bork. For a Circuit Court Judge——

Senator Byrd. Yes.

Judge Bork [continuing]. It is. A Supreme Court precedent is law to me.

Senator Byrd. In other words, the doctrine of stare decisis has no persuasion with you as a Supreme Court judge; is that what you are saying?

Judge Bork. No, sir. I am not saying that. I am saying that a Supreme Court justice can reconsider a case, as apparently you want the Supreme Court to reconsider its cases, which really do not support standing in this thing. But I am saying a circuit judge certainly cannot reconsider the Supreme Court's cases.

Senator Byrd. Well, the Supreme Court at some point in time may have to—it may be confronted with this challenge on the part of the Senate or both Houses and if you are on that court, you will be confronted with that situation. And suppose the national securi ty interests are very much in the balance and there is no person per se who can say that he has been injured by the act of the Executive.

Judge BORK. Well, I can—I am sorry.

Senator BYRD. But to let that decision stand would give succor and comfort to adversaries, to the Soviet Union, let's say. And it is imperative that somebody decide this, because if somebody does not decide it, it is just going to stay, it is going to remain an impasse.

Now, are you saying to me that you are going to still, 5 years from today, 10 years from today, stand by that statement that you made in the beginning. It was pretty much open and shut; we ought to renounce outright the whole notion of congressional standing.

Judge BORK. Well, I certainly would renounce it outright as far as the regular kind of case is concerned. I have never seen a case and I do not know how I would react under the dire circumstances you state. You know, the Supreme Court—I do not want to get myself into trouble on another subject—but the Supreme Court has said no prior restraints, but it has always kept the possibility of a prior restraints upon newspaper publication in the case of a troop ship sailing out in a war and the paper is going to publish where it is.

So there may be that enormous national emergencies like the troop ship will alter law, but I have never faced a case like that, and to tell you the truth, Senator, I have not thought about it.

Senator BYRD. Well, you have never faced a case like that.

I could say the same thing with regard to a set of circumstances, for the sake of argument, dealing with a Senate amendment or a certain motion. But at some point the Senate will have to decide that and it thereby will set a precedent, or it may overrule some previous precedent.

I think I hear you saying—and I am not attempting to put words in your mouth, you control that side of the table—but it seems to me, I would say, well, I do not know how the Senate would come down in that hypothetical set of circumstances, but I am not going to say never. I am going to say, let's see the circumstances when they come, let's see what they are, and in the light of previous precedents or if there are no precedents, let's let the Senate speak.

In the Senate, if someone raises a constitutional question, the Chair does not rule. The Chair submits that question to the Senate, a constitutional question. So we may have to decide a constitutional question in the future that we have not decided yet. And today I might maintain a certain position but it would be a little hard for me to say never.

I am hoping I am hearing you say that you have not been confronted with a compelling and persuasive set of circumstances yet but the door is still open.

Judge BORK. Senator, let me say this. In the routine kind of case in which the President and the legislative branch get into a squabble over whether an appropriations bill is being properly carried out, I think there should not be congressional standing or Presidential standing or judicial standing in that kind of a case and what I am really trying to protect—this is an aspect of my general philosophy of judicial restraint—what I am really trying to protect is to prevent the courts from stepping into legislative business.

I mean, we will be moving in and deciding what is legislative business, what is Presidential business and so forth. The legislative branch ought to be supreme in that area and not the courts. But you are quite right. If somebody had said—before *Near* v. *Minnesota*, the great case involving prior restraints—if somebody had said there are no prior restraints, it can never be, and then the troop ship case comes up when the paper is about to publish the details of a troop ship in the middle of a way, the courts tend to make an exception for that.

Maybe the same thing would happen here if it is the kind of a dire circumstance where failure to act is going to play into the Soviet Union's hands or something of that sort. I cannot foreclose that possibility.

Senator BYRD. So it is possible that Congress could be given standing?

Judge BORK. Yes. It is possible in that kind of a case. I do not think in the routine case I would ever agree to it.

Senator BYRD. So the statement, "we ought to renounce outright the whole notion of congressional standing," you do not subscribe to that 100 percent today?

Judge BORK. Well, I subscribe to it in the regular kind of case. I do not think the courts ought to thrust themselves into legislative and Presidential business and be deciding it. You give me the extreme case which I never thought of when I wrote that, and I have to admit that I do not know exactly how that case would look to me if it comes and it is extreme enough.

I am not very happy about the thought that the national security is going down the drain while a court is standing there saying, well—so, you know, in that kind of a case one might try to fashion a doctrine. In the extreme case, not the regular case.

Senator BYRD. It would be the extreme case I would think that would get to the Court.

Judge Bork, I thank you. I have enjoyed the little bit of participation in your hearing that I have been able to take part.

I thank you, Mr. Chairman, for the courtesies extended to me.

I find, Judge Bork, that I leave as I came, undecided, but unlike you in the matter we have been discussing, I am going to happen to make a decision one way or the other before the year is out. I hope that I make the right one.

As I said the other day when I was here, I am going to be fair to you. I am going to look at all the testimony and continue to listen to my constituents, pro and con, and talk with my colleagues, consult with my conscience, pray about it and I hope that in the end I will do the right thing.

I thank you both.

Judge BORK. Thank you very much.

The CHAIRMAN. I am sure you will, Senator.

Before we move to the next witness, I notice that the former Secretary, Carla Hills is out there. Welcome, Madam Secretary. It is nice to have you here.

I believe our next presenter or questioner is Senator Grassley from everyone's favorite State of Iowa, these days.

Senator **Grassley**. First of all, Mr. Chairman, I am glad you are here in person, even though I would have said this for the record in any event. But I want to thank you for the way you have conducted these hearings. You have handled them very well. It has been a very difficult job. You have been under a lot of pressure, but you have handled yourself and the committee extremely well and I want to thank you for that.

Again, Judge Bork, I have got to say good afternoon and compliment you to a considerable extent. This is my last round of questioning for this forum. I will have a lot of opportunities to question other people about your qualifications, but I think I want to thank you for your historic appearance before this committee.

I think your answers have been very sincere, most thoughtful, and very complete. They have not only been complete to the questions that I have asked you, but also to my colleagues—I think even to those who had their minds made up two months ago. You have been very thoughtful and sincere and most complete in your answers.

That is to your credit. I respect you for that. I think, too, that there has not really been enough attention given to your family and supporters. I think they need to be commended as well for the grace and extreme patience that they have shown this week. The entire family has my deep respect.

Even though you have been the one who has been on the firing line, I am sure that they felt some of the pressures, even part of the pressure that you have had.

Judge **Bork**. Indeed they did, Senator.

Senator **Grassley**. Judge, I think I have a theory that helps explain the false and ridiculous notion that you have changed your views here in order to improve your confirmation chances. This is the so-called "confirmation conversion" idea. It occurs to me—and this comes after listening to you for 3 days—that the real problem here is that your views were so distorted for the past 2 months that people actually began to believe everything that they heard and read about you. People actually started believing their own press releases, I believe.

I must say that the way this campaign against you have been conducted is to the discredit of those lobbying against you. In any event, now that you have explained why the campaign against you has been nothing but one misrepresentation after another—you have been accused of changing your mind.

This may be some sort of neat political trick, but I think most people see it for what it is. My deep regret about all of this is that I wish your Washington-lobbyist opponents had spent more time taking the trouble to understand the powerful reasoning behind your philosophy rather than mis-stating the facts in that philosophy.

Those are just things that—you know, I am part of the process here and I have got to make up my mind and be responsible for everything I do—but I guess I feel when people have suffered an injustice, that bothers me very much.

Now I want to go on to some of the substantive things that I have asked you about before, and I am going to pick up where we left off yesterday. I asked you about the *Finzer* v. *Barry* case, the

D.C. Circuit case upholding the 500 foot limit on public demonstrations in front of embassies in the District of Columbia, and I explained why I thought that the law was over-broad and beyond the reasonable time, place and manner restrictions on the rights of free speech and assembly. I also said that I was concerned about this statute being selectively enforced.

In fact, last year my Judiciary subcommittee held hearings on the very issue of selective prosecution in the District of Columbia. We heard testimony, for example, that those arrested for protesting in front of the Soviet Embassy were prosecuted while those arrested in front of the South African Embassy were not prosecuted. And you said yesterday that selective prosecution was not an issue in *Finzer* v. *Barry* and I accept that.

But you also said that the case would have been analyzed differently if there had been such evidence. You even said that the result might have been different. I would like to have you elaborate on that. For instance, what is the test for selective prosecution, or how would your analysis proceed if that had been the case?

Judge BORK. Senator, you catch me without a prepared thought on this subject. I know that selective prosecution, if it is proved, may invalidate the prosecution, but not the law. It would not change the constitutionality of the law. It would probably invalidate the prosecution.

Selective prosecution is hard to prove unless you have got a massive pattern. Now, maybe there is a massive pattern in these two cases you mentioned. But I have never faced that. I have never had to decide that case and I do not want to decide it sitting here.

Senator GRASSLEY. No.

Judge BORK. But if selective prosecution is proved, as I say, it affects the prosecution. It would not affect the constitutionality of the law.

Senator GRASSLEY. Well, I did not mean to catch you off guard. I should go on because I can appreciate the situation you might be in. We will drop it at that.

This week we have heard a lot about various speeches you have made. I want to turn to a controversial speech that another Justice made. This past May, Thurgood Marshall created some public controversy of his own while he was giving a speech on the Bicentennial of the Constitution. Justice Marshall stated at the outset of that speech that he saw no reason to celebrate the achievements of our Founders or the system of government they created. And I don't mean to quarrel with Justice Marshall. I am not here to do that. I think I understand his position because I did have a chance to look at the entire speech. But I still found these remarks somewhat troubling, especially coming from one sworn to uphold the Constitution he finds defective.

Are you familiar with Justice Marshall's comments? And, if you are, then I would like to have your reaction to them?

Judge BORK. Well, I should say two things. Senator, I have only seen newspaper accounts of it. The other thing is I don't think one judge should be commenting upon the views of another judge. Justice Marshall has always been a very good Justice, and when I argued before him I used to do fairly well. And I like him.

Having said that, let me just say, not by way of controversy, but that I think there is good reason to celebrate the Constitution in its 200th year.

Senator **Grassley**. Well, would you think that maybe the Justice was trying to be just a little provocative?

Judge **Bork**. I don't really want to characterize his motives or intentions or anything else.

Senator **Grassley**. Well, I thought maybe I might get you to say that people, even though they are on the Court, can be provocative. You have called yourself provocative, you have been called provocative by others, and you have tried to do that in the various positions you have held; and you have done that well.

Judge **Bork**. I don't want to characterize anything Justice Marshall did. It was obvious, from reading the comments of others, that some people found them provocative.

Senator **Grassley**. Well, I just thought that it might be an illustration of the fact that even an associate justice of the Supreme Court can have a different view on whether our Constitution is worth celebrating, and I guess you said you thought it was worth celebrating. So you can have a different point of view. It illustrates that colleagues have different views or philosophies of government; and, obviously, that is certainly true here in the U.S. Senate. Maybe more so than any other body in the world.

Would it be fair to say that the D.C. Circuit on which you now serve has members who don't necessarily share your legal philosophy or your views about what you think the proper role of the courts happens to be?

Judge **Bork**. That would be fair to say, Senator.

Senator **Grassley**. How would you characterize your personal or professional relationship with your colleagues?

Judge **Bork**. They have always been highly civil and friendly.

Senator **Grassley**. Could you repeat, please?

Judge **Bork**. I say they have always—our relationships have always been highly friendly, civil, good. I think we say, sometimes, harder things about each other in print than we ever do in person. In fact, our meetings are quite congenial and we, you know, see each other at various social functions from time to time.

Senator **Grassley**. I would like to follow up, then, with a question in the area that touches on collegiality and open-mindedness. You have testified that you have had occasions where you changed your view of a case on the court of appeals after having had a chance to hear oral arguments by the attorneys in the case, is that correct?

Judge **Bork**. That is correct.

Senator **Grassley**. About how many times has that happened?

Judge **Bork**. Oh. I really don't know, Senator. I will tell you almost routinely, if I didn't change sides. I don't always change sides. I don't mean that. But almost routinely my perspective on the case changes and the way I deal with it changes after oral argument; and sometimes, not infrequently—I can't tell you how frequently—my decision about who should win changes after oral argument. Oral argument is extremely valuable to a judge.

Senator **Grassley**. Okay. In other words, you might reach one tentative conclusion about the proper outcome of a case after reading the legal briefs, and then after hearing the lawyers make their case during oral argument, you might be persuaded by better reasoning; is that how it might happen?

Judge **Bork**. Yes; or something comes up that suggests the question to me, and you ask the question and you get an answer you didn't quite expect, and you begin to change your view of the case.

Senator **Grassley**. Have you ever had an occasion to change your view of a case after you actually wrote the initial panel opinion; say, when the case was reheard by the entire DC Circuit?

Judge **Bork**. Well, I have once changed my view of a case that came out the same way by the panel. I mean, the result, who won, was the same but the rationale changed. I once decided a case, got a petition for rehearing and, after a lot of exchange, granted it, and the panel changed its mind, 2 to 1. But then we reheard the case en banc, and the en banc court sustained the panel. But I changed my mind between two panel opinions.

More recently, I wrote an opinion joined by Judge Edwards, with Judge Skelly Wright dissenting, upholding an EPA position against a public interest law firm—public interest group.

Senator **Grassley**. Was that in *National Resources Defense Council* v. *EPA*?

Judge **Bork**. Yes; *National Resources Defense Council* v. *EPA*. And there was a petition for rehearing, and then it was reheard en banc. It was a little odd, because none of us had really—I think the National Resources Defense Council got up and disavowed the dissent in their favor by Judge Wright, and then the EPA got up and disavowed my opinion in their favor, so we had to start all over again.

But I asked a question and got a very unexpected answer and came down the other way, voting for the—remanding the case, in effect, voting against EPA this time. I got a unanimous en banc court on that one.

Senator **Grassley**. Well, there has been some publicity in the papers about your participation in that case, and I would think that that would speak well of your capacity and willingness to rethink positions, contrary to those who have criticized you as being too rigid. This is not out of expediency, but in the spirit of scholarly give and take and honest debate with your colleagues.

Judge **Bork**. That is what the law is all about.

Senator **Grassley**. But I think my colleagues here on the committee, and eventually the whole Senate, ought to think of that as one example. And not the only example, probably, because you said there were several. In fact, "not infrequently" was the term you used, where there had been arguments given after you had had a chance to study the legal briefs and you changed your mind.

Judge **Bork**. Um-hum.

Senator **Grassley**. So you aren't in cement.

Judge **Bork**. By no means.

Senator **Grassley**. When citizens come before courts in America, they don't want a guarantee that they are going to win. But they do deserve no less than a judge who has an open mind, one who is willing to hear them out. Time and again I think you have shown this ability to rethink positions in a rigorous and intellectually honest way. My only regret is that all those in the chorus of opposition don't have the same skill. I wish these folks had some of the same courage you have shown.

If they had it, they would have realized by now that you are precisely the kind of thinker that we ought to have on the Supreme Court of the United States. They ought to be looking at you from that standpoint. I hope that, after a week of you being here, people will have a chance to study the hearing record and give consideration to that.

Judge Bork, we haven't had many questions about criminal law. And maybe, of course, that is because there really is no Washington lobby that is pro criminal. But nevertheless——

The CHAIRMAN. There is a lot of lobbies that will be glad to hear you say that, Senator. They will remind you of that statement because there are some who have been branded that way. I think you are right. I agree with you, but I am just suggesting that.

Senator GRASSLEY. They are lucky I said it instead of Senator Simpson.

The CHAIRMAN. That is right.

Senator GRASSLEY. Judge Bork, you have spoken out earlier today against expansive interpretations of procedural rights that would sometimes allow criminals to escape justice. I agree with you, but I am interested in your rationale.

Could you explain some of the dangers inherent in what you sometimes refer to as the "sporting theory of justice," or did you refer to that as the "game theory of justice"?

Judge BORK. I don't recall that I did, Senator, but I am sure there is a tape from someplace where I may have said that. I don't recall saying it.

Senator GRASSLEY. No. I should not credit you with those words. But that is sometimes what it is called.

Judge BORK. Well, I haven't had great experience with criminal law. I have argued some criminal law cases as Solicitor General in the Supreme Court. I have decided some criminal law cases in the DC Circuit. But I am by no means an authority on criminal law, and I must say I really can't do much better than to say that the question of resolving society's legitimate interests and the accused's legitimate rights is very difficult. But in all cases I think the accused must be assured a completely fair trial, and that is about as far as I can go. That is just a general philosophy. I am sure it is—with more experience with the field, I am sure I could elaborate more.

Senator GRASSLEY. Well, could you at least explain for us the reasoning behind your vote in *United States* v. *Brown*, in which you joined in overturning the conviction of nine defendants on a number of serious criminal charges?

Judge BORK. Yes. That was an enormous prosecution and trial, but—I mean, many charges and defendants. But it turned out that a—it was a RICO—Racketeering, how is that? It was a Racketeering Act charge. But it turned out that one witness had sent out word that he couldn't sit or something of that sort—not witness, I am sorry. A juror had sent out word that he couldn't decide the case, and the judge questioned him.

First, he complained about the statute. He didn't like the statute. But then he said something that we thought had to be—the full panel we sat on—thought had to be taken as a statement that he didn't like the evidence, either.

Well, it was a very awkward moment for the trial judge. He did the best he could; finally, he excused the juror. But we thought that there was too much chance, given what the juror had said, that a juror who did not accept the Government's view of the facts had been excused from the jury, and therefore the defendant was denied a trial by 12 jurors. And we reversed for that reason.

We didn't reverse, we remanded for a new trial. We didn't do anything else. But it looked very much as if—you could not say for sure that a juror who had decided for innocence hadn't been excused. The trial judge didn't mean to do that, but that is what the transcript gave theimpression.

Senator GRASSLEY. Well, based on your action in that case, would it be fair to say that you won't hesitate to overturn a conviction if constitutional rights are violated?

Judge BORK. Well, that is right. That is right. No, I—statutory or constitutional right has to be respected and the persons have to get a fair trial, and get a chance at a juror—12 jurors in case one of them wants to acquit.

Senator GRASSLEY. The next question I am going to ask is probably more important to a non-lawyer like me than it would be to people here who have studied the law to a great extent. You have had a chance during this hearing to discuss many Supreme Court cases and make references to Supreme Court Justices of the past, even some of the present. I don't know whether you have had much of a chance to give any thought to something like this, but could you tell me which Justices, past and/or present, that you hold in highest regard and which you would like to pattern yourself after and why?

Judge BORK. Well, I think I had better stay away from contemporary Justices, Senator.

Senator GRASSLEY. Okay.

Judge BORK. And as I think back——

Senator GRASSLEY. Let me say there is not a United States Senator who hasn't thought of how he or she compares to the 1,750 Senators who have served in this great body. So I am asking you in that same vein.

Judge BORK. Well, of the Justices I have admired in the past, I think of Taft. Now, of course, there is the great Chief Justice John Marshall, but he had a unique situation he was in when the Court was starting off. And then there was—William Howard Taft I think is a better judge, a better Justice and deserves a better memory than he has, because he used to work carefully with textual materials and historical materials to try to give a very balanced decision about constitutional matters.

He also once held the chair that I later held at Yale, so I have to give him credit for that. He was also Solicitor General and circuit judge. Those were his most important positions.

Charles Evans Hughes I always thought was very good. Robert Jackson I liked. Of course, there are the great ones; you know, Holmes, whom I have been criticizing here, but he is clearly a great Justice. I mean, I criticized him on one case, which I have been arguing about. But he was clearly a great Justice. Robert Jackson I thought was good. There are a lot of them.

Senator GRASSLEY. What is there about these predecessors that you would like to pattern yourself after? What is there about them?

Judge BORK. Well, pretty much they are people of dispassionate temperament, they make a serious attempt to locate the law and locate the case they are looking at within the law, and are highly intelligent in doing that, and highly sophisticated in doing that.

By and large, they are people who are practitioners of what we have been calling judicial restraint. And Felix Frankfurter I should add to that list, who was very good in a number of cases. In many, most cases.

Senator GRASSLEY. I appreciate that very much. And, Mr. Chairman, this will be my last question.

Chief Justice Burger, while he was Chief Justice, spoke out on the issues of judicial administration, lawyer advertising, frivolous lawsuits, and the quality of lawyers admitted to the bar. I would like to have your opinion in each of those three areas.

Judge BORK. Well, I, starting with the last, I don't think—I think the quality of lawyers being admitted to the bar is quite high. I think there is a problem sometimes with trial lawyers because a trial lawyer really needs a lot of experience and a lot of knowledge of technical nuances, how to get evidence introduced and so forth, and maybe there ought to be a little additional training for trial lawyers, you know. But the quality of lawyers generally I think is quite high.

I'm sorry, the other one was judicial administration and—oh, frivolous lawsuits.

Senator GRASSLEY. Yes. Frivolous lawsuits and lawyer advertising.

Judge BORK. Well, lawyer advertising, I confess, doesn't bother me. Advertising for other products is a way of bringing information to consumers and making them aware of a range of choice. It can also be deceptive. I assume deceptive advertising by a lawyer could be punished.

But I don't see why—one of the problems with a lot of the citizenry, generally they have, is that they don't know where to turn when they have a legal problem, and some of these new mass case law firms I think do a good service in areas of routine wills, routine real estate transactions, and so forth. They provide services at a low price and I think, as I understand it, they are pretty good at it, and I think that their existence and what they offer ought to be made known.

In addition to that, the commercial speech aspect of the first amendment seems to say that lawyer advertising cannot be prohibited. But, as a policy matter, I am not really troubled by it.

And judicial administration, the courts at all levels are suffering from enormous overload, and I think we are going to have to rethink rearrangements of courts and tribunals and jurisdictions in order to cope with that problem. It is an enormous problem and it takes a long time to talk about it.

Senator GRASSLEY. Did I miss the point on frivolous lawsuits?

Judge BORK. Oh, frivolous lawsuits, I am sorry. Yes, there are a lot of those in the system, and I don't really know how to deal with them. I mean, somebody has to address that problem because they take up, you know—they take up a lot of time and money for the adversary who has to defend it even if it is frivolous, and they take up a lot of time and energy from courts that could be better spent on more serious matters. But it is a tough problem, how to weed out the frivolous from the one that maybe looks a little odd but turns out not to be frivolous.

It is a serious problem and I hope the bar, and the judiciary, and perhaps the Congress can deal with it, and find mechanisms to deal with it.

Senator GRASSLEY. Thank you very much for answering my three rounds of questions. I appreciate it very much. I would like to reserve my time.

The CHAIRMAN. You need not reserve it. Any Senator who wishes to ask questions after everyone else has, we are going to let Senators have an opportunity to do that, and we are going to stay here. So you need not reserve it, I assure you, if you wish to ask questions.

Judge, I am going to ask my round of questions now, and then we will break for a few minutes, unless you would rather break now.

Judge BORK. No, that is fine.

The CHAIRMAN. Judge, I am going to make a statement at the outset with my friend from Wyoming here, and he sure has been a friend, and I do not say that lightly. But I am going to disagree with him on something here.

I want to, I think, put this in a slightly different perspective, and I will just give you my perspective on this, and then I have several questions.

It is true that there are interest groups that are characterizing you in ways that you have never heard me characterize you, and you never will hear me characterize you.

I heard one interest group referred to you as a Neanderthal. I think that is preposterous, and I think it is undignified, and I think it is untrue. But just so we all understand how this works, one of the reasons maybe some of the groups are upset is because of other people.

See, it's not only your adversaries but your friends who are helping you, to paraphrase my friend from Wyoming.

Jerry Falwell said, and I quote: "We are standing at the edge of history." This is on August 4th. "Our efforts have always been stalled at the door of the Supreme Court and Bork's nomination will be our last chance to influence this most important body."

Most people, most Americans, although they have respect for Jerry Falwell, do not doubt what Jerry Falwell's political proclivities are.

Then, a statement in the "Christian Voice" on July 27th, after you were named, the following appeared:

> Ensure conservative America, even after President Reagan leaves the White House in 1988. We have a prime opportunity to give the Supreme Court its first conservative majority since 1930. Did you realize that Justice Powell was the decid-

ing vote in winning the last eight pro-abortion cases brought by the Supreme Court, by the American Civil Liberties Union.

There probably was a hiss when that was said. "Confirming Judge Bork would change all of this." Let me just read, last, "Did you realize"—this is a Christian Voice broadcast—"Did you realize that Justice Powell was the deciding vote in winning the last eight pro-abortion cases brought by the Supreme Court, by the American Civil Liberties Union. Confirming Judge Bork would change all that."

There's many more quotes. I am not asking you to associate with that at all. I know you do not, either end. But the point is that this thing feeds off itself.

Judge BORK. Oh, sure, sure. I understand. The people on both sides of the issue are purporting to know what I am going to do and they do not, and I do not know the Reverend Falwell.

The CHAIRMAN. I was not suggesting you do, and that is what this hearing is all about. Our debate is, at least yours and mine so far, to the extent we have had a debate—not a debate so much—but our differences, and I think they exist—they are about fundamental rights and whether or not they are found under the Constitution, within the Constitution.

And Judge, one of the reasons why some people on this panel have raised the issue about consistency is that—a little bit "you're darned if you do, and you're darned if you don't." But your admissions, or, your admissions may be the wrong word—it's too strong. Your assertions of change in positions that you have had—for example—the change in the 1964 Civil Rights Act, you concluded later was a good thing.

And concluded that your 1971 view was better than the view expressed in the 1968 "Fortune" article.

Those, in the past at least, prior to the changes, have in the minds of some of us resulted in an original view that you had, that some of us find—and even you find—one you no longer accept.

For example, on freedom of speech. That at least the provocative statement was enough to cause some of us—you have pulled away from that bright line you tried to draw, at least theoretically—to get upset. At least it got me upset.

And in the course of these hearings, there have been some—I would say they are close to revelations—regarding your views on the equal protection clause, underlying equal protection, the advocacy of civil disobedience under the first amendment, and now there seems to some of us a change in your view on precedent.

I am not doubting you changed, but it seems as though you have. And all this leads me to believe that as we debate this 200-year-old document, and we are still on the same fundamental debate, that is, the role of individuals and the rights of individuals relative to the majority and to government generally.

And you have indicated you will apply your underlying principles in concluding how to vote on cases, and some of us—I, for one—think that the underlying principles are principles that will—not because there is any malevolence on your part, not because you personally believe the conclusions should be what it would be—force you to conclusions with which I have strong disagreements.

The tension between the individual and the government has been a debate that has focused the attention of every generation of Americans for 200 years, and each generation, as I see it, has with the exception of the brief period in the Lochner era, has expanded those rights, those individual rights relative to the Government, relative to economic power.

And it seems to me that that battle is going to continue, and that the Court will have to play a very pivotal role as to whether or not the Constitution embraces the expansion, the continued expansion of individual rights.

And I want a Court that continues to mature in the way in which I think society is maturing. Society now recognizes, and the Court protects—and I am sure you will agree it should—my 6-year-old daughter's right to think about being President of the United States, which was a preposterous notion 50, 70, 100 years ago.

She has as much right to think about that as she grows up as my two sons do. Our society recognizes that in our complex world there are almost as many divorced people as there are married people, and maybe we should evolve the right, the constitutional marital right, the constitutional right of a parent, whether married or not, to see their child.

The Court protects art, for no other reason than it is art. No other reason. Just because it ennobles us. It raises us up. It makes us laugh. It makes us cry. It has no relationship to anything else. Just simply because it is there.

Just simply because it makes us feel good. Simply because it is provocative, even though it has no relationship to any political context, no relationship to political speech or political discourse.

And Judge, with notable exceptions, at least in the first instance, based on your writings, you and I have ended up at a different point, a different spot. And I would like to go back now, and I say that by way of trying to explain why I think some people—and I, from reading the press, although I have tried not to do that too much the last 2 days—reading the press, there is this question raised about whether you have flipped or changed, or moved.

And so I do not ask this, and I hope you take me at my word. I do not ask these questions that I am about to ask—none of them are going to be sharp questions—I do not ask them for any other reason than trying to make sure I am able to mesh what has been said.

So if you will give me a few minutes here, and I am going to give you all the time in the world to respond.

I would like to start with—I realize we have been over it several times—the equal protection clause. Now, the equal protection clause, as the Court has looked at it in the recent past—and by that, I mean the last generation or so; actually, the last 60, 80, maybe 90 years—has gone through mild, at least—I think we would acknowledge—changes.

Now, you have stated—and I think you are right—that the core principle in the equal protection clause, the 14th amendment, was race; that was the core principle. Yet, there are various tests that have grown up. One was, as we spoke about, and Senator Specter spoke at length about, and Senator DeConcini, the strict scrutiny test, which basically says in matters of race, you had better have an overwhelming reason to make a distinction. And I am not using, as my son would say, "lawyers' language" here; I am just trying to make it as colloquial but accurate as I can, so that I understand it as well as everyone else.

Then the Court in the Seventies began to apply an intermediate scrutiny test. That fell somewhere between strict scrutiny and the rational basis test. The rational basis test is a lot looser, as we both acknowledged, so that if in fact a legislative body had any rational basis to make the distinction that was being made, then the Court would usually uphold it. But the Court started to play around. They wanted to expand, as I view it, expand rights. And they began to apply this intermediate scrutiny test—not as tough as strict scrutiny, but not as easy as the rational basis test.

And then Justice Stevens said he did not like all these categories. He said there should be one test, basically—the reasonableness test.

Now, it seems to me—although I do not take issue with Justice Stevens coming up with that—that that is almost a totally subjective test; that reasonableness—my dear mother, God bless her—and I hope she was not taking the quote from anyone else—and she probably did—"What is one man's meat is another man's poison," or something like that—she gets them mixed up, like I do.

Judge Bork. Yes, yes.

The Chairman. So reasonableness to Senator Specter may not be reasonableness to me, and reasonableness to me assuredly would probably not be reasonableness to Senator Humphrey because we disagree so much on things.

But it is very subjective, as I read it. And yesterday, you said—I am flipping, changing, a little bit here now, because I am trying to figure it out—you said, when there was a lot of questioning about your article on neutral principles, which is now on the best seller list, you said the part that did not make much sense anymore—the part that should not be looked to so much anymore—is the second half. It was basically two halves.

Judge Bork. Oh, the second half is all right, Senator. I did not mean to disavow it.

The Chairman. Oh, no, no, no. I did not mean that. The second half is where you try to draw a bright line. But the first half, you said—and I will not go through all the quotes; you have said it as late as 1986 and 1987—let us just stick with the first half of that article.

Now, you say—and I think, to your credit, you are one of the few people of late who has tried to come up with a constitutional construct. Some of the law and economics folks have done the same; your colleagues, Mr. Posner, and Mr. Easterbrook have attempted it, and Mr. Winter, and others. But you say—and I quote—"But this resolution of the dilemma"—the Madisonian dilemma you talk about with great eloquence—"imposes a severe requirement upon the Court, for it follows the Court's power is legitimate only if it has and can demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution, of respective spheres of majority and minority freedom. It does not have such a theory, but merely imposes its own value choice, or worse, if it pretends to have a theory, but actually follows its own predilections, the Court violates the proposition of the Madisonian model that alone justifies its power, and then necessarily, abets the tyranny either of the majority or the minority."

Now, that is a very eloquent and, I think, compelling, statement. I can think of no test that would more violate the principle that you set out here than the reasonableness test, which is totally subjective. I think we both have to acknowledge that a judge—and I am not considering you conservative, liberal—a judge can go anywhere he or she wants under that test. What is reasonable to me may be totally unreasonable to Senator Humphrey, and what is totally unreasonable to him may be reasonable to me.

Now, what I am trying to figure out is how you could possibly adopt such a subjective test as Justice Stevens has and particularly since there is nothing that I have found in any of your prior writings, any of your prior speeches, anything you have ever said prior to this hearing starting, that you adopted the Stevens standard.

That is the question.

Judge BORK. Okay. Let us go into—it is going to take a little while.

The CHAIRMAN. Please, take the time you need.

Judge BORK. I can think of no test that is perhaps more subjective than a reasonable basis test than the intermediate scrutiny test that the Supreme Court now uses. As a matter of fact, I remember I was once arguing a case in the Supreme Court, and somebody said what about strict scrutiny. And I said, well, if you say strict scrutiny, the case is over. And one of the other Justices said that is right, it is a conclusory term; we say strict scrutiny when we intend to strike it down.

In the past, they have said rationality when they intend to let it stand up. Intermediate scrutiny—nobody quite knows what that means. It goes all over the place. It is highly subjective. And I do not think the reasonable basis test is that subject, but one could argue about which one is more subjective. But unless you are going to compelling all the way, or unless you are going to let it stand all the way, there is an element of subjectivity that cannot be avoided.

The CHAIRMAN. I agree, but why, then, based on neutral principles, why didn't you stick with the less subjective standard, which we all thought you had? You understand why guys like me, after reading, I think, all you have written, would logically conclude, as I think Senator Specter did in the beginning, logically conclude that your test in applying the—when you said, for example, that activism tends to trivialize the Constitution, for example, once the Court expands the equal protection clause beyond the subject of race, standards for demanding equality are blurred, et cetera——

Judge BORK. Where is that?

The CHAIRMAN. I am sorry. We have quoted so many times—the 1974 Mayflower speech; and then you did a similar thing at the—that was when you were Solicitor General.

Judge BORK. Yes.

The CHAIRMAN. The only point I am making, and then I will stop—you see, what confuses us is that obviously—I say obviously—I believe, obviously, the rational basis test is less subjective than the reasonableness test.

And we all thought—correct me if I am wrong, Senators Specter and DeConcini—I think we all thought that you applied and thought—you did not like any of it.

Judge **Bork**. I do not like the multi-tier, group-by-group approach.

The **Chairman**. Well, I understand that. But doesn't it make sense in line with neutral principles and in keeping judges from wandering over the landscape to have the most objective test you can; and isn't the rational basis test more objective?

Judge **Bork**. No. The rational basis test, if it is the lowest of the three tiers——

The **Chairman**. Yes.

Judge **Bork** [continuing]. That is more objective only in the sense that it allows everything to be done; I mean, it just does not strike any laws down.

The **Chairman**. That is right, but isn't that—let me stick with that, now—isn't the embodiment of what you write——

Judge **Bork**. No.

The **Chairman** [continuing]. That majorities—that the Madisonian principle, in fact, says, as you read, as I read what you have said about it, the Madisonian dilemma is resolved by you by saying that, look, the only circumstances in which minorities—a minority; I do not mean that in terms of race—a minority—have rights is when—and you have said this in your articles, and I will paraphrase, I will not go and find the quote—is when those rights are delegated to them by the majority. And the Constitution, really, isn't that a gathering of the majority to enshrine in the Constitution what rights minorities will have; and that is why you have to look at the textual context of it, right?

Judge **Bork**. That is right. The Constitution was a great—the Bill of Rights, at least—was a great moment in which a super majority passed a self-denying law.

The **Chairman**. Right.

Judge **Bork**. And that self-denying law has now been spread from the federal government to the State governments.

The **Chairman**. Now, let me stop you there, too. You see, there is the crux of your and my disagreement.

Judge **Bork**. But I want to get back to this question of the——

The **Chairman**. No, no, I know—I will let you get back to it, but I want to make this point. The crux of our disagreement is I do not believe they were self-denying. That is why I think the 9th amendment meant something.

You see, I think that—and I want my friend from Wyoming to understand why I am having a disagreement here—that I think that the majority did not grant anything. What the majority did was acknowledge some of those rights that we automatically had that predated the Constitution, predated anything, predated the Declaration of Independence.

Now, back to this point. I understand you. I just want you to understand why we do not understand what appears to us to be a change on your part.

Judge **Bork**. Well, can I address this question of that?

The **Chairman**. Yes, please.

Judge BORK. As we have sat here, I have discussed with you some things where I have changed my mind, such as the bright line test applied to explicitly political speech. I have also said to you that there are areas where I have not changed my mind, and that is where we get into discussions, because you do not like the fact that I have not changed my mind, but I have not.

There are also areas where I have said I haven't changed my mind, or else I haven't thought about it again and maybe I would think the same thing I said before if I thought about it again—I don't know. But I accept it as settled law as a judge.

Now, to accept it as settled law as a judge is not to change your mind.

The CHAIRMAN. Is this one of those areas?

Judge BORK. Which?

The CHAIRMAN. Equal protection clause?

Judge BORK. Yes, let me go to that, the equal protection clause, because I think it's important to understand where you get. The Court started off with this group-by-group business—some groups don't qualify, others do. I think that's——

The CHAIRMAN. Excuse me, don't qualify under certain tests?

Judge BORK. To be covered.

The CHAIRMAN. To be covered by certain tests.

Judge BORK. Yes, they get at most a rationality test. And the rationality test, as I pointed out in this——

The CHAIRMAN. They all get covered, just in different ways, right?

Judge BORK. Well, yes, but this rationality test led them to say that women couldn't be licensed as bartenders unless they are related to a male proprietor, and so forth. It just isn't much of a test. But, passing that, I think the Court got off on the wrong foot because—and we are going into an arcane area again—perhaps because they adopted the approach of what is known as Footnote 4 in the *Carolene Products* case, which says we must protect discrete and insular minorities. And that was minorities who are small, don't have much contact or connection with the rest of the society, and aren't big enough to vote.

If you approach the equal protection clause in that way, I take it women would not be covered, because women are not a discrete and insular minority.

The CHAIRMAN. Because they can vote.

Judge BORK. Women would not be covered if you are talking about discrete and insular minorities. But I think this group-by-group approach, each group with a different standard, intermediate, etcetera, is really intellectually incoherent. And let me pause right here and say—because I forget to mention it—the subjectivity of a reasonable-basis approach is no greater than much of constitutional law, and all the doctrine of neutral principles means is not that we have an automatic rule; it means that the judge should honestly say, if I decide this case on these criteria, then I must decide any other case that has the same criteria the same way.

The CHAIRMAN. That's why it is so subjective, Judge, because in the 14th amendment you are not applying all cases by the same rule.

Judge **Bork**. No, I know—I am describing to you what the theory of neutral principles, as laid down by Herbert Wechsler, was, which I was trying to follow in this article.

The **Chairman**. You moved on a little bit from there.

Judge **Bork**. What?

The **Chairman**. I said you moved on from——

Judge **Bork**. He was talking about application, and I said why shouldn't you use it in definition and in derivation.

The **Chairman**. That's right.

Judge **Bork**. But this group-by-group approach, in which some groups get really no protection because they call it "rationality" and away we go, I think is wrong, because a lot of groups that are now covered in one way or another would never be covered if you went back to what they were aiming at.

The **Chairman**. Which is they were aiming only at race, right?

Judge **Bork**. Well, that was sure the core of it, but let me tell you this, if you are doing an original-understanding approach to the Constitution, the surest guide, the first guide, the first thing you turn to, is the text, and the text of this thing says "nor shall any person be denied equal protection of the laws." That I think means that you don't say maybe they were thinking about blacks, former slaves, and so forth, but they stated a principle that's broader. And we'll come to it in a minute—I'm not so sure they were thinking about that—maybe, I don't know. The language and the history suggest that this group-by-group approach is misguided.

Now, yesterday I think I mentioned Congressman Bingham who was the drafter of the equal protection clause, and when he was speaking to the Congress in support of it he said "Is it not essential to the unity of the government and the unity of the people that all persons, whether citizens or strangers within this land, shall have equal protection in every state?" And then there was Senator Howard, a member of the committee that drafted the 14th amendment, and its manager on the floor, on the Senate floor, and he said "The equal protection clause abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another."

So my point is I think it's more faithful to the language, and at least to what Senator Howard and Congressman Bingham said, to say, look, this thing applies to all people, it applies to any person; there is no reason to say this group gets this scrutiny, this group gets this scrutiny; it is much easier to say we are going to ask whether a distinction made between persons is a reasonable way to accomplish a valid legislative purpose. Now, that means that the law is going to change over time, that is, understanding of reasonableness changes over time in the society. But that is true of our understanding——

The **Chairman**. Do you keep strict scrutiny in your test?

Judge **Bork**. You get the same result as strict scrutiny, but you don't start with strict, intermediate, and——

The **Chairman**. So for you there is only one test, not strict, but just reasonable.

Judge **Bork**. That is right. That is what Justice Stevens suggested I think with a great deal of merit.

The CHAIRMAN. Let me offer an alternative, not that I expect you to accept it, but again so we understand our differences.

It seems to me under the neutral principles article, and how you have articulated it in many other fora, you would not come to the conclusion you did for the following reason. You would conclude that all men, if you are not going to make distinctions among classes of persons, that they would all be viewed as protected.

Judge BORK. They are.

The CHAIRMAN. Wait a minute—in the same way that did not allow for the legislative bodies to make distinctions, a little bit like the ERA.

Judge BORK. Not allow legislative bodies to make any distinctions?

The CHAIRMAN. Correct. If you are going to move the route of applying neutral principles, you either do it that way or you begin to make classifications. But to end up with a reasonableness test, it seems to me that you may very well find, although you state it can't, now—you may find that there are distinctions being made further down the road on reasonableness based upon alienage.

Judge BORK. Yes.

The CHAIRMAN. Based upon being handicapped. Based upon maybe even race, if you abandon the strict scrutiny test.

Judge BORK. Oh, no, no, Senator.

The CHAIRMAN. Why couldn't you?

Judge BORK. Because——

The CHAIRMAN. What would happen if it were concluded under your rationale, as related to the propensity to communicate disease, that genetically one race carried the gene more than another race and a court came along and made that distinction—I mean, a legislative body made the distinction.

Judge BORK. And what do they do?

The CHAIRMAN. Well, they decide that, for example, there is going to be automatic testing for one group of people, which, by the way, worries a lot of people. You see, when I talked to you before about the future, it's not very far off the horizon that if we don't get one disease under control, you may find legislative bodies taking whole classes of people based upon propensity of conduct to say we are going to put you in a certain category, we are going to demand mandatory testing for you.

Judge BORK. I am not going to try to decide cases of the future as——

The CHAIRMAN. No, no, I just want you to continue to philosophize a little.

Judge BORK. Well, I am talking about—for example, it is now the settled consensus that there is no basis for distinguishing between racial groups.

The CHAIRMAN. But it's settled consensus that they make that judgment based on strict scrutiny. You are abandoning that test.

Judge BORK. There is no reasonable basis to make a distinction between the races, if you will, Senator.

The CHAIRMAN. Well, I happen to agree with you, but you abandon the test they use.

Judge BORK. Justice Stevens has abandoned it and arrived at all the same results.

The CHAIRMAN. When did you adopt Justice Stevens' view?

Judge BORK. I don't know, I——

The CHAIRMAN. I never heard it until this——

Judge BORK. Well, I haven't been writing about the equal protection clause.

The CHAIRMAN. I know—not necessarily in your writings; I mean, have you ever adopted it anywhere before? I mean, I've never heard it before.

Judge BORK. It's not in writing, but, you know, we've discussed all these cases in class. And when I first started talking about it, I was saying they ought to give the rationality test some teeth, and decide these cases differently. That in a way was starting into a reasonable-basis test, because a lot of these cases I discuss here—on page 12 of my Indiana article, *Kotch* v. *Board of River Port Pilots*—you can't get a license unless you are related to a river boat pilot; *Goesaert* v. *Cleary*—a woman can't get a license as a bartender unless she's the wife or the daughter of a male owner; *Levy* v. *Louisiana*, and so forth—there are all kinds of cases that that classification system just hasn't protected anybody.

The CHAIRMAN. Concluding on that same page 12, you said: "There is no principled way in way anyone can define the spheres in which liberty is required and the spheres in which equity is required. These are matters of morality, of judgment, of prudence. They belong therefore in the political community. In the fullest sense, they are political questions."

Judge BORK. That's right. And I'm talking about Professor Wechsler's remark about Justice Frankfurter in cases where they had to decide about a political question, and therefore wouldn't, or where they decided about liberty and equality, and therefore wouldn't. If you use concepts like that, you are into the question of morality and prudence and so forth.

What I'm trying to say is——

The CHAIRMAN. Aren't we into that with "reasonableness"?

Judge BORK. What you are going to do is look at this thing and say—you know, we discussed *Reed* v. *Reed* in which a statute said that a man had to be preferred to a woman as an administrator of an estate. Nobody can think of a reason for that; it's an outmoded stereotype.

We discussed the *Cleburne* case, I think using the reasonable-basis test. Justice Stevens struck down a law that disadvantaged retarded people.

The CHAIRMAN. But how about if we get into cases that are more likely to occur? I am not asking for your judgment. We get in a case where we say it's not reasonable for the army to make a distinction between whether or not a woman can fly an F-15 and a man can fly an F-15. I'm sure, I guarantee you there are people in this body who will say that's a very reasonable distinction, women shouldn't be up there flying those F-15's.

Judge BORK. That's right, you are going to have to decide cases like that, and there is going to be evidence about whether a certain kind of strength is required, biological function, and so forth. You know, that can't be avoided. If you are going to get into this, you get into the same thing with intermediate scrutiny; you don't get away from anything with intermediate scrutiny—you are into the same business.

The CHAIRMAN. But what you are doing when you move off—and I will move off this subject now—but when you move off the rational-basis test, at least in the rational-basis test, although I admit—I think the reason the Court went to intermediate scrutiny is because the rational-basis test didn't get them where they wanted to go.

Judge BORK. That's right.

The CHAIRMAN. They wanted to reach out. And so the rational-basis test was more restrictive in fact, and that's why they went to intermediate scrutiny. Now, you are coming to reasonableness, and all of us thought, based on your writings, you would be at intermediate scrutiny, and we are quite frankly wondering whether or not, because your whole—everything you have written about this clause is, one, you'd like to see it viewed more restrictively.

Judge BORK. No, no, I said that if you are going to use this group-by-group approach, once you get beyond race and race-like things, then you are making political choices about which group gets which scrutiny.

The CHAIRMAN. So a business does not get any more scrutiny, the chemical industry gets no more scrutiny than a woman?

Judge BORK. No, no. I would think—you know, I am now launching into areas where I have never worked.

The CHAIRMAN. We are accustomed to that up here; it's our job.

Judge BORK. I know, but I don't want to start making statements——

The CHAIRMAN. You don't want to be a Senator.

Judge BORK [continuing]. That are going to haunt me. But in economic rights the Court has generally, I think, supposed that interest group politics was at work and they didn't examine it too closely. Whether that's a correct result or not, I don't know.

The CHAIRMAN. Let me move to another area. Unfortunately, there's much more to talk about that—and I appreciate your willingness to engage me on this. The tape with your statement that "I don't think in the field of constitutional law precedent is important" and your comments yesterday in response to questions, raise some issues about precedent. And today you made a distinction that I'd like to pursue.

Judge BORK. Before we get off that tape, Senator, I would like to say this: you have in your hands speech after speech and interview after interview where I have said some constitutional decisions are too embedded in the fabric of the nation to overturn.

The CHAIRMAN. And, to the best of my knowledge, you have only used two examples ever.

Judge BORK. Well, I was trying not to get into trouble by saying too much.

The CHAIRMAN. I understand, I understand. I just want to make sure. Now, I don't want to go back to the tape. I want to go——

Judge BORK. But you mentioned the tape, and I——

Senator SIMPSON. Mr. Chairman, it's untoward of me, but I would like to hear him finish, that he address it. I don't want to stay here all night, but——

The CHAIRMAN. I am just trying to hurry the thing up.

Senator SIMPSON. I would like to hear a full response to either a question or a multi-question that is directed at him—I really would. And I will stay here as long as you wish.

The CHAIRMAN. Please go ahead.

Judge BORK. One of the problems, Senator, is that you move from topic to topic, and I don't get a chance to discuss either the——

The CHAIRMAN. Please go back to any topic you want to discuss, I'm sorry.

Judge BORK. That particular tape I made the distinction between precedent in the statutory context and precedent in the constitutional context, and gave the reason—and that is an utterly accepted distinction by everybody.

The CHAIRMAN. That's all I wanted to talk about.

Judge BORK. That is the only time in all of these interviews and speeches where I didn't say: and there are some constitutional decisions that are too embedded, too late to overturn. And to make something out of that in a question-and-answer period strikes me as ridiculous.

The CHAIRMAN. I'm not.

Judge BORK. I know.

The CHAIRMAN. If you had let—if I had gone through, I could have saved us that. This is one time if I had said the whole thing it would have saved time—all I want to talk about is the distinction that you enunciated today between constitutional questions and how precedent affects those, and legislative decisions and how precedent affects those.

Now, I want to make sure I understand what we mean by, what you mean by constitutional as opposed to legislative cases. For example, *Brown Shoe* v. *United States*—you are obviously familiar with the case. That's a statutory case, correct?

Judge BORK. Well, yes, sir, but you have got a very unique statute involved there. If you deal with the antitrust laws, as the Court has said many times, you are dealing with open-textured statutory provisions much like the Constitution, and in fact you are dealing with a large delegation from Congress to the courts to deal with competition.

The CHAIRMAN. Let's start at the other end. *Shelley* v. *Kraemer* is a constitutional case.

Judge BORK. Right.

The CHAIRMAN. *Baker* v. *Carr* is a constitutional case.

Judge BORK. Right.

The CHAIRMAN. *Katzenbach* is a constitutional case.

Judge BORK. Yes.

The CHAIRMAN. Again, I'm not going to go through them all, I'm not trying to be argumentative. I just want to make sure that I understand.

Now, it is obviously—I shouldn't say—your distinction, constitutional versus statutory, is drawn, as it has been by many others, to suggest that when it is constitutional, precedent is more binding.

Judge BORK. No, quite the contrary.

The CHAIRMAN. Oh, I see.

Judge BORK. The reason for the distinction given by Justice Brandeis, Justice Douglas, everybody who talks about it, is that if a court reads the Social Security Act incorrectly, if a court reads the

Mann Act incorrectly, Congress can correct the court instantly: it can pass a statute saying we didn't mean that, do it this way—no problem. If a court misinterprets a fundamental profound provision of the Constitution, Congress cannot change it.

The CHAIRMAN. Like the *Griswold* case.

Judge BORK. Right, like the *Griswold* case, like *Brown* v. *Board of Education,* like any case you want to choose.

The CHAIRMAN. I'm with you.

Judge BORK. Congress cannot change it. That means, as everybody has said, the Court should be more willing to rethink a constitutional decision because only the Court can correct the mistake, nobody else can.

The CHAIRMAN. That's a point I thought I was making.

Judge BORK. You said precedent meant more in constitutional cases than it did in statutory cases, and the reverse is true.

The CHAIRMAN. You are exactly right; I misspoke. So that in the constitutional cases, those are the areas where the Court can go back, because if they don't go back and correct a mistake, no one can correct it.

Judge BORK. Yes.

The CHAIRMAN. None of us can pass a law changing *Shelley,* changing *Griswold,* changing *Katzenbach,* unless we pass a constitutional amendment, because there is a constitutional principle in there.

Judge BORK. Yes.

The CHAIRMAN. Now, you then go on, as you've heard a hundred times today—again, I'm trying to get this out—you say—and you've said, and I forget which speech, but you will remember it when I say it, if you don't, well, I'll dig it up—about how an originalist judge would have no problem overruling an non-originalist precedent because that precedent, by its very basis of a judicial philosophy, has no legitimacy. Or the statement you made earlier, which is: I don't think in the field of constitutional law precedent is all that important.

Judge BORK. I know, but in the second speech you read—that's a Federalist Society speech—that particular remark was scribbled into the margin, as you know, because you have the notes from which I spoke—and in the very next paragraph I go on to say of non-originalist decisions on the commerce clause, that it's too late to overrule them.

So there was never a case except that one question-and-answer period at Canesius College when I said then you make the point that you can't overrule something.

The CHAIRMAN. Okay. I am not saying you can't. Let me get to the last point.

Judge BORK. I know. But you shouldn't cite that Federalist speech because——

The CHAIRMAN. Okay. Let me back off then and go on. If it is a——

Senator THURMOND. Did you finish, Judge?

Judge BORK. I think so, Senator. Thank you.

The CHAIRMAN. If it is a constitutional principle involved, the Court, if it believes it has made the decision wrongly, can and should overrule it, unless it has become settled doctrine.

Judge BORK. I gave the—well, of course *Plessy* v. *Ferguson*, separate but equal, was settled doctrine.

The CHAIRMAN. But the point—in other words, the point I am trying to make is to make sure I understand you. You say that when a court made a mistake on a constitutional principle, that a judge, if he believed it was a mistake—a Justice—should come in and overrule it unless——

Judge BORK. There are a lot of factors.

The CHAIRMAN. Unless it is a commerce clause, unless it is—you know——

Judge BORK. No. There are a lot of factors. I have listed them all for you already. Unless private expectations have grown up around it, people have internalized the right; government institutions, private institutions have grown up in reliance upon it, and so forth and so forth.

The fact is the Supreme Court, I am told, has overruled about 250 constitutional cases in its time.

The CHAIRMAN. I am sure it has, which gets me to the last point on this. Back to your dozens of cases——

Judge BORK. Oh.

The Chairman [continuing]. That should be overruled.

Judge BORK. Reconsidered, I think I said.

The CHAIRMAN. Reconsidered. Excuse me, reconsidered.

Now I am trying to figure out the reason why a lot of people are concerned is because the cases where—and I will make the statement and you respond, please. You have made, by your own admission, and by the admission of those who are for you and again you, provocative statements about dozens of cases.

You have—I wouldn't say dozens. At least a dozen or—maybe 20 that I can think of.

Judge BORK. I have what?

The CHAIRMAN. You have made provocative statements.

Judge BORK. Oh.

The CHAIRMAN. Let me go through the whole thing, so you understand what I am getting at, so I am not in any way misleading you.

You started off—the reason why there is some concern on my part, at least, is you say there are dozens of cases that should be reconsidered. Some of the dozens of cases may be some of the ones you have written about—we don't know. Some of the ones you have written about, if you mean they should be reconsidered, scare the living devil out of some of us, like me.

If you think that you should reconsider the rationale, the rationale in *Griswold,* it worries the devil out of me. If you mean you think you should reconsider the rationale in *Roe,* it worries a lot of other people. If you mean you consider the rationale—and I can go down the list.

Now you have said that you know what those cases are, at least in your quotes, these dozens, and yet you have come back and you have made, at least you have left the impression with me that the precedent is so binding generally that you are really not going to go look at any of these cases.

So you have Orrin Hatch reading a list of all these cases that we have raised as concerns, as if to say: Isn't it ridiculous, Judge? You would never reconsider those cases. So there is a dilemma here.

Judge **Bork**. There are some I would re—No, I have never told you that I am so bound with precedent that I am not going to reconsider any case. Of course, it would take a lot of Justices to reconsider a case.

The **Chairman**. No, I understand that.

Judge **Bork**. And I have never said I am so——

The **Chairman**. But not the principle, because the principle might come back up.

Judge **Bork**. I beg your pardon? I didn't understand "the principle."

The **Chairman**. The principle in the case. You are not going to go back and reconsider *Griswold*; no. But the principle embodied in *Griswold* is likely to come up again somewhere along——

Judge **Bork**. It may. It may. A number of cases may come up in various fields that the Court may wish to re—I think the Court last term overruled four cases at the end of the term, something like that—or maybe during the term. You have to think about it. You have to be careful what you do. You have to know what effects you are causing on people, and so forth, and on settled expectations. But it happens.

The **Chairman**. You tell us, not cases, but principles—constitutional principles—you think warrant being reconsidered by the Court and you would feel obliged to reconsider as a judge. Just the principle, not the case.

Judge **Bork**. Well, I don't think I should go into that any more than I have already gone into here, which has been quite a bit. I mean, I have discussed my problems with various kinds of reasoning in some kinds of cases, and I think I have gone about as far as I should go.

The **Chairman**. Okay. Let me finish up with the one principle, constitutional principle, that still really disturbs me in terms of not being fully embraced, and that is what was referred to, I have been referring to as the marital right of privacy.

Judge Bork, there has been a lot of discussion, by me mostly I guess, about that issue with you. So to make the facts clear, you and others have basically said, that in the Connecticut case, the *Griswold* case, Connecticut made it a crime for a married couple to use contraceptives. But there is another part of the law that made it a crime to give couples or anyone else information and advice about contraceptives. And the executive director and medical director of a birth control clinic were arrested because they examined a woman and prescribed a contraceptive.

The Supreme Court found that the criminal laws were unconstitutional. Now they inferred with a right of—excuse of—they interfered with the State by talking about this right of marital privacy, which Douglas, as you have gone into detail about, disagreeing with, said was older than the Bill of Rights.

Now I have got a real simple question. With the views you have now, had you been sitting on the Court, how would you have ruled on that case?

Judge **Bork**. It is quite clear. I think marital privacy is a right older than the Bill of Rights, and that is why it has always been respected. Even in Connecticut, they didn't enforce that law against married couples and they had a terrible time, the Yale professors did, getting these doctors arrested.

But passing that, it is a right deeply built into our society, and no doubt about it. But, if I were sitting on the Court and Justice Douglas circulated that essay about emanations and penumbras resulting in a generalized right of privacy, which is wholly undefined and we don't know where it will go next—no, I would not have agreed to that opinion.

Marital privacy is a very important thing. And if a case came up in which I had to think about a constitutional principle, I would think very hard because it is so important. However, if when I was finished thinking I could make no legitimate constitutional case, I would not make a decision that was not justified by the Constitution.

The **Chairman**. Let me conclude with a letter I received from Harriet F. Pilpell, for Katherine G. Rohrbach and herself. I assume she is an attorney with——

Judge **Bork**. I know them.

The **Chairman**. Okay. I don't know her.

Judge **Bork**. Well, there are two women there.

The **Chairman**. Okay. She says:

> Dear Senator Biden. On behalf of Katherine G. Rohrbach——

Am I pronouncing it correctly?

Judge **Bork**. I believe so.

The **Chairman** [continuing].

> And myself, I write this letter to clarify the legal situation as it existed in Connecticut prior to the decision in *Griswold* v. *Connecticut*. There is a decision of the Connecticut Supreme Court of Errors, dated March 6, 1940, a copy of which is enclosed. You will note that there was a prosecution of two doctors and a nurse in violation of the Connecticut statute against the use of contraceptives.
>
> The case did not go beyond the highest court in Connecticut; however, as a result of this decision, nine Planned Parenthood clinics which had been providing contraceptive services until they were closed, remained closed until the decision of the United States Supreme Court in *Griswold* v. *Connecticut* in 1965. During the intervening period, efforts were made to bring the question of constitutionality of the Connecticut statute to the U.S. Supreme Court. Although the Court did not review in two cases prior to *Griswold*, they decided against the opponents of the statute on technical grounds.
>
> In the second of such cases, there were dissents from the denial to pass upon the statute by a leading conservative Justice and leading liberal Justice. Both Justices Harlan and Douglas dissented in separate findings, stating that in their view the Connecticut statute violated a basic constitutional right of privacy, a position which the majority of the Court adopted later in *Griswold*, in 1965.
>
> The citation of *State* v. *Nelson Godrich*, etc., are 126 Conn. 412—

Well, I won't go through that.

> The citation of the third case—

I will skip that, too.

> Katherine Rohrbach represented the Planned Parenthood League of Connecticut from 1955, and I have represented the Planned Parenthood Federation of America since 1940. From 1940 until the decision in the *Griswold* case, no birth control services were available to Connecticut women who could not afford the price of a private physician.

The whole point being very clear, Judge. That that case, as at least these two attorneys argue, the reason they wanted the test case was the Planned Parenthood outlets had been shut down by the 1940 case, and poor women couldn't get contraceptives but wealthy women could.

Judge Bork. I don't think that is true that poor women couldn't. But, anyway——

The Chairman. At least not through Planned Parenthood.

Judge Bork. I said to begin with when we started this that the only way they enforced the statute was against birth control clinics that operated in the open. That is right.

The Chairman. But they weren't operated in the open. That is why they didn't enforce it——

Judge Bork. No, no. But now we have shift——

The Chairman [continuing]. They were closed down.

Judge Bork. Now we have shifted from the marital bedroom to the question of whether they are dealing with birth control clinics.

The Chairman. I see.

Senator Simpson. Mr. Chairman, I think that there is a distortion there that needs to be cleaned up. He said, if I recall, and I just want to get the record correct, that there had never been a case brought on the issue of the bedroom—the right to privacy, the marital right. That which you read has something totally different from that.

I happen to be a big—I think Planned Parenthood is a remarkable organization. I have put my money and my other efforts into helping them. But, for Heaven's sakes, that doesn't have anything to do with this issue. That doesn't have anything to do with it.

The Chairman. Well, you and I will get a lot of chances to debate that on the floor. But, go ahead, Judge.

Judge Bork. Also, I should say that in *Poe* v. *Ollman*, which was the predecessor case, the one in which Justice Harlan relied I think not upon a right of privacy, but upon a right derived an ordered liberty concept, the majority in that case said we haven't been shown and we can't see that this law is ever enforced against anybody, and they had to go back down and get somebody arrested and come back up.

The Chairman. Okay. My last question, and it is kind of a reiteration. You have indicated you wouldn't have voted with the majority in *Griswold*. Would you have voted with the minority in *Griswold*?

Judge Bork. If I had not seen a better argument than the one that Justice Douglas offered, I would have joined Justice Black, Hugo Black, and Justice Potter Stewart.

The Chairman. Have you ever seen a better argument?

Judge Bork. I have never looked at an argument from that area, again.

The Chairman. I thank you very much, Judge. We were going to break anyway and there is a vote on. We will break now for 10 minutes, and then we will finish up. Thank you very much.

[Recess.]

The Chairman. Judge, we are getting down to the wire here. We are going to finish tonight and we will, if we are required to, go much more than another hour and a half or so. We will break very hour from now on, to make sure there is some time. I assume it is your preference to finish up tonight as well.

Judge **Bork**. It is very definitely my preference, Mr. Chairman.

Senator **Leahy**. I might note for some of us at the far end of the table it is our preference, if the Judge is able, too. I want to go back home tomorrow and see my family.

The **Chairman**. All right.

Senator Specter?

Senator **Specter**. Thank you very much, Mr. Chairman.

Judge Bork, I want to turn to a subject on the finality of Supreme Court decisions in terms of interpreting the Constitution. This picks up a somewhat broader subject than *Marbury* v. *Madison*. There has been some discussion of *Marbury* v. *Madison*, not a whole lot.

There are some prominent people in our country today who appear to be questioning the finality of Supreme Court decisions. One Presidential candidate flatly questions the finality of the Supreme Court decisions, saying, as I understand his comments as printed in an extensive article in the Washington Post that the President has authority to interpret the Constitution, that the Congress has the authority to interpret the Constitution, as co-equal branches, notwithstanding what the Supreme Court of the United States has said.

There has been a statement made by Attorney General Edwin Meese which borders on that conclusion. Attorney General Meese may not have intended to reach that conclusion as he addressed an op-ed piece to the Washington Post after a speech he made at Tulane on October 21, 1986.

But I believe that this raises the most fundamental question for the Supreme Court and for the Constitution, and it is a question in my judgment of enormous importance. And Attorney General Meese said this:

> But as constitutional historian, Charles Warren, once noted, what is most important to remember is that "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court." By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously, it does have binding quality. It binds the parties in a case and also the executive branch for whatever enforcement is necessary, but such a decision does not establish a supreme law of the land that is binding of all persons and parts of the Government henceforth and forever more.

Now what troubles me about this statement is that Attorney General Meese appears to be giving support to what Charles Warren says; that even after the Supreme Court has made a decision it is the Constitution which is the law, suggesting some difference from what the Court has said. And then, Mr. Meese's own words, saying that the Supreme Court decision has a binding quality for the parties in the case, and also the executive branch for whatever enforcement is necessary, suggesting that the Supreme Court decision does not bind beyond that range.

My question to you is do you agree with what Attorney General Meese has said?

Judge **Bork**. Well, I am not quite sure what it means, Senator, but let me say this. He started off that somebody said that the Congress and the President can also interpret the Constitution, which is quite true. When the Congress decides to pass a statute, it must—it should, since they have taken an oath to defend the Constitution, think about the constitutionality of what it proposes to do. When the President is about to act, he should—she should, if we should have one—think about it, too; and usually he gets advice from the Office of Legal Counsel about the constitutionality of what the President proposes to do.

But having done that, the Supreme Court—the courts and ultimately the Supreme Court, are the final determiners of what the Constitution is. But when the Court decides a case, I think as Abe Lincoln said in his debates with Steven Douglas about the *Dred Scott* decision, he has no desire to challenge that decision or say nobody is bound by it, but you are free to go back and ask the Court in a future case to change its mind.

And I think that is true for a while. Professor Herbert Wechsler, I think it was, who said that you can ask the Court to rethink until it becomes clear that it is settled, and when it is settled, it is settled. And this ties into, of course, the discussion we have had about precedent and respect for it. Courts can rethink, but it may be, as I have said before, too late to rethink for a variety of reasons.

Senator SPECTER. But you would agree, then, that a Supreme Court decision has more of a binding quality than simply on the parties to the case and on the executive branch to enforce that specific decision?

Judge BORK. That is true.

Senator SPECTER. And unless there is an appeal and a change in the Court's decision, that such a decision does establish a supreme law of the land that is binding on all persons and all parts of the Government.

Judge BORK. That is true.

Senator SPECTER. Judge Bork, I want to turn now to a statement you made in *Barnes* v. *Kline*, which has been the subject of some discussion as to standing. But in your enumeration of the powers of the President, you said this in your dissent, at page 55 of the opinion: It—referring to the Constitution—quote, "was to allow room for the evolution of the powers of various offices and branches, that the Constitution's specification of those powers was made somewhat vague. The framers contemplated organic development, not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint."

There, obviously, you treat executive powers as a blueprint in the Constitution with a fuller statement to be developed as organic law.

Why not such a similar interpretation for the Bill of Rights? Why the necessity to find a specific constitutional right as a prerequisite for dealing with State legislative action?

Judge BORK. For this reason, Senator. I said specifically the only time I got into a debate with my colleagues over this—and the colleague I was having the debate with was Judge Scalia—was in the *Ollman* case, where I found a column protected by the first amendment. And as I explained there, there will be an evolution of the Bill of Rights as new threats to the freedoms guaranteed develop—whether those threats are developments in legal doctrine, as in libel law, or threats coming from technology, or whatever it is; and you do have an organic growth. And there is a lot of freedom in that. I mean, these are questions of degree and questions of judgment, which is why you need judges and not just read the Constitution.

But I do not think that I can ever justify a judge putting a freedom or value in the Constitution that the framers or the ratifiers in no way contemplated. Now, they did not contemplate the circumstances, so you may get an evolution for that reason. They did not contemplate future developments, so you may get an evolution of a value that is in the Constitution. But I think they have to put the value there.

Senator SPECTER. But in your quotation in *Barnes* v. *Kline,* when it comes to executive power, you allow for growth. In your opinion in *Ollman* v. *Evans and Novak,* where Judge—now Justice—Scalia criticized you as going beyond the intent of the framers, you did expand the constitutional right, and your opinion in *Ollman* v. *Evans and Novak* might be said to have some similarities to Justice Douglas' opinion in *Griswold* v. *Connecticut.* That is an articulation by a judge of a constitutional right which at least Justice Scalia said was not within the intent of the framers.

Now, why not that as a general principle of constitutional law?

Judge BORK. In *Ollman,* I had a constitutional freedom specified in the Constitution, and the question was what it takes to protect that freedom, and I evolved that. Justice Douglas did not point to any freedom or value specified in the Constitution, and I think that is the difference between the two cases.

Senator SPECTER. Well, liberty is in the Preamble of the Constitution. You have objected to an interpretation or a specification of liberty rights in your writings on *Meyer* v. *Nebraska* and *Pierce* v. *Society of Sisters,* but why not liberty in the very Preamble of the Constitution as a basis for privacy in *Griswold* v. *Connecticut*?

Judge BORK. Senator, I think the reason for that is—and you can use liberty in the 14th amendment; it speaks of no person may be deprived of life, limb, or liberty without due process of law——

Senator SPECTER. Well, I do not pick that one up because it is due process, which you have objected to. That is why I picked the fundamental of liberty from the preamble. But take liberty either place. It is a cherished value; it is the cornerstone of the Constitution. It seems to me very rational—as rational to say that privacy is derived from liberty that liberty implies privacy, as it does to say that freedom of the press implies the Evans-Novak rights which you found in the *Ollman* case.

Judge BORK. Well, the difficulty, I think, Senator, is that if I decide that I am going to protect liberty, just in general, not without any specific provision of the Constitution, then I have no—obviously, I cannot say everybody is free to do whatever they want to do, and no statute may exist because it interferes with liberty; we cannot have anarchy. So then I have to define what liberties—I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have.

Now, that is exactly the effort I engaged in for about 6 or 7 years in that course on constitutional theory that I thought with Alex Bickel. And I became convinced that it was an utterly subjective enterprise and that I was running my values into what I was coming up with. I do not know—each of us may have a different idea about what liberty requires. And if we have no guidance from the Constitution itself, it is just the judge legislating the Constitution—you know, if a judge said, "I think I will enact a statute," we would all recognize that that was improper. But a statute, I assume Congress could repeal. If a judge legislates the Constitution, I think the situation is far more serious, and I do not want judges, including me, going around, saying, "You have this liberty, you do not have that liberty," and I cannot explain why I got it.

Senator SPECTER. But why should you be as free to find additional executive powers, as you say you can in *Barnes* v. *Kline,* moving from a blueprint?

Judge BORK. Let me see what I said.

Senator SPECTER. You said the Constitution's specification of those powers was made somewhat vague——

Judge BORK. Yes——

Senator SPECTER [continuing]. That the framers contemplated organic development. Why not organic development for liberty? Why only organic development for executive power?

Judge BORK. But it is not executive power; it is also congressional power. There has been an organic development of congressional power, too, in this country.

Senator SPECTER. All right, all right. This really focused on executive power. But take it as you have articulated it—why organic development for congressional or executive power, but why not organic development for people power, defined as liberty?

Judge BORK. Well, there is one decisive difference between you and me, Senator Specter, and that is you were elected; I was not. And if the people do not like what you are doing with respect to liberty, they have a cure. If they do not like what I am doing with respect to liberty, they have no recourse.

Senator SPECTER. You were not elected when you decided the *Ollman* case.

Judge BORK. That is right. But I had a constitutional provision, a constitutional liberty, specified for me, and I was empowered to do my best to ask what is required in this case to protect that freedom.

Senator SPECTER. Well——

Judge BORK. Now, I do not mean to say that judges do not have latitude, and they may not decide different things differently. But at least I knew that I had a constitutional liberty with a lot of Supreme Court decisions about how broad that liberty was supposed to be, with a history of our country, and I could decide it. But I could not go off and say, well, I will take the first amendment and decide a case about minimum wage laws.

Senator SPECTER. But Judge Bork, in the tradition of our law, and as the Supreme Court has interpreted the decisions, including Holmes and Black and Frankfurter, there are traditional expansions of liberty very much within the framework that you articulate in *Barnes* v. *Kline* and that you applied in the *Ollman* case, in terms of the contours of the law which do not have any more specification.

For example, Frankfurter, whom you characterized as one of the stars of the Supreme Court, had this to say in *Roshin* v. *California*—and I hope to take up with you some criminal law cases at a later time and some of the due process considerations generally, but it fits in right here—this is what he said in citing tradition from Cardozo—and it might be worth just a moment of explanation to say that Roshin was a criminal law case where police officers in California broke into a person's house and pumped his stomach, and the Supreme Court suppressed the evidence and found for the defendant in the case. And Frankfurter quotes Cardozo as saying there are values, quote, "so rooted in the tradition and conscience of our people as to be ranked as fundamental"—language which is very close to what your colleague Professor Bickel used. And then Frankfurter says, "The vague contours of the due process clause do not leave judges at large." That is what you are concerned about. And Frankfurter goes on and says, "We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial functions. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process." And he refers to Cardozo's "Nature of the Judicial Process", one of the most famous law books ever written, that I know you are familiar with.

Now, that is the contour of the interpretation of the law. That is the contour you follow in *Ollman*. That is the contour you articulate in *Barnes* v. *Kline*. Why not a similar contour for liberty?

Judge Bork. Because, Senator, I can do anything with the concept of liberty which is unstructured. I can reach any result I want to. For example——

Senator Specter. You can do that pretty much with freedom of the press.

Judge Bork. I have to be talking about a press case, and I have to be talking in terms of the kinds of categories that have been built up in libel cases in the past, rhetorical hyperbole and so forth; actual malice, all that. There is a whole structure there.

Now, we should remind ourselves that there was a time when the word "liberty" in the 14th amendment was used by judges to strike down social reform legislation. They struck down minimum wage laws in the name of liberty; they struck down laws in the *Lochner* case, law regulating the hours that bakers could work. They went through social reform laws very fast, in the name of liberty, and struck them down. And I cannot say they are right or wrong about liberty. I can say they were wrong because they were using a concept to reach results they liked, and the concept did not confine them, and they should not have been using that concept.

Senator Specter. Judge Bork, I do not think the Supreme Court has to be right all the time. The question is what are the powers of the Court.

Judge Bork. That is right.

Senator Specter. The Court has a consistent tradition, starting with *Fletcher* v. *Peck,* where Chief Justice Marshall talks about values rooted in the conscience of the people, which moves away from the specific language of a particularized right, so that you have a very long history in the Constitution of the United States, of constitutional interpretation, which does not require a particularization of a specific right.

Judge BORK. I think in *Fletcher* v. *Peck,* if memory serves, the statement by Marshall was somewhat ambiguous. He refers to the nature of society, that maybe there is something in the nature of society. But in any event, he did not use that nature of society in that case—didn't he use the contract clause?

Senator SPECTER. He used the contract clause, and he also used the language which is more generalized, and this is what *Fletcher* v. *Peck* held. And when you say it is vague and generalized, I would not disagree with that. You can say that about most of the Supreme Court decisions, with all due respect. But he says this, at page 139 of the opinion: "If a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defense would be a valid one."

Well, that is fair to read as an alternative holding to freedom of contracts or to the "general principles of our political institutions".

So you go back to 1810, with Marshall, in *Fletcher* v. *Peck,* on the power of the court again and again and again.

And I grant you that the *Lochner* decision is a bad one. And I think the Court is going to come to bad decisions. But a more fundamental issue for me is what is the power of the Court to do; and if you restrict the power of the Court to an articulated right, then you very much limit, as I see it, the tradition of the Court.

And I see in your own writing, *Barnes* v. *Kline,* when you deal with executive and congressional power, and it raises a question which I would like your comment on, a question raised by others, as to whether there is not a broader expanse as you interpret law, Judge Bork, if it comes to Congress or if it comes to the executive, as contrasted with the interpretation of law as it relates to the individual, that individual liberty.

Judge BORK. Well, I do not think so, Senator. I hate to say what I have said before, but the fact is I have decided some constitutional cases, I have decided first amendment cases, and found for individual liberty. I decided a double jeopardy clause case just the other day and found for individual liberty. There is no problem that way. My only problem is I do not want to be a free-floating legislator of constitutional law; I just do not.

Once a judge gets to the point where he says he is allowed to use the concept of liberty to do whatever he thinks liberty requires, then in a nomination hearing like this, that judge should be asked to make campaign promises about what he thinks liberty requires in specific instances, so that you would be satisfied he is going to do the right thing.

And we have been proceeding on the assumption, which I think is quite correct, that I should not be asked to make promises about particular cases. But if I am free to decide liberty, then you ought to ask me what I am going to do about the minimum wage law.

Senator SPECTER. Judge Bork, I would not ask you what you are going to do about the minimum wage law, just as I would not ask you about what you are going to do about the abortion case.

Judge BORK. No, but that is only because you think I am confined by some principles and not free to make up liberty as I see fit.

Senator SPECTER. No, because I do not think that you ought to be asked about a specific case; but I think it is fair to ask you about a generalized principle, and I think it is fair to ask you about the interpretation and the structure of our constitutional government. And I think that you have moved considerably in your statement about equal protection not being limited only to race. And I intend to talk to you later this evening about your interpretations of the antitrust law, because there, you take the Congress' words, and you feel very free to disregard them, at least——

Judge BORK. Oh, no, oh, no, Senator.

Senator SPECTER. Well, let me pick that strain up——

Judge BORK. All right, but I would like to get on the record right now that I do not feel free to disregard what Congress decided.

Senator SPECTER. Well, let us pick up the antitrust strain in just a minute or two and focus continuing on this issue about the tradition of the Court to make interpretations, as you suggest for Congress and the executive in *Barnes* v. *Kline,* and as you have in *Ollman,* in terms of what the Court has done in other matters, and as to what has been written.

Alexander Bickel, to whom you refer again and again, has written on the subject, and has talked about the leisure and the insulation of judges, a quotation that you refer to many, many times in your speeches.

Judge BORK. Because once I became a judge, I though it was a funny concept of a judge's life.

Senator SPECTER. Well, there is less insulation if you are a Supreme Court nominee, at least during the confirmation process——

Judge BORK. There is also no leisure on any court these days.

Senator SPECTER. Well, perhaps more leisure than legislators have.

Have you had an all-night session on the court of appeals that runs to 6:30 in the morning, Judge Bork?

Judge BORK. No, I have not.

Senator SPECTER. We have them with some frequency.

Judge BORK. Well, I guess I picked the right Branch. [Laughter.]

Senator SPECTER. But the point that Bickel makes, and the point that so many Supreme Court Justices have made, and the point that the Constitution makes on life tenure is the insulation; and that gives a Supreme Court Justice perhaps a little more courage—except, perhaps, for Senators who have repetitive profiles in courage—but the history of our country has been that the Congress has refused to act, and the executive has refused to act. And you were quoted as saying that *Plessy* v. *Ferguson* had ceased to be equal with being separate in the 1920's, 1930's and 1940's, and it took until the 1950's for the Supreme Court to decide the case. And there has been a reliance by the people of this country on the courts as a refuge when they cannot get legislative bodies to act because of unwillingness to face the kinds of tough decisions or executives, because the other side of the coin of being elected is that there is a tremendous inertia and unwillingness to face problems, and the insulation that judges have has provided the tradition, and the tradition of the Supreme Court of the United States, to make good faith interpretations in an expansive way.

And that is really what I am looking to, because I think that is the tradition of the Court.

Judge **Bork**. It is, and I could not agree with you more. But you mentioned—I guess I should say something—you mentioned Justice Hugo Black as being in this tradition you described. I think he was not. Justice Hugo Black was constantly complaining about the natural law approach to the Constitution, and I think he dissented, in *Rochin* v. *California*, on precisely that ground, that this shock the conscience of the Court business is a natural law——

Senator **Specter**. He wanted to put it on specific grounds in the Bill of Rights as a privilege against self-incrimination and unreasonable search and seizure. He did not avoid the problem——

Judge **Bork**. No.

Senator **Specter** [continuing]. And when the crunch came, on *Bolling* v. *Sharpe*, on the District of Columbia school desegregation, Justice Black was with the majority on desegregating the schools on due process grounds, so that when the crunch came, Justice Black was willing to use due process—even though there was no specification.

Judge **Bork**. Yes, he read an equal protection component in. I do not want to name names, but there were judges who later had second thoughts about that decision.

Senator **Specter**. Well, Justice Black did not read an equal component in it so far as that opinion was concerned; he did not write any concurrence. He simply followed Chief Justice Warren's opinion. There was no equal protection read into it as far as Justice Black was concerned.

Judge **Bork**. Well, I think the opinion said that due process also has components of equality, and that has been taken since to mean that there is an equal protection component of the due process clause. Well, I have filed briefs that way, and I seem to win cases that way.

Senator **Specter**. Well, you may file briefs that way, Judge Bork, and I will send for the opinion again; I thought you and I had finished discussing *Bolling* v. *Sharpe*.

Judge **Bork**. Well, I do not think there is any point in going back over whether it incorporates an equal protection standard or not, but that is my understanding.

Senator **Specter**. Well, the opinion by Chief Justice Warren is pretty flat, that it is a due process consideration, and it is a matter of fundamental fairness, and he does not find equal protection applicable to the federal government. On the contrary, he says we have to write this opinion separately, because so far as the States are concerned, equal protection applies. But so far as the federal government is concerned, there is no equal protection clause; therefore, there has to be a separate opinion, and it is put on due process grounds.

And Justice Black goes along with the opinion of the Court. He does not file a concurrence.

Judge **Bork**. I should say, Senator—you said Justice Black was not afraid to face the problem in *Rochin*—nor would I be. And it seems to me the most likely thing to do is what Justice Black did, and that is place it on fourth amendment grounds.

The use of a stomach pump is a terrible way to punish somebody. It is a very painful process and should not be allowed—at a minimum should not be allowed—unless there is a determination by a judge that there is such probable cause to think this fellow swallowed the cocaine that you can use it.

Senator SPECTER. Judge Bork, I think it is fine for you to do justice in *Rochin* without the due process clause if you can find it. Now the question is how are you going to do justice in privacy cases without the due process clause—if you can find an alternative, that is fine. But what I am looking for and what I think the tradition of the Court has been is not to be hidebound by being able to find a specific right if it comports to fundamental principles rooted in the conscience of our tradition, which is the Cardozo language, or fundamental considerations of fairness. And in the nature of the judicial process that we have had since 1810, *Fletcher* v. *Peck*, there is that really well-established tradition.

Judge BORK. Well, Chief Justice Marshall—I hate to keep interrupting, but a point goes by, and I do not want to not get a chance to say something——

Senator SPECTER. Okay.

Judge BORK. That kind of language never appeared in the Marshall Court after that; it just died out.

Senator SPECTER. So what?

Judge BORK. Well, I think they became nervous about it. But the point I wanted to make about Cardozo and *Palko* v. *Connecticut* and the concept of ordered liberty was a much narrower and less dynamic form of judicial decisionmaking than the right or privacy cases are.

Senator SPECTER. Judge Bork, there is a continual line of analysis in your writings, too——

The CHAIRMAN. Senator, would you make this the last line, and then we will come back to you? You have a little more time.

Senator SPECTER. Sure.

The CHAIRMAN. You have a few more minutes. I just wanted to let you know.

Senator SPECTER. All right.

Judge Bork, I was starting to comment about a strain in your writing about the Constitution responding to the demands of the people—and here again you refer to Bickel with some frequency—and that if the Court makes a decision that does not have popular support, it will change; or if the Court makes an opinion which does have substantial minority opposition, in the absence of some majority support, it will change. And you made an interesting comment in the League of Women Voters publication, this year, 1987, where you said, talking about the evolution of constitutional doctrine, referring to Supreme Court Justices, quote, "Furthermore, they are screened through a Senate Judiciary Committee, which has become, I think, increasingly sophisticated"—one of your comments which may not draw any objection from this panel—"a Senate Judiciary Committee, which has become, I think, increasingly sophisticated; that what is at stake are constitutional issues.

So in the long run, the Constitution is not merely what the judges say it is, but what the people want it to be."

Now, if a Constitution can be influenced by a sophisticated Senate Judiciary Committee and can be responsive to what the people want it to be, then why the harsh constricture that a right has to be specified before you would interpret it through a very important American value?

Judge BORK. For this reason, Senator—but the right does not have to be specified; some rights and powers are inferred from structure and so forth; I mean, it does not have to be specified entirely.

Senator SPECTER. That is part of my problem. That is an articulation that you agree with, but you limit it, even when you come to what so many people think are really fundamental values.

Judge BORK. Well, I agree they are fundamental. I am now trying to recall—what exactly was I—I am sorry.

Senator SPECTER. The question is that if the Constitution has sufficient flexibility to respond——

Judge BORK. Oh, I remember now.

Senator SPECTER [continuing]. To what the people want it to be, and a sophisticated Judiciary Committee, et cetera.

Judge BORK. I do not think, Senator, that by that I mean that the Constitution has built into it flexibility for judges to keep responding to the people, because if they did that, of course, the Bill of Rights might disappear when the people are pretty sore.

What I meant is—and I think I have said it before—judges unfortunately are mortal, which I find increasingly disturbing, and if there is a political pressure in the society for certain results, as there was in the New Deal to expand the commerce power beyond what the Court was currently willing to let it be, the Court cannot forever withstand that strong political pressure, if for no other reason than that Justices die and retire, and the President will nominate somebody whose views are more expansive about the commerce clause—which is precisely what happened in the New Deal era. And the Senate will confirm them, and you will get a de facto change in the Constitution, not because the document is flexible, but because human beings come and go.

Senator SPECTER. Is that bad?

Judge BORK. Probably not. In a way, one could wish that we had done what Canada did. As I recall, the judges up there were frustrating similar social legislation in a way that ours were, and Canada amended their Constitution. I wish we had done that.

But good or bad, it is inevitable, the kind of development I described.

Senator SPECTER. We will return to the subject.

Thank you very much, Judge Bork.

The CHAIRMAN. Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Bork, it has been a long day, and I am sure you will be as happy as we will when it is over. I have a number of questions, and rather than belabor and stay here for several hours, I am going to ask the chairman if he is going to entertain submitting some of those questions to you, because I know there are other members who would like to have an opportunity to talk to you, and I know you would like to have it finished today.

The CHAIRMAN. Without objection, any question that any member wishes to submit rather than ask, I am sure the Judge would be delighted——

Senator DECONCINI. Yes, fine.

Judge BORK. In a way—I do not mean to be unpleasant or anything, Mr. Chairman, but in a way I would rather write an answer to a question right now—just in the interest of getting home and getting some dinner; that is all.

Senator DECONCINI. Yes, sir. If I went through the questions, it would take a couple more rounds, I think. As Senator Specter has pointed out, there are a lot of unanswered questions and a lot of them that you have answered for me—though I may not agree with them, you have answered them, but some I do agree, or at least I am satisfied.

I am concerned—and this is really not addressed to you; it is addressed more to the White House—one of the records that have been put together regarding your record on the circuit court is interesting, and I have read it, and I do not know if you approved it, but it points out some pretty good statistics on reversals and how many cases you have handled.

But Judge Bork, can you tell me if any of the majority opinions which you wrote have ever been considered by the Supreme Court?

Judge BORK. I do not know, I really do not know. I did not put that stuff together.

Senator DECONCINI. I did not think you did.

Judge BORK. And I did not even read it, because there comes a point in this process when you cannot bear to read anything more about yourself. But I do not know——

Senator DECONCINI. I do not think there is. And it is okay. That does not disqualify you by any means. But I think it is most misleading on that, because it indicates that so many of your cases have gone up, that you have written something on, and that your opinions have been adopted. But in fact, if I am correct, not one of the cases where you wrote the majority opinion has been considered by the Supreme Court.

Judge BORK. Well, it may be. And one reason for that is a lot of them have been petitions for certiorari, petitions to review my opinions, and they have been denied.

On the other hand, I think it has been pointed out—and these are not my numbers; somebody's numbers—that I have written a number of dissents, and I think in each case——

Senator DECONCINI. Yes.

Judge BORK [continuing]. When I have written a dissent and it has gone up, the Supreme Court has adopted my position.

Senator DECONCINI. That is correct. And I will go further. Your supporters in that particular piece of the White House, they cite only split decisions, and where there was a dissenting opinion by you. And that is fair enough, but I think it is important for the record to be clear, because I read that, and as I got into it more and more, I found out—at least I think I found out—that none of your majority opinions, which makes it a little bit fooling with statistics, because——

Judge BORK. Well, Senator——

Senator DECONCINI [continuing]. Wait a minute—it indicates that this majority position you have taken has not been adopted by the Court—well, it has not been considered, so it has not had a chance to be adopted, not that it might not be.

Judge BORK. Well, yes. And of course, if they deny certiorari, one supposes they do not find it too outrageous.

Senator DECONCINI. That is right.

Judge BORK. I do not know if any cases in which I participated but did not write the opinion have gone up. I simply do not know.

Senator DECONCINI. And then likewise, just for the record, yesterday we had that list of 100 law professors. I now have a letter from former Dean Marcus of the University of Arizona—which does not say he opposes you, by the way—and I will put it in the record here, and you will have a chance to see it. It says that he does not support or oppose Judge Bork. And I think it is important that the record be as clear and concise as it can be that Dean Marcus did not want his name used without his permission, although he says in the letter, clearly, taking the view that, "It would be presumptuous for me to support or oppose Judge Bork's nomination," and he explains the constitutional reasons.

So without objection, Mr. Chairman, I will ask that it be part of the record.

The CHAIRMAN. Without objection, it will be entered in the record.

[Material follows:]

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

COLLEGE OF LAW
OFFICE OF THE DEAN
Telephone: Area Code 602, 621-1498

September 17, 1987

The Honorable Dennis DeConcini
328 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

Apparently some confusion has arisen concerning my public statements and position regarding the confirmation process currently taking place in Washington. On numerous occasions I have been asked publicly whether I would "support" the confirmation of Judge Bork. I have also been asked my views as to the process which begins with the Senate Judiciary review of Supreme Court nominees. On the latter point , as I have written to you previously, I believe the confirmation process requires a thorough, but narrow review by the Senate. In particular, I think that the review ought to include an analysis of very high standards regarding education, experience, intellect, judicial integrity and the ability to operate within the mainstream of American legal procedure and practice. I do not think, however, that a detailed discussion of ideology or general philosophy should be the cornerstone of the confirmation process.

On the former point, I have taken the view that it would be presumptuous for me to support or oppose Judge Bork's nomination. Instead, I have focused on the question of whether he is qualified to serve on the Court. On several occasions I have indicated that--based on the evidence available at the time--Judge Bork is a highly intelligent and experienced judge, lawyer and teacher. I have always believed, however, that the resolution of his appointment was one for the Senate after hearing substantial testimony both from Judge Bork and other interested parties.

Yours truly,

Paul Marcus
Dean and Professor of Law

PM/eb

Arizona Daily Star, August 29, 1987

Page Twenty – Section A

METRO/STATE

UA's Dean Marcus calls for Bork's confirmation

By Tom Turner
The Arizona Daily Star

Paul Marcus, dean of the UA College of Law, said yesterday that the Senate should confirm the appointment of Robert H. Bork to the U.S. Supreme Court.

"It appears at this moment that Judge Bork is eminently qualified," Marcus said, "although as president, I wouldn't have nominated him."

Marcus, who will testify at Bork's confirmation hearings in Washington, D.C., spoke at a luncheon meeting of the Pima County Republican Women's Club.

Marcus said the Senate's responsibility is only to examine a judicial candidate's education, record and performance as a legal practitioner.

"The only person who can legitimately consider a judicial candidate's philosophical views is the president," Marcus said. "I believe that's the way the Constitution says it should be done."

A president always will try to shape the court to his own philosophical image, Marcus said.

"But the Senate is at its worst when it tries to use a court nomination to fight its own philosophical wars," Marcus said.

He said that examining a candidate on philosophical grounds implies that the Senate can determine how a candidate will decide future court cases.

"That is an impossibility," Marcus said.

He cited Earl Warren, "one of California's toughest prosecutors," who wound up writing the Miranda decision that guarantees criminal defendants the right of counsel.

Hugo Black, once a conservative senator from Alabama, became an outstanding supporter of the First Amendment in his years on the Supreme Court, Marcus said. Byron White, a close friend of Robert Kennedy's, has been one of the strongest supporters of President Reagan's appointees, Marcus added.

Personally, he said, he disagrees with Bork "on a host of issues," including Bork's narrow view of the role of the court in protecting individual rights and liberties.

But, Marcus said, Bork has received the American Bar Association's highest evaluation as a judge. The Senate also swiftly confirmed him five years ago as a federal Circuit Court of Appeals judge for the District of Columbia.

Senator DeConcini. Now, Judge Bork, I do have a question that has been raised, not by me, but by one of your colleagues, Judge Gordon, regarding a panel that you sat with with Judge Robb. I only read in the newspaper what some of the clerks said and what your response was. And I would like to turn to that for a moment. It relates, of course, to the opinion in *Vander Jagt* v. *O'Neill.* And I am not so much interested in the opinion, because I am really not; I am interested in the problem that is raised here that you may be able to clarify completely as to the ethical standard that is used by judges.

Is it correct to say that, although you had agreed to write a majority-based opinion on numerous reason, it was agreed that the opinion would not be based on standing, as clearly stated in the memorandum from Judge Robb dated March 19, 1982?

Judge Bork. That is entirely true. We were going to—I can describe——

Senator DeConcini. Okay.

Judge Bork. I am sorry.

Senator DeConcini. Now, between that memorandum and the time you drafted the opinion, you apparently had a change of heart and decided that the opinion should be based on standing; is that correct?

Judge Bork. That is correct.

Senator DeConcini. Okay. Now, in September of 1982—as a matter of fact, the 17th, to be exact—you sent your opinion based on the standing issue to Judge Gordon. With that opinion, you did not attach any explanation for your application of the standing reasoning; is that accurate?

Judge Bork. That is accurate. I did not——

Senator DeConcini. I am going to let you answer the whole thing, so you do not have to jump—I just want to lay the case, and then I will be glad to let you have as much time as you want.

Then, a week later, on September 24, 1982, you sent an explanation letter to Judge Gordon that you had been notified of Judge Gordon's concern prior to sending the apologetic letter to Judge Gordon.

Had you been notified of Judge Gordon's concerns before you sent that?

Judge Bork. I do not recall.

Senator DeConcini. You do not recall. That is fair enough.

Judge Bork. I do not think I even heard from Judge Gordon until his last letter, sending me his last draft. That is my recollection.

Senator DeConcini. Okay. Then, next, on October 1, 1982, you forwarded a copy of your letter to Judge Gordon to Judge Robb. Now, is there any reason you let a week go by, or do you recall? I realize that is 7 years or 5 years ago.

Judge Bork. I have no idea. I do not recall.

Senator DeConcini. That is fair enough. After receiving a copy of your September 17 letter to Judge Gordon, Judge Robb responded by saying he was "surprised" to have your proposed opinion based on standing, and that he could not agree with the reasoning.

In this same letter, Judge Robb suggested that Judge Gordon prepare an opinion based on something other than standing, as originally agreed in the conference back in March of 1982.

Then further, on October 8, 1982, you sent a letter to both Judge Robb and Judge Gordon, and in that letter you characterized your failure to notify Judge Gordon of your decision to write the opinion, based on a different reasoning than originally agreed to, as follows: "Inexcusable. I neglected to write to Judge Gordon about my change of opinion." End of quote. That was in your letter.

Now, it concerns me—the doctrines, we could talk about, but that really is not necessary—there seems to be some question as to what took place during the period after you agreed to draft the opinion and the actual drafting. That is not so much the change of heart that I have a question with—I think judges are entitled to change their minds and to try to convince their colleagues on a panel to change their minds—but rather, the way in which you communicated this change particularly to Judge Gordon.

In your letter of October 8, 1982, you wrote that although you had spoken to Judge Robb concerning your change in approach, Judge Robb did not remember speaking to you; did not doubt that it took place, but was certain that he did not understand what you say that you had proposed.

Now, is that correct, and can you tell me more about really what took place so I can have a clear understanding?

Judge Bork. Yes. And I will be glad, if you wish, to prepare a written submission on this, because this idea that I would try to get an opinion through first a panel and its clerks, and then a full Court and its clerks—because we have a rule that an opinion, after the panel approves it, has to lie there for 7 days—and if I did manage to get an opinion through the panel and the clerks and then the full Court and the clerks, that they would not *en banc* me as soon as they found out, makes the whole thing——

Senator Leahy. That they would not—I am sorry?

Judge Bork. They would not *en banc* me—to get rid of this opinion. The whole strategy is actually a preposterous suggestion. And what happened is this—and people remember this—what I said in the letter of——

Senator Simpson. Could you put that microphone down a little bit?

Judge Bork. I am sorry. Okay.

I said in my September 24 letter to Judge Gordon what the fact was; that as I started on the opinion, I thought it was harder to get the case out under either the political question doctrine or the speech or debate clause. And the Supreme Court's opinion in *Valley Forge* made it easy to dispose of it on standing grounds.

And in addition to that, we had coming up for *en banc* rehearing in our court a challenge to the Senate and the House of Representatives' paying of chaplains. The case demanded that you not pay chaplains any salary on the grounds it violated the establishment clause. And in the middle of that case was going to be the political question doctrine and perhaps the speech and debate clause. And I did not want to publish a panel opinion taking a hard position on that, and then the *en banc* thing comes along and maybe wipes out the rationale I use in this case.

So my clerk and I—Paul Larkin, his name is—discussed this, and I said to him, and he remembers this, that I was going to go up and talk to Judge Robb about using standing instead. And I did go up, and we had a long talk. And I am told by Judge McKinnon on our Court that Judge Robb's secretary at the time remembers me going up to talk to him about this.

I did talk to him about it, and he agreed with me.

Senator DECONCINI. He agreed—excuse me—he agreed that you should change the opinion and do it on standing?

Judge BORK. The standing, yes. I said to him, you know, this Court had a position in *Goldwater* v. *Carter* which was vacated by the—I was not on the Court then—which was vacated by the Supreme Court because it did things on other grounds. But this Court wrote an opinion on standing in *Goldwater* v. *Carter,* I think which had a majority of the Court, and I said why don't I use that rationale, because it will go by this Court; they will buy it.

And he said all right, and then we had a long talk in his office about his father being on the Court, and some of the mementos he had from that.

I went back and told Paul Larkin that Judge Robb had agreed and we would do it this way. And Judge Gordon was down in Kentucky—I should have written him instantly—but I did not think there was going to be a flap about it. I mean, it just seemed to me to be a noncontroversial——

Senator DECONCINI. Excuse me. You did not write him why—you just forgot?

Judge BORK. Yes, I just forgot, and it did not occur to me. I did not think it was going to be a big deal. And I was new on the Court. I should have just automatically sent everybody something; I did not.

Senator DECONCINI. Did you make any notes of your discussion with Judge Robb?

Judge BORK. I did not. All I can tell you is that people remember me going up there to talk to him and coming back and saying it is okay.

Then I sent the opinion out, and then I forget whether—maybe one of Judge Gordon's clerks said to my clerk something about it, and maybe I wrote Gordon for that reason; I do not know. But in any event, we went ahead, and I wind up writing a concurring opinion—yes—with them, saying it is a standing case. And they were saying, well, it is really an equitable discretion case.

Now, this equitable discretion concept is one of considerable difficulty. It exists nowhere but in our circuit. What it says is if we find that there is standing, then——

Senator DECONCINI. I do not need to know the case. My concern is the procedure which you are going through, really. I do not need to go into cases. I guess the question—and you answered it fair enough, that you forgot to advise the third panel member of what you remembered was the change of heart or change of decision on the part of Judge Robb.

Judge BORK. Well, more than that. The third panel member never complained to me about this until the other day. He did not complain to me then; he wrote a letter—never a word that anything had been funny about this.

Senator DeConcini. Well, when you sent the opinion to him, he complained, Judge Gordon, did he not?

Judge Bork. Not to me. I do not think I have ever heard from him. No, I have no——

Senator DeConcini. He did not accept the opinion. He got hold of Judge Robb. You did not know that he got hold of Judge Robb?

Judge Bork. No, I did not, I did not.

Anyway—I am not sure about that, even, because I do not think I heard from Judge Robb until after I sent Judge Robb the copy of my letter to Judge Gordon. Well, anyway, this is what I got back from Judge Gordon, with his final draft. He discusses what he has done to the draft, and so forth and so on, and he would appreciate it if he could have my law clerk ring up to work on circulating the opinion and so forth, process the opinion.

And the last paragraph of this letter of December 17th says, "May I take this opportunity of expressing to you my pleasure in sitting with you last March, and the making of your acquaintance, and I wish you and yours a happy and joyous Yuletide season."

That was the only sentiment he expressed to me from then until now.

Senator DeConcini. That is Gordon, that is Gordon.

Judge Bork. Yes.

Senator DeConcini. Now, isn't it true that on October 5th, 1982, Judge Robb wrote you and Judge Gordon a memorandum, and in it he said, "Now, I am surprised to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the results, I regret that I cannot concur in the opinion. I would apply the Riegle theory to this case. The *Valley Forge* case relies on it, and the proposed opinion was not a case of the congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the Riegle theory in a congressional plaintiff context."

Doesn't this refute what you said, that Judge Robb had agreed with you?

Judge Bork. No, it does not at all, Senator, because——

Senator DeConcini. Why not?

Judge Bork. Well, he did not remember it. And he did not even deny that we had met and talked. And other people do remember.

Senator DeConcini. Are you familiar with this memorandum?

Judge Bork. Yes, I think so.

Senator DeConcini. Okay.

Judge Bork. But I called Judge Robb when I got this thing and said, "What are you doing? I do not mind you changing your position," because I thought he had changed his position from standing to the other thing. "What are you doing?" We talked about this. And he said, "If you say we talked about it, I will accept that, but I do not remember it." And that is where it stood.

Senator DeConcini. Okay.

Judge Bork. But that I did talk about it is quite clear from people who are still around, who remember it.

Senator DeConcini. Judge, let me go to one other quick thing here—I think it will be quick—and that is, you have not been called on as a judge to issue decisions on the first amendment establishment of religion or the free exercise clause; and I understand you have not written a lot about it, although there is a very controversial speech that supposedly you made to the Brookings Institute on September 12, 1985, when you discussed the Supreme Court decision in the area.

Are you familiar with the speech?

Judge BORK. Oh, yes.

Senator DECONCINI. Good. You said in part of that speech, "A relaxation of current, rigidly secularist doctrine would, in the first place, permit some sensible thing to be done," end of quote. And after discussing one particular case, the *Aguilar* case, you go on to say, quote, "I suspect that the greatest perceived change would be in the re-introduction of some religion into public schools and some greater religious symbols in our public life."

You label this as a political speech, and I will take it as such, and not as a mandate of a judge discussing a case.

After the Brookings speech, there was the incident where Reverend Kenneth Dean, the pastor of the First Baptist Church of Rochester, NY, asked you a question. Reverend Dean, who will be a witness here next week, says that he told you about an embarrassment and conflicting experience by an eighth-grade boy who was instructed by his Jewish parents not to read the Bible or lead prayer in classroom devotions dominated by Christians.

And Reverend Dean says in a news article there, that you responded, "Well, I suppose he got over it, didn't he?"

In view of that remark, first of all, is that your remark, and secondly, with the constraints of not commending on how you would decide religious cases, the establishment cases and establishment clause, can you give us some idea of what do you believe the Founding Fathers intended under this clause?

Judge BORK. Well, I want to go back a moment, Senator. I have not had much experience with this, and in that speech, I said things no more than most people are saying—I mean, scholars in the field, and so forth.

And you referred to it as a political speech. It was not a political speech. It was——

Senator DECONCINI. Excuse me. It was not in the sense, I do not believe, a speech in the sense that you were giving it as a judge. That is why I said political. I meant it was a non-official judge's conference of any nature——

Judge BORK. No. It was religious leaders. They had religious leaders. And Mr. Warren Cikins, who was the head of the seminar program——

Senator DECONCINI. I was only trying to make the distinction that you were not standing there as a judge, giving a speech; you were standing there as an individual, which you had the right to do—maybe I am incorrect, but that is how I read the context of the speech in the Times Union.

Judge BORK. Well, I discussed this thing, but I am not—in the first place, I do not know that much about the framers' intentions in the area of the establishment clause, and——

Senator DECONCINI. Well, first, do you remember the exchange with Reverend Kenneth Dean?

Judge BORK. No, I do not, and I am certain that I did not say a thing like that about "a Jewish boy will get over it." There has been some discussion of my relationship——

Senator DECONCINI. If Reverend Dean said that you did say that, your answer to that next week is going to be that he is mistaken?

Judge BORK. I certainly am. I do not know what I said, but if I said anything—it must have been in front of a group. And I earlier introduced into the record, Senator, letters—somebody also said that I endorsed school prayer. I do not know what was going on that night, but I did not endorse school prayer.

I never taught those cases; I never really thought about the problem, and I certainly did not wait until I became a judge and go over and talk to an audience about endorsing school prayer.

But I have here two letters that were introduced—I will not read them all through, but I have here two letters. One is from Mr. Warren Cikins, who was the head of the seminar program and who kept notes throughout the evening—and he still has his notes—and Mr. Cikins, I should note for this purpose, describes himself as a devout Jew—and he says he finds no reference to any specific Supreme Court decision, but only an expression of broad concepts and principles.

"I find no opinion expressed by the Judge on the issue of school prayer," and so forth. And these letters are in the record, so I will not read them all to you.

Senator DECONCINI. I am sure that, without objection, they will be put in the record.

Judge BORK. And then there is a letter from Rabbi Joshua Haberman, who was there, from the Washington Hebrew Congregation. This one was printed in the Washington Post. Rabbi Haberman was sitting right in front of me as I spoke from the podium, and he said if he had nothing but the Post's account of the evening's discussion, "I would draw entirely wrong conclusions about Judge Bork's views on Church and State issues. Your reporter was not present at the meeting. I was. As a rabbi, with a strong commitment to the separation of Church and State, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort."

Senator DECONCINI. Fine. Without objection, that letter will appear in the record.

Judge BORK. All right. But I wish you would go on, Senator, and read—because I like—it is so laudatory. I like the rest of it.

Senator DECONCINI. Let me ask you about the establishment clause, Judge. I know you have not taken up cases on it. What kind of activities by the Government were meant to be prohibited, in your judgment, by the framers?

Judge BORK. Oh, I think anything—my judgment—I have to be very careful about this, because I have not got a worked-out position.

Senator DECONCINI. You what?

Judge BORK. I have not got a worked-out position. I never taught those cases when I was a constitutional law professor; I never wrote about them. I have read a couple of books since then, but I have not got a worked-out position.

Senator DeConcini. Well, but it is hard for me to imagine, Judge Bork, with your intellectual capacity and the experience that you have had, that you have not thought about this clause and the first amendment, having done all you have done. But if that is your answer, that is your answer.

Judge Bork. Well, let me say this. I think it is clearly important that religion and government be kept out of each other, for the good of both religion and government.

Now, that gets you into very difficult cases about whether a city can put a trailer outside a parochial school and have the children come out for remedial reading, and so forth. That is the kind of—that is where we are operating, on the margin. I mean, there is no——

Senator DeConcini. Would you apply a strict standard, or a reasonable standard, or what would you apply there—or have you thought about it?

Judge Bork. No, I do not think it is a strict standard or a reasonable standard. I think the question is, given what we know of the ratifiers' intent, and given the way the precedent has developed, you have to make adjustments at the margin in every case.

Senator DeConcini. Okay. Judge Bork, I only say this to you because I think you have devoted a lot of time to this, and it is very important to you, as it is to me. I cannot think of a more important decision that Congress makes than confirmation of all judges, but certainly, the Supreme Court judges. And I welcome any written responses you want after you look at this record, because the equal protection clause bothers me a great deal. We have gone over it and over it, and I am not going to go over it again.

The right of privacy concerns me. You have responded in some areas, particularly the *Dronenberg* case yesterday. I was very concerned about those 10 pages of what I consider philosophizing. I accept your answer to that, that they were taken up, all of those points. I have not read that, but I have no reason to dispute you.

Your explanation of the firing or discharge of Archibald Cox, although I do not agree with that, I have no reason to dispute what you said there.

But I am greatly concerned, as has been expressed by a number of people on this panel, this committee, and the people that I talked to, about your inability to find a right of privacy as it relates to the *Connecticut* case that we have gone over and over here, either in the ninth amendment or something. And with the outstanding intellectual capacity that you have and experience, I find that very difficult, but I accept that that is your position—and also on the equal protection clause.

I say that to you because it is up to you whether or not you want to rehash this in writing for me. That is not an assignment, by any means, and I do not want to leave it with you that that is going to make the difference. But I am very concerned about it, and I mean that sincerely. I feel some emotion tied to it. I have two daughters; one is a doctor, and one is going to be a lawyer. And if they were truck drivers in heavy equipment, I would feel the same way.

I want to be satisfied not only for my daughters, but for all women, that they would have really equal opportunity before the eyes of the nominee. And you have not convinced me of that, although you have gone over it a great deal, and if there is anything you want to add to the record, I will be more than happy to consider it.

I do not make these judgments on one, single issue. I have said that many times. I would not vote against you or would not vote for you because you happen to come down on a side that I like, or disagree with my own value system. This disturbs me, the equal protection, and——

Judge BORK. May I ask, Senator, why it is you think there is any—I mean, I have a mother and a wife and a daughter, too—and why it is you think that I might not protect women under the equal protection clause?

Senator DECONCINI. Well, I find it very difficult, coming from where you have come from, your very strong views as to the 14th amendment early on; your acceptance a few days ago, the first time that I found that you do apply it to women—that is very positive. I do not say that critically. Although some will hold you suspect for that, I say, hey, that is positive. Here is a jurist and an academic, a professor, who is willing to move and expand; that is good.

Then we get into this argument of the standards that you apply, and the fact that you—and you cite Justice Stevens—have come up with something new. That concerns me, because this is such a fundamental belief that I have in the equal protection clause as it applies to women.

I am worried about you have a standard out here of reasonableness where all the other judges, including Rehnquist in a couple of his dissents, used the rational basis, or the intermediate basis, or on race cases, the strict basis.

Judge BORK. It comes out the same way, but I think it makes more sense then explaining why the amendment applies to all people. But on this, you know, I have been teaching those cases in which they applied the equal protection clause to women before, and I have never criticized them, never complained about them. The only trouble with them is they applied the lowest level of scrutiny they could find, so that they had these ridiculously discriminatory statutes, which I criticized in class.

There was the case when they say a woman can't be licensed as a bartender unless her husband owns the place. They applied the equal protection clause, but they upheld the distinction. Now, I never complained about applying the clause. All I ever complained about was upholding the distinction.

Senator DECONCINI. Fine. I just had to share that with you as we proceed with these hearings and deliberate, and I thank you, Judge Bork, for your willingness to rehash some of these things for some of us who haven't been to law school in a long time.

Thank you, Mr. Chairman.

The CHAIRMAN. We will recess, Judge, for 5 minutes and, with you and I and the ranking member, we will work out the remainder of this schedule to, hopefully, everyone's satisfaction.

We will recess for 5 minutes.

[Recess.]

The CHAIRMAN. Judge, you and I and the ranking member and others have conferred outside, and I am about to announce something that is going to get me in more trouble with the news media than I have already gotten into this week, and that is that we will be in tomorrow, but here is the game plan.

Tonight we will go forward with the Senator from New Hampshire, who has 10 minutes; the Senator from Vermont, who has 30 minutes; and the Senator from Wyoming, with 3 minutes. We will then adjourn for the evening.

Although you and I said we would come in at 10, I would prefer at 10:30, if you don't mind, so the train will get me down here on time. That's okay?

Judge **Bork**. All right, Mr. Chairman.

The **Chairman**. We will come in at 10:30 tomorrow. Upon coming in tomorrow, we will then go to the Senator from Alabama, who has 30 minutes; then we will go to the Senator from Pennsylvania, who has 1 hour and 30 minutes; then we will go to the Chairman, who will have a half hour at his discretion to yield to anyone he wishes to yield it to or use it himself. The questioning will then end.

Senator **Thurmond**. What about our side? You said, the "Chairman."

The **Chairman**. I still think of you as the Chairman, Mr. Chairman. I apologize. You are always my Chairman. I mean to say the ranking member. Thirty minutes will be yielded to—will be in the control of the ranking member, Senator Thurmond, to assign any way he wishes.

At the end of Senator Thurmond's 30 minutes, the questioning, to your great relief, will be over, at which time you will have as much time as you want, but I understand you want about 5 minutes or thereabouts, but do not feel constrained by that, whatever amount of time you want to make a statement, which I understand you would like to make.

Then the Senator from South Carolina wishes to have 3 minutes to make a statement. And although I don't plan on using it, I would like to reserve up to 10 minutes. No more than 10 minutes.

At the conclusion of my two, three—maybe not——

Senator **Kennedy**. Ten minutes.

The **Chairman**. The Senator from Massachusetts would like 10 minutes tomorrow. To question or to——

Senator **Kennedy**. To question.

The **Chairman**. So prior to us going to the half hour, finishing off with the Senator from South Carolina, we will have 10 minutes, the Senator from Massachusetts; we will go to a half hour, the Senator from South Carolina. Questioning will end. Five or more or whatever you want for your statement. Three minutes for the statement from the ranking member, and up to—I don't plan on using it—but up to 10 minutes for me. That will end your presence here before the committee, and we will begin with the public witnesses on Monday.

Senator **Thurmond**. Not subject to recall by unanimous consent.

The **Chairman**. Well, it is hard to get a unanimous consent agreement since others are not here, and I have no intention of recalling you. But I am not going to seek a unanimous consent request for that at this point. I assure you I have no desire whatsoever, much I have learned to enjoy your company, to ask you to come back barring something extraordinary that would happen in the public witness list.

So I think I can—as a matter of fact, I am going to be so bold as to suggest I will speak for the Democrats on that. The ranking member speaks for the Republican. That is the deal, and if you can hang on for what will amount to another 43 minutes tonight, we will finish for tonight—30 plus 10 plus 3.

So I now yield to the Senator from New Hampshire for his 10 minutes tonight.

Senator HUMPHREY. Thank you, Mr. Chairman. I doubt I will need even that much time.

First, the Senator from Arizona raised some questions about the significance of whether or not some of the D.C. Circuit Court cases reaching the Supreme Court on appeal were authored by others than Judge Bork. I am not going to go into that further because, frankly, I think it is not a substantial point.

But I would like to put into the record 8 or 10 pages, Mr. Chairman.

The CHAIRMAN. Sorry. I beg your pardon. Without objection.

Senator HUMPHREY. Thank you.

[Material follows:]

RE: Statistics Concerning Judge Bork's Record on Appeal In Cases Where He Wrote or Joined the Majority Opinion

This memorandum reflects a study of the 396 cases in which Judge Bork either wrote the majority opinion for the D.C. Circuit or joined the majority. The study looks only at Judge Bork's record with the Supreme Court. The charts provided below summarize the results of the study: references to the relevant cases are provided in the appendices attached hereto.

A. Cases in Which Judge Bork Authored the Majority Opinion

Total Cases	117
Cases with no Supreme Court activity	105
Cases in which certiorari was denied	10
Cases in which certiorari was dismissed	1
Certiorari granted, awaiting review	1
Cases in which the Supreme Court reversed	0

B. Cases in Which Judge Bork Joined the Majority

Total Cases	279
Cases With no Supreme Court activity	251
Cases in which certiorari was denied	24
Certiorari granted, awaiting review	2
Cases in which the Supreme Court affirmed	2

C. Cases in Which Judge Bork Either Wrote or Joined the Majority

Total cases	396
Cases with no Supreme Court activity	356
Cases in which certiorari was denied or dismissed	35
Certiorari granted, awaiting review	3
Cases in which the Supreme Court affirmed	2
Cases in which the Supreme Court reversed	0

APPENDIX A: APPEAL RECORD IN CASES WHERE BORK AUTHORED THE MAJORITY OPINION

A. Cases in Which Certiorari Was Denied

1. Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3821 (U.S. 1987).

2. Three Way Corp. v. I.C.C., 792 F.2d 232 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 573 (1986).

3. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 880 (1986).

4. San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n, 789 F.2d 26 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 330 (1986).

5. Neumann v. Reinforced Earth Co., 786 F.2d 424 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 181 (D.C. Cir. 1986).

6. Norfolk & Western Railway Co. v. United States, 768 F.2d 373 (D.C. Cir. 1985), cert. denied sub. nom Aluminum Association v. Norfolk & Western Railway Co., 107 S. Ct. 270 (1986).

7. Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984), cert. denied, 469 U.S. 881 (1984).

8. United States v. Garrett, 720 F.2d 705 (D.C. Cir. 1983), cert. denied, Garrett v. United States, 465 U.S. 1037 (1984).

9. Black Citizens for a Fair Media v. F.C.C., 719 F.2d 407 (D.C. Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

10. Loveday v. F.C.C., 707 F.2d 1443 (D.C. Cir. 1983), cert. denied, 464 U.S. 1008 (1983).

B. Cases in Which Certiorari Was Dismissed

1. City of New York Municipal Broadcasting System v. F.C.C., 744 F.2d 827 (D.C. Cir. 1984), cert. dismissed, 470 U.S. 1084 (1985).

C. Certiorari Granted, Awaiting Review

1. Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), cert. granted sub. nom Boos v. Barry, 107 S. Ct. 1282 (1987).

APPENDIX B: APPEAL RECORD IN CASES WHERE JUDGE BORK JOINED THE MAJORITY OPINION

A. Cases in Which Certiorari Was Denied

1. Keener v. WMATA, 800 F.2d. 1173 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 1275 (1987).

2. Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied 107 S. Ct. 1347 (1987).

3. Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), cert. denied, 106 S.Ct. 3335 (1986).

4. White v. Office of Personnel Management, 787 F.2d 660 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 276 (1986).

5. United States v. Vortis, 785 F.2d 327 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 148 (1986).

6. City of Charlottesville v. F.E.R.C., 774 F.2d 1205 (D.C.Cir. 1985), cert. denied, 106 S. Ct. 1515 (1986).

7. Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 3272 (1986).

8. Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub. nom National Association of Broadcasters v. Quincy Cable TV, Inc., 106 S. Ct. 2889 (1986).

9. American Postal Workers v. U.S. Postal Service, 764 F.2d 858 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 792 (1986).

10. United States v. Treadwell, 760 F.2d 327 (D.C. Cir. 1985), cert. denied, Treadwell v. United States, 106 S. Ct. 814 (1985).

11. N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educ. Fund, 753 F.2d 131 (D.C. Cir. 1985), cert. denied, 472 U.S. 1021 (1985).

12. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985).

13. Carstens v. N.R.C., 742 F.2d 1546 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136 (1985).

14. Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 569 (1985).

15. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

16. United States v. Glover, 725 F.2d 120 (D.C. Cir. 1984), cert. denied, Glover v. United States, 466 U.S. 905 (1984).

17. Sea-Land Service, Inc. v. Dole, 723 F.2d 975 (D.C. Cir. 1983), cert. denied, 469 U.S. 824 (1984).

18. Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1983), cert. denied, 467 U.S. 1210 (1984).

19. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

20. United States v. Weisz, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, Weisz v. United States, 465 U.S. 1027 (1984).

21. Munsey v. Federal Mine Safety and Health Review Comm'n, 701 F.2d 976 (D.C. Cir. 1983), cert. denied sub. nom Smitty Baker Coal Co. v. Federal Mine Safety and Health Review Comm'n, 464 U.S. 851 (1983).

22. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983), cert. denied, 464 U.S. 823 (1983).

23. Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

24. Connecticut v. Schweicker, 684 F.2d 979 (D.C. Cir. 1982), cert. denied, Schweicker v. Connecticut, 459 U.S. 1207 (1983).

B. Certiorari Granted, Awaiting Review

1. Church of Scientology v. I.R.S., 792 F.2d 153 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 947 (1986).

2. Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903 (D.C. Cir. 1986), cert. granted sub. nom K Mart Corp. v. Cartier, Inc., 107 S. Ct. 612 (1986).

C. Cases in Which the Supreme Court Affirmed

1. Consumers Union of the United States, Inc. v. F.T.C., 691 F.2d 575 (1982), aff'd sub. nom Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

2. National Ass'n of Retired Federal Employees v. Horner, 633 F. Supp. 511 (D.D.C. 1986) (three-judge court), aff'd, 107 S. Ct. 261 (1986).

RE: Statistics Concerning Subsequent History With Respect to Judge Bork's Dissenting Opinions

There are 20 total dissents by Judge Bork, not counting dissents in motions for rehearing en banc. This memorandum describes what, if anything, happened in those cases on appeal.

The results of this study are astounding: the Supreme Court never disagreed with any of Judge Bork's dissenting opinions, just as it has never disagreed with any of his majority opinions.

A. No subsequent history: 10 cases (%50 of total)

1. Catrett v. Johns-Manville Sales Corp., Slip op. (D.C. Cir. Aug. 7, 1987).

2. United States v. Paddock, Slip. op. (D.C. Cir. Aug. 7, 1987).

3. Restaurant Corp. of America v. N.L.R.B., Slip. op. (D.C. Cir. Aug. 25, 1987) (Bork concurring in part and dissenting in part).

4. Wolfe v. Department of Health and Human Services, 815 F.2d 1527 (D.C. Cir. 1987).

5. Greenberg v. F.D.A., 803 F.2d 1212 (D.C. Cir. 1986).

6. Robbins v. Regan, 780 F.2d 37 (D.C. Cir. 1985) (Bork concurring in part and dissenting in part).

7. Weisberg v. Department of Justice, 763 F.2d 1436 (D.C. Cir. 1985).

8. Franz v. United States, 712 F.2d 1428 (D.C. Cir. 1983) (Bork concurring in part and dissenting in part).

9. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (D.C. Cir. 1983) (Bork concurring in part and dissenting in part).

10. McGhee v. C.I.A., 697 F.2d 1095 (D.C. Cir. 1983) (Bork concurring in part and dissenting in part).

B. Cert. Denied: 2 cases (%10 of total)

1. Prill v. N.L.R.B., 755 F.2d 941 (D.C. Cir. 1985), cert. denied Meyers Industries, Inc. v. Prill, 106 S. Ct. 313 (1985) and Meyers Industries, Inc. v. Prill, 106 S. Ct. 352 (1985).

2. Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), cert. denied, District of Columbia v. Brown, 471 U.S. 1073 (1985).

C. Cert. Granted: 1 case (%5 of total)

1. Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 666 (1986).

D. *Reversed*: 2 cases (%10 of total)

1. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985), *rev'd*, *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986).

2. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (en banc), *rev'd*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

E. *Vacated*: 2 cases (%10 of total)

1. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot*, *Burke v. Barnes*, 107 S. Ct. 734 (1987).

2. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1498 (D.C. Cir. 1983) (en banc), *vacated*, *Weinberger v. Ramirez de Arellano*, 431 U.S. 1113 (1985).

F. *Affirmed in Part, Reversed in Part*: 1 case (%5 of total)

1. *Sims v. C.I.A.*, 709 F.2d 95 (D.C. Cir. 1983) (Bork concurring in part and dissenting in part), *aff'd in part and rev'd in part*, *C.I.A. v. Sims*, 471 U.S. 159 (1985) (agreeing with Bork's view below).

G. *Rehearing En Banc Granted*: 1 case (%5 of total)

1. *Mississippi Industries v. F.E.R.C.*, 809 F.2d 1525 (D.C. Cir. 1987) (Bork concurring in part and dissenting in part), *rehearing en banc granted*, 814 F.2d 773 (1987).

H. *Rehearing En Banc Granted, then Denied*: 1 case (%5 of total)

1. *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), *rehearing in banc denied*, Slip op. (D.C. Cir. July 31, 1987).

Senator **Humphrey**. Mr. Chairman, at this hour as is usual there is a certain mellowness and camaraderie in the air, but that hasn't been the case at other times in this day or in other days, and there are certain things that have transpired that I want to address as my last part in this hearing today.

The Senator from Massachusetts in his summation noted that the record speaks for itself, and indeed it does. It is unfortunate, however, that some are so deaf they cannot hear the record speak. It is unfortunate that some are so deaf they cannot hear what the record of Robert Bork the Solicitor General and Robert Bork the Judge says.

And when that record speaks and is heard, if anyone is listening, it says unequivocally that Robert Bork is a temperate, reasonable man. A man it turns out who has decided as a judge in favor of minority persons and women in 88 percent of the civil rights cases which have come before him. The record says that Robert Bork is a man of fairness and decency, of intellect and intellectual honesty. It is unfortunate that some refuse to listen to the record, refuse to listen to the most relevant of all possible testimony about what kind of judge, what kind of a Justice Robert Bork would make; namely, his exemplary and impeccable record as a judge on our nation's second most important court.

Instead they insist almost exclusively on exhuming his writings as a college professor. Let me say something about those writings. They were available. Those writings, same writings, were available when this committee and the Senate scrutinized Robert Bork 5 years ago for the judge on the DC Circuit Court of Appeals and when this body voted, without dissent, to confirm him. Those writings were available then.

My point is this: If today those writings can be claimed to prove that Robert Bork is an enemy of equality before the law for all citizens, irrespective of race or sex, then the same claim could have been made on the same basis 5 years ago when he was before this committee the last time. But no such claim was raised. That is very peculiar, isn't it? Very odd. Especially in light of the extraordinary parallel between this hearing for Robert Bork and that of Thurgood Marshall in 1967. I saw parallel because, like Robert Bork, Thurgood Marshall had served as both Solicitor General and a circuit court judge.

Now, Mr. Chairman, let me quote our distinguished colleague, the Senator from Massachusetts, from his statement before this committee on that occasion; that is, in the 1967 hearing on Thurgood Marshall. These are the words of the Senator from Massachusetts:

"Mr. Chairman, I would like to add one final thought"—his words in part, of course. "Mr. Chairman, I would like to add one final thought. Judge Marshall has undergone nominations hearings before this committee twice in the last 5 years [just like Robert Bork]. Twice in the last 5½ years and on the first occasion he was nominated to the second circuit and on the second he was nominated to Solicitor General. In both of those hearings this committee heard ample proof of his fitness for high legal office, and his record subsequently has only added to his qualifications. I, therefore, think we can move expeditiously ahead with his confirmation."

I ask unanimous consent, Mr. Chairman, that that passage be placed in the record—in the transcript.

The **Chairman**. Without objection, it will be placed in the record.

[Material follows:]

think you have made one. We cannot. That is why I have got to try to be certain if I can. And if you cannot answer these questions as to your own view, then of course I have to just assume—I accept your statement that you have never been dishonest here. No one thinks of such a thing. I only ask to get your honest viewpoint. That is what I seek, if I can get it. If you tell me you cannot give it or you are not going to give it, very well. But I would ask you another question along the same line.

Do you subscribe to the philosophy that the fifth amendment right to assistance of counsel requires that the counsel be present at a police lineup?

Judge **Marshall**. My answer would have to be the same. That is a part of the *Miranda* case.

Senator **McClellan**. Well, I must say to you—I will not pursue it any further at the moment, but I must say to you that this leaves me without the necessary information I need affirmatively to consent to your appointment. I need it. You have the background, you have the training, and you have the ability. But I do not care who it is that comes before this committee hereafter for the Supreme Court; I am going to try to find out something about their philosophy and not take the chances I have taken in the past. I mean that. This is a fundamental principle and an issue here that I think I have a grave duty to perform.

I have asked these questions in all good faith. I thank you for your attention. I regret I have not been able to get an answer that would disclose to me your viewpoint on these vital issues.

Judge **Marshall**. I am very sorry, Senator.

Senator **McClellan**. That is all, Mr. Chairman.

The **Chairman**. The committee is going to quit at 12 o'clock, because there will be a number of rollcall votes this afternoon.

Senator **Hart**. Mr. Chairman?

The **Chairman**. Yes.

Senator **Hart**. Lest I miss the next meeting, although I do not anticipate I would——

The **Chairman**. We will return in the morning.

Senator **McClellan**. I cannot be here.

Senator **Hart**. I would like to make just a very brief statement for the record, if I may. And this is like entering the verdict before the briefs and records have been read.

But it was my privilege, Mr. Chairman, to report favorably the nomination of Thurgood Marshall for the second circuit court. I think that his service own that court and his experience and performance as Solicitor General make it even more clear that the Senate will do itself honor, the Court will be graced, and the Nation benefited by his confirmation to the Supreme Court. I would regard it as a very happy day that I can report the nomination again.

Judge **Marshall**. Thank you, Senator.

Senator **Kennedy**. Mr. Chairman?

The **Chairman**. Senator Kennedy.

Senator **Kennedy**. I would like to make a brief statement as well.

When this committee meets later to vote on the confirmation of Mr. Thurgood Marshall as a Justice of the U.S. Supreme Court, it will indeed be a most historic occasion. History will be made not so much because we will be recommending the confirmation of the first member of the Supreme Court who is a Negro, but because we will be recommending the confirmation of a man who is uniquely qualified and, one might say, perfectly prepared to become a Supreme Court Justice.

For the first time in history, we have a man who established a national reputation as a leading trial and appellate litigator, a man who established a distinguished record as a Federal appellate judge, and a man who has served as the Government's chief appellate litigator, in the Office of Solicitor General.

Mr. Chairman, I cannot think of any better preparation and qualification for the Supreme Court, and I do not know of any Supreme Court nominee whose record matched Thurgood Marshall's in these respects.

Judge Marshall is before us today because he is an outstanding lawyer, judge, and Solicitor General, not because he is a Negro; but we cannot ignore the fact of his race. His reaching the very highest pinnacle of achievement in his profession is a symbol of the progress we as a nation have achieved in assuring all of our citizens equality of opportunity. Yet, at the same time, his success highlights how far we still have to go.

Just yesterday, for example, in Boston, the NAACP announced its plans to file suit in 11 cities because Negro workers are still being denied access to employment opportunities in construction industries. Certainly one of the most important tasks of the 90th Congress will be to close the gap between these two disparate phenomena.

Mr. Chairman, I would like to add one final thought. Judge Marshall has undergone nomination hearings before this committee twice in the last five and a half years: on the first occasion, he was nominated to the Second Circuit; and on the second, he was nominated Solicitor General. In both of those hearings, this committee heard ample proof of his fitness for high legal office, and his record subsequently has only added to his qualifications. I therefore think we can move expeditiously ahead with his confirmation, and I want to congratulate both Judge Marshall and President Johnson on this fine appointment.

I would also, Mr. Chairman, like to introduce into the record a statement of Senator Dodd in support of the nomination of Mr. Marshall.

The CHAIRMAN. That will be granted.

(The statement of Senator Dodd is as follows:)

STATEMENT SUBMITTED BY SENATOR DODD, OF CONNECTICUT

Mr. Chairman, distinguished fellow colleagues on the Judiciary Committee, I consider Thurgood Marshall to be one of the really great and distinguished American men of this century.

In recent years, our Committee has been privileged to hear nominations to the Supreme Court of some of the country's finest lawyers and legal minds.

Thurgood Marshall's nomination is fully in keeping with this tradition of excellence.

Indeed, Thurgood Marshall is uniquely qualified for this high position.

He has served in public office with great distinction, as an appeals judge and as Solicitor General.

And he has been a towering figure in the landmark cases striking down discriminatory laws and practices, in the litigation and the decisions which lie at the very heart of American life and have brought us closer in our everyday life to those principles for which we stand.

Senator HUMPHREY. And the same thing can be said for Robert Bork. He has been twice before this committee, found fit, and, if anything, his record has only been embellished since the last time he appeared before this committee.

I find it peculiar, indeed, that some who voted for Judge Bork 5 years ago seem to have amnesia today about their vote. But they did it, and as they say, the record speaks for itself. This inconsistency disturbs me because it does violence not only to Judge Bork and his family; it does violence, it does an injustice to our country.

Because, really, it pollutes and it politicizes the confirmation process, a process which relies so heavily on good faith and bipartisanship. Yes, politics. And that is the only possible explanation of the self-evident inconsistency before us. Unless you can believe the amnesia theory, that is, you have got to see it as politics. After all, Judge Bork's writings were available 5 years ago and they haven't changed in the last 5 years. Politicizing the confirmation process is a very sad way, indeed, to celebrate the 200th anniversary of our Constitution.

Judge Bork, good luck to you. Chief Justice Warren Burger indeed was right when he described you as the best nominee for the Supreme Court in the last 50 years. By virtue of your superb qualifications, you deserve confirmation; and I believe that you will be confirmed because I cannot believe that the Senate will abide in politicizing the confirmation process. That process is far too important to sacrifice to short-term political expediency.

I relinquish the balance of my time.

The CHAIRMAN. Thank you.

Judge, I just, after all I have gone through in saying when we would start tomorrow, I didn't realize that I had a—this running for President, you are not home very much; and I promised my son I would be at his football game tomorrow at 10:30. Would you mind if we didn't start till 12:00? That make a difference to you? That is a heck of a thing to say in public.

Judge BORK. No, that wouldn't make a difference, Senator.

The CHAIRMAN. I mean the same time constraints. Or 11:30?

Judge BORK. 11:30 is all right. Twelve o'clock is all right. I was kind of hoping to see the Boston College game.

The CHAIRMAN. What time is that?

Senator LEAHY. Can we get a little side bet on this? [Laughter.]

The CHAIRMAN. I tell you what, we can work out a deal here.

Judge BORK. No, that is all right.

The CHAIRMAN. Seriously, I don't want to——

Judge BORK. I will tape the game.

The CHAIRMAN. Well, then do any of you fellows object to us not starting till 12?

Senator HATCH. I don't know about Senator Thurmond. Oh, here he is.

The CHAIRMAN. Do you mind if we don't start till 12?

Senator THURMOND. That is all right. Yes.

Judge BORK. Can we have the same closing?

The CHAIRMAN. Yes, same everything. Same everything. Twelve o'clock. I may be a half hour late, I will have someone start it. I truly appreciate it, Judge. Thank you.

I will yield now to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. At one time I always liked to make those games. I, one time, came to a soccer game out in McLean. My young son and the young son of now Justice Scalia was playing. It was a cold day and the kids were playing. The two of us were sitting there kind of muttering a bit. He mentioned he had driven a few miles to get there. I told him that I had started out that day in Ankara, Turkey, to get there for that soccer game. The soccer game, fortunately, the team of our sons won.

But it is important to be there, and I mention that only as a prelude. That same son with the rest of our family is—he is finishing high school in Vermont and the family is up there, so I will not be here tomorrow, Judge Bork. I will be in Vermont. I have been down here now for the last 10 days. I also want to get home and see my family. And I hope this does wrap up soon so that you can have the rest of the weekend with yours.

You know, I said at the outset of this hearing about the rather unique character of a confirmation hearing. I said you might find it part trial by ordeal and part like a graduate seminar in constitutional law, and I think my prediction was accurate.

But I also predicted that the Committee's examination of you would be long, and I am sure you are ready to agree to that; that it would be thorough; but I also felt it would be fair and serious, and here again I think I was right. We have heard some statements today and, in fact, early in the hearing to the effect that the hearing had taken on some characteristics of an inquisition. Well, I have to object to that.

I have been here throughout the hearings, not every single minute of it, but most of it. In fact, I think I have been here probably more than anybody else, or as much as any member of this committee, and I haven't seen an inquisition. I have heard some repetitious questions. I have heard a great many leading questions, but I haven't heard any unfair questions.

As far as repetition is concerned, I think that I should say in defense of the committee that we have heard quite a few statements from you, sir, on critical issues in this proceeding that we had not heard before—not in your confirmation hearings or in your prolific writings or speeches or your judicial decisions. And every Senator, of course, has to look at that and judge for himself what weight to give to this new information, to decide whether it was expected or unexpected, but I wanted to mention that fact because I think that goes to why you have had to answer sometimes the same questions more than once. Perhaps each of us see it a little bit differently, each one of us has a particular interest and we would follow up on it.

And so, you know, sometimes the rhetoric about inquisition may inspire the troops, but I don't think people who have followed these hearings closely and attentively would agree with that characterization. They haven't seen an inquisition. They have seen a committee—an historic committee—of the U.S. Senate performing one of its most useful duties under the Constitution.

I think we have done it with seriousness and dignity, but also I might say with a firm and fair hand wielding the gavel. But they have also seen a nominee responding forthrightly and willingly in detail to the inquiries of members of this committee, and I commend you for that. And also I would commend your wife and your sons and your daughter, who sat patiently throughout this, and I know that has been a long time for them and I think that you, sir, should be very proud and appreciative of them, and I am sure you are.

Judge BORK. I am, indeed, Senator.

Senator LEAHY. Now what I would like to do, if I might, is pick up at a place where I left off yesterday, go back again to the area of free speech, to a concept you have expressed frequently in your writings, and that is the idea that the local community should have the right to suppress speech that doesn't meet the legal test of obscenity on the grounds that the speech is harmful to the community's moral standards.

And, in your 1979 University of Michigan speech, you said, on page 15, "The Court tends to assume that there is not a problem if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the squeamish. The assumption is wrong. The consequences of such private indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, taste and moral values inculcated do not stay behind in the theater. A change in moral environment—in social attitudes toward sex, marriage, duties toward children and the like—may as surely be felt as a harm as the possibility of physical violence. The Court has never explained why what the public feels to be a harm may not be counted." And you made similar comments.

Now that quotation uses the word "pornography" and I know you have discussed here the interchanging of it, but, as lawyers, we know that pornography is one thing, obscenity is quite another.

The Supreme Court spoke to that distinction. That was the 1959 case of *Kingsley Corporation* v. *Regents of the University of New York* and I believe that may have a target of some of your speeches. The State of New York had tried to ban a film, to quote from the Court's decision, because "the whole thing of this motion picture is the presentation of adultery as a desirable, acceptable and proper pattern of behavior."

Now, there was no contention the film was obscene. It was not banned under an obscenity statute. The Supreme Court in a nine to nothing decision held the first amendment prevented the State from banning this film "because this picture advocates an idea—that adultery under certain circumstances may be proper behavior," and then went on to say, "the first amendment's basic guarantee is the freedom to advocate ideas."

Now, that was sort of a long lead in, not because I am up here to advocate or promote films advocating adultery but to follow up on an answer you gave to Senator Specter. You told him on Wednesday that you believed that the Supreme Court is the ultimate arbiter of whether a work is obscene and if a local community tried to ban works that were not obscene, the courts should prevent that from happening; is that correct?

Judge BORK. That is basically correct.

Senator LEAHY. And that is consistent with *Kingsley,* but it did not seem consistent, to me, with your University of Michigan speech. Would you agree?

Judge **Bork**. Well, no, Senator. It is inconsistent only in the sense that I used the word "pornography." But as I have told you, I have been using that interchangeably with "obscenity." I agree with you that I should not have done that. It is not as precise as it should be. But I was talking about pornography which amounts to obscenity in this speech.

Senator **Leahy**. Let me go to another one. A very similar question is raised by your repeated criticism of the Supreme Court case *Cohen* v. *California.* That is one of those—I think we referred to it as a Chaucerian language, modern adaptation.

Judge **Bork**. Yes. An Anglo Saxon term.

Senator **Leahy**. As an Anglo Saxon term and perhaps recognized more universally than you might like. You have written about this case a number of times. In fact, you eloquently, I thought, you did in a speech to the Justice and Society seminar in Aspen, [illegible] You said that, I guess, the defendant in this case had worn on the back of his jacket a slogan, and I will quote you, that "suggested that the reader perform a most implausible physical act with the draft law," close quote.

And in fact, having done that, he was convicted of disorderly conduct. The Supreme Court in that opinion by Justice Harlan struck down the conviction. Justice Harlan said the first amendment prevents government from distinguishing among words that people might find offensive, prohibiting some, permitting others.

You sharply criticized that decision. The decision had asked how is one to distinguish this from any other offensive words, or how can the government constitutionally pick and chose among words without infringing free speech. And as I understand your Aspen speech and several others, you said they can pick and choose by the common sense of the community. And here, again, you believe the community ideas of morality should prevail over a first amendment protection of free speech.

In fact, on page 18 of your Michigan speech when you discuss the *Cohen* case, you said, "Far from protecting such speech, it"—the first amendment—"offers additional reason for its suppression."

Again, a lengthy lead-in judge, only because I am wondering if this is inconsistent with what you told Senator Specter about the role of the Federal courts to protect non-obscene free speech regardless of the views of even the majority of the local community which might find the speech offensive.

Judge **Bork**. No; I stated, and I still state, that in order to protect the first amendment guarantees of free speech, the Court has to define what obscenity is and it may not allow a community to override that. I object to *Cohen* v. *California.* I have here my Francis Boyer lecture on this matter, and what I said was—and I disagreed with Justice Harlan on two grounds.

He said: "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?"

I then said: "One might as well say that the negligence standard of tort is inherently boundless, for how is one to distinguish the reckless driver from the safe one? The answer in both cases is by the common sense of the community. Now, the common sense of the community, I take it, is shared by the Supreme Court—whether this is obscenity or not. Almost all judgments in law are ones of degree and the law—not the community—the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms."

Then I went on to complain about Justice Harlan's second rationale where he said—these are my words—apparently thinking the observation decisive, he said, and I quote him: "One man's vulgarity is another's lyric."

And then I said, on that ground it is difficult to see how law on any subject can be permitted to exist because he said——

Senator **Leahy**. How law on?

Judge **Bork**. On any subject can exist, because he is saying that if somebody regards it as good, how can the rest of us say it is not. Well, we can say that about obscenity, I think. We can say that about theft. We can say it about all kinds of things and the fact that somebody thinks it is all right does not mean you cannot have law about it.

Senator **Leahy**. But the courts have ruled on the question of obscenity and I read your analogy about the reckless driver. But can you really use that analogy, because in speech we are talking about a First Amendment right. We are not talking about a constitutional right in tort law. Not in that sense.

Judge **Bork**. No.

Senator **Leahy**. We are not talking about a constitutional right to drive recklessly.

Judge **Bork**. No, we are not.

Senator **Leahy**. But do we have a constitutional right to speak recklessly?

Judge **Bork**. We have a constitutional right to speak recklessly, but the Supreme Court has recognized that obscenity violates that. I mean, obscenity is not protected. I think in this case the Supreme Court allowed obscenity on two grounds that I think were inadequate.

Now, interestingly enough Senator, later, in the *Pacifica* case the Court said the Federal Communications Commission could take away a station's license—I think that was what they did to them, or at least suspend them or something of that sort—when a comedian was allowed to say a string of obscenities over the air. And I think one of the obscenities was the same one involved in the *Cohen* v. *California* case.

Senator **Leahy**. Are those not, though, talking in the—under the FCC law we are also talking about public airwaves, publicly owned?

Judge **Bork**. As a matter of fact, I think the man arrested in *Cohen* v. *California* was walking into a public building, namely a courthouse, with this obscenity on his jacket.

Senator **Leahy**. You understand, my question, though, is if we say that the common sense of the community is going to pick out what words can be used or not, again, are we not saying then the community's ideas of morality are going to prevail over our first amendment protection for free speech? If I could just pull it a bit further in going back to your negligent driver, there we let a jury, for example, determine whether there is negligence or not. There are certain obscenity things where we make the ruling as a matter of law by the Court.

Judge Bork. Well, even in the negligent driver case, Senator, if a jury found that there had been negligent driving when the judge knew very well that there had not and that there was no basis for the verdict, he would set it aside. But in this case there is nothing in my writing to suggest that any community can override the guarantees of the first amendment. No community can override any guarantee anywhere in the Constitution, and no community can override the powers given to Congress in the Constitution.

That is not the way the Constitution operates and I have never said otherwise. And here I said the law does not flinch from such judgments. The question of whether this is an obscene word is, in the first instance, for the community. It must decide whether its obscenity law applies to this word. Then the Court must decide whether it is obscene within the meaning of the first amendment case law. And if it is not obscene within the meaning of the first amendment case law, then the speech is protected.

I have no problem with that. I have never said anything to the contrary.

Senator Leahy. Well, Judge, you have answered my questions a great deal, now over an hour's worth on first amendment free speech questions. Senator Specter has followed up a number of those, you have answered him, and then I have followed up on what Senator Specter said.

So you have had a lot of chances to think about the subject during this week. Do you still feel as critical about the *Cohen* case today as you did when you spoke at Aspen in 1985?

Judge Bork. Well, when was this? Because I may have said it more recently even. But I feel that the reasons given by Justice Harlan, that is, how can anyone tell what is obscene and what is not—which the law assumes it can in a case like *Pacifica* and elsewhere—I feel that reason is not adequate and I feel that statement that one man's vulgarity is another's lyric is not adequate to protect an obscenity.

I feel about that precisely the same way as I did when I gave the Boyer lecture.

Senator Leahy. Thank you. This morning, in response to Senator Thurmond, you summarized much of your testimony throughout this hearing about some important doctrines of constitutional law, and I found that summary very interesting and I suspect all of us are going to go back and read and re-read it as we go through this.

But you described these doctrines as now firmly part of our law, that whatever theoretical challenges might be available to them, it is too late for any judge to tear them up. I think most, or I would assume everybody here agrees with that. But among the doctrines you listed, some you have characterized in your writings—in fact, in your discussions with me—as too firmly embedded in our law to tear up.

For example, the expansive interpretation of the commerce clause, the legal tender cases that authorize the printing of paper money. We all agree that if you go back and suddenly say, wait a minute, that is wrong, then, of course, you would have to have a new Supreme Court decision saying, for instance, plastic has taken over for it.

Judge BORK. All right.

Senator LEAHY. But nobody questions that. I mean, that is well settled. But then there are some doctrines in this category which you sharply criticize in your writings, but that you characterized at this hearing, and I think in some instances perhaps for the first time, or at least the first time I have heard it, as too late to tear up.

Let met go down through a couple of those if I might. They include the prevailing free speech doctrine, including the cases on advocacy of law violation culminating in *Brandenburg* v. *Ohio*, and the extension of first amendment protection of speech that has nothing to do with the political process. They include the expansion of the equal protection clause to cover sex discrimination and other types of discrimination. At least you agree in general with the results that have been reached although you would have taken a somewhat different route to arrive there.

I do not want to go out so far here that you do not have a chance to come back. Am I correct so far? Have I characterized your testimony correctly so far?

Judge BORK. About the *Brandenburg* and the equal protection clause covering gender?

Senator LEAHY. Yes.

Judge BORK. Yes.

Senator LEAHY. Now, what I am unclear about is your testimony on the cases based on a constitutional right to privacy in matters relating to procreation, child rearing and the like. And there we have some decisions that you have criticized in the strongest terms over many years. Sometimes you have criticized them as unprincipled, intellectually empty, utterly specious, in at least one instance I believe, unconstitutional.

Judge BORK. I must learn, Senator, to begin saying, "on the other hand."

Senator LEAHY. You should know, of course, that none of us would ever resort to rhetoric that we would then chew on later. I even had my mother tell me things. She reads the Congressional Record and she has even referred to it and said, did you really say that?

But let me ask you this. Would you agree or disagree with this proposition: that the cases establishing a constitutional right to privacy in these matters have become part of our law, and that whatever theoretical challenges may be available to them, it is too late for the Supreme Court to tear them up?

Judge BORK. Senator, I have, I think, rather consistently testified that I am not going to answer that question because that is a highly controversial matter. I have consistently testified if a case came back that I would say to the lawyer, can you derive in some other fashion than emanations and penumbras a right of privacy from the Constitution that has some limits, some contours to guide the judge?

If you cannot, can you find a narrower right that covers your case—whatever the case is—and root it in the Constitution? And if you cannot do that, let's discuss stare decisis and whether this is the kind of case that should be overruled. And I have listed the factors that one would consider in deciding whether a case should be overruled. And I cannot go any further than that. I think that is the best I can do.

Senator LEAHY. But what about *Griswold*, Judge? Let's back up there just a tad if we might. You know, as has been said by many before me, democracy is a terrible system of government, except it is the best we have. And our own system of government with the three branches of government has to be one of the most inefficient, unwieldy forms of government, but it is by far the best.

Take the average person. They see a legislature that may go off and do quirky things for whatever political reasons, whether it is the national legislature or a State legislature. And they see an executive perhaps indifferent to their wishes as they see them. So they always look to that one body, the Court, that seems more independent than the other two put together, less swayed by the passions of politics or the passions of the moment, and they go to it.

We go back to the law in *Griswold*, and the people say that is a crazy law. We all agree on that. Except, as Senator DeConcini has pointed out, and I certainly from my experience as a prosecutor can well concur, you sometimes find prosecutors who will take a look at a crazy law and say, for whatever reason, I am bringing some charges on that, and then all of a sudden that crazy law that we all chuckled about becomes very real to some man or woman when the indictment is handed down or the information is issued and the police officer is at the door.

And so where do the people go? They go to the Court. And in the case of *Griswold*, you are sitting on a court reviewing that. I understand and accept what you say about the penumbra of privacy and so on. But suppose they do not have a stare decisis, and suppose they do not have some other theory. What do you do? You say, look, I am sorry; that is a crazy law but you just bought the radish.

Judge BORK. Senator, the fact is, I have said from the beginning that the mere fact that a law is outrageous is not enough to make it unconstitutional. If the statute in *Griswold* had ever been enforced against a married couple, or any couple, I think there might have been a very good chance it would be an invalid conviction because there is no fair warning. Nobody ever applied the law that way. If they had applied the law that way, the law would have been repealed instantly.

But passing that, merely the fact that it is a dumb law gives the Court no additional power because there is no statement in the Constitution that no State shall make a dumb law. You referred to the fact that when people are dissatisfied with legislatures and executives, they always look to the courts. It is also true that there is a great deal of dissatisfaction with the courts in this country.

So that I do not think that it is fair to say that the courts are the only body of government which the people trust. Some people do. A lot of people do not.

Senator LEAHY. Judge, we could probably go around and around and wrap ourselves in some kind of penumbra here doing it, but you have answered this question a number of times.

Let me just sort of close in this area. You say in the privacy area that you are not willing to take this as a kind of settled area of law, certainly not like the cases about currency. You are perfectly willing to accept those cases, obviously, because we as a nation have accepted that idea. So you see—am I stating your position correctly to say you see those as entirely different?

Judge **Bork**. Well, I see the privacy cases in any particular context—I mean, it has been applied in a variety of ways—as still controversial cases. The Court is still divided about it. The people are still divided about it. It remains a live controversy in a way, of course, the legal tender cases do not.

I would like to point out once more that the Constitution explicitly protects many important aspects of privacy—the first amendment, fourth amendment, fifth amendment and so forth—so it is not a right of privacy I am opposed to. It is a generalized undefined right of privacy that is not drawn from any constitutional provision. Maybe it can be, but I have not seen it done yet.

Senator **Leahy**. You would say that the law is far more settled in the area of first amendment that we have spoken of?

Judge **Bork**. Oh, yes. There are hundreds of decisions in that area.

Senator **Leahy**. And equal protection?

Judge **Bork**. And equal protection.

Senator **Leahy**. But this area you see as still a moving area, very controversial?

Judge **Bork**. It seems to be.

Senator **Leahy**. Judge, I might say that in some areas we agree and some areas we disagree, but I have sat in an awful lot of confirmation hearings and you have sat there and answered and answered and answered. And I applaud you for it.

Others will be asking you questions, and then we will spend days going back through the record and dissecting it once again. But I appreciate the fact that each question I have asked you have come back with an answer and I thank you for that.

Judge **Bork**. Thank you, Senator. You mentioned that we may disagree on some issues. I think that is inevitable. Reasonable men and women will differ on issues that are still current. There happen to be strong arguments on both sides of these questions. If there were not, they would not be issues. If there were not, there would not be arguments, and indeed if there were not, there would not be cases.

Senator **Leahy**. Judge, no nominee to the Supreme Court or any other court could be so molded to fit in a way to agree with everybody up and down this table. There is no person, a nominee for anything, including sainthood, that could fit this group, let me tell you that.

Thank you, Mr. Chairman.

The **Chairman**. Right on the money, Senator.

Senator Simpson has 3 minutes.

Senator **Simpson**. Mr. Chairman, I thank you.

I should have submitted this to our chairman, but I think it would be important to have, Mr. Chairman. Ask Judge Bork to submit in writing the answers to that Judge Gordon matter on the *Vander Jagt* v. *O'Neill*.

The **Chairman**. Can you do that, Judge?

Judge **Bork**. I would like to do that because there is really more evidence there than I can keep getting at orally.

The **Chairman**. No problem. The record will be open as long as it takes for you to do that.

Judge **Bork**. All right.

[Material follows:]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

OCT 1 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in order to supplement my testimony before the Committee concerning my participation in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983). I understand that the questions raised by the Committee concerning Vander Jagt arose from an August 24, 1987 letter to the Committee written by Senior District Judge James F. Gordon, a copy of which was provided me last week upon request.

I think the recollections of other persons involved, the contemporary documentation, and the practicalities of the situation all demonstrate that Judge Gordon's present recollection is incorrect. Moreover, I and other judges often discover in the course of preparing an opinion that "it will not write" and change the rationale or even the result. That is precisely what happened in Vander Jagt.

It may help to recount the events in Vander Jagt, as I and others remember them, because our recollection of these events differs significantly from Judge Gordon's. I have attached to this letter all the documents I have located in my files that concern the panel's deliberations in this case, and to which I will refer. As you can see from a review of these documents, I do not believe there is any basis for calling into question my actions in the Vander Jagt case. In addition, my recollection of these events is corroborated by my two law clerks who handled the case from beginning to end, Paul Larkin and John Harrison, and by Judge Robb's personal secretary, Ruth Luff. Ms. Luff's recall of these events was brought to my attention by Senior Judge MacKinnon, who called me after Judge Gordon's letter had been noted in the Washington Post. I have attached to this letter the declarations of Paul Larkin and John Harrison and the affidavit of Ruth Luff.

In Vander Jagt, several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority impermissibly diluted the political influence of the Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

On March 19, 1982, I sat on a panel with Circuit Judge Robb and District Judge Gordon, of the Western District of Kentucky, sitting by designation, and heard oral argument on the appeal. At conference following the argument, the panel agreed to affirm the district court, and Judge Robb, who was senior judge on the panel, assigned the writing of the opinion to me. Judge Robb's March 19 memo stated "[t]he opinion will assume that the plaintiffs have standing, but will conclude that they are out of court for numerous other reasons."

In the course of preparing the opinion, I came to the conclusion that the appeal should be decided instead on the ground that the plaintiffs lack standing to sue. I reached this view after a review of the Supreme Court's decision in the Valley Forge case, handed down just months before. Soon thereafter I visited Judge Robb in his chambers and discussed with him my view that the rationale for our decision to affirm the district court should change. Judge Robb agreed with this proposed change, and I returned to my chambers and informed my law clerk assigned to the case, Paul Larkin, of the substance of my discussion with Judge Robb. Both Paul Larkin and Judge Robb's secretary, Ruth Luff, remember this meeting.

On September 17, I sent to Judge Robb and Judge Gordon a draft opinion in the Vander Jagt case; my cover memorandum routinely indicated that I was disseminating the draft "for your review and comment."

(Judge Gordon incorrectly remembers that my draft was not sent to him until "the first part of November," and incorrectly adds that it came without a cover note. This is important, because Judge Robb was hospitalized in November, as Judge Gordon's letter indicates, but he was not hospitalized before then, when these events took place, at the time when Judge Gordon would have had reason to call Judge Robb. As the declaration of John Harrison suggests, what Judge Gordon now remembers as a conversation with another judge concerning this incident may well have concerned other aspects of the case, including perhaps whether Judge Robb would write a separate opinion or join in Judge Gordon's opinion.)

My draft opinion proposed to affirm the district court's dismissal for lack of standing, consistent with my discussion with Judge Robb. One week later I wrote Judge Gordon, apologized for failing expressly to notify him in advance of the change in rationale, and explained my standing rationale; I sent a copy of this letter to Judge Robb on October 1, who may not have received it immediately because he was on vacation in Massachusetts at the time. I do not recall who or what prompted the September 24 letter to Judge Gordon.

To my great surprise, I received from Judge Robb in Falmouth, Massachusetts a memorandum to Judge Gordon and me dated October 5, in which Judge Robb expressed surprise at my draft opinion and disagreed with its rationale. Judge Robb wrote that he would apply the holding in the Riegle case, where the court determined a matter of its "equitable discretion" not to disturb the legislative decision. Judge Robb wrote "If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately."

Although in his letter Judge Gordon states that at conference, the Riegle case and the equitable discretion doctrine were discussed, Judge Robb's memorandum the same day of argument does not mention that rationale as a basis for our decision. Moreover, I do not recall any mention of the Riegle rationale by Judge Robb or Judge Gordon at conference or at any time before Judge Robb's October 5 memorandum. My recollection that the Riegle rationale was not considered until Judge Robb's October 5 memorandum is supported by the two memoranda of Judge Robb in my files and my October 8 memorandum, discussed below, to which neither Judge Robb nor Judge Gordon objected. That memorandum shows that at our conference after the argument we agreed to put the case on either the Speech or Debate Clause or the political question doctrine.

I immediately wrote Judge Robb and Judge Gordon on October 8. I explained in full my standing rationale and recounted my earlier visit to Judge Robb's chambers, our discussion of the standing rationale, and Judge Robb's agreement with my proposed change in rationale. I readily acknowledged that "the confusion into which this case has been plunged" was the result of my failure immediately to apprise Judge Gordon of my discussion with Judge Robb when I disseminated my initial draft opinion September 17. I made no excuses; in fact the memorandum contains four separate apologies for this one oversight. I wrote, "Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." I informed the panel members that I would write a lengthier concurrence, one which would allow me fully to elaborate my thinking on the standing doctrine.

Thereafter, draft opinions by Judge Gordon and me were freely exchanged and comments were made on each other's drafts. I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. Indeed, neither I nor my law clerk at the time, John Harrison, recalls that the matter was ever brought up after my October 8 memorandum.

In my view, whatever misunderstanding there had been in the early fall of 1982 as a result of my failure to inform Judge Gordon of my change in rationale when I sent him my proposed draft was long ago cleared up to everyone's satisfaction. Upon reading the affidavit of Judge Robb's secretary, I now understand why Judge Gordon could have been upset at the time, because Judge Robb, forgetting our visit, may have told Judge Gordon that he could not have agreed to a change in rationale because I never discussed the matter with him. But I do believe that my memoranda of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt-- in fact, I gave the matter no thought-- that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Judge Gordon's present day recollection of the events in 1982 is all the more surprising after his final letter to me is considered. On December 17, 1982, Judge Gordon sent me his "final draft," and asked that I see to it that his opinion would be processed for publication. Judge Gordon concluded his letter to me with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." This is hardly the sentiment of one who thinks an attempt to dupe him has just been made.

The appeal was decided eventually on February 4, 1983. Judge Robb joined in Judge Gordon's opinion, which affirmed the district court's dismissal on the "equitable discretion" rationale announced in the Riegle case. I wrote a concurring opinion concluding that the plaintiffs lacked standing to sue.

In his letter to the Committee, Judge Gordon states that he was "shocked" to receive my draft opinion. Yet I do not recall that Judge Gordon expressed to me, either at the time, 1982-1983, or at any time since, any displeasure with the panel's deliberative process, or specifically, my involvement in the case. And Judge Gordon does not indicate in his letter that he ever raised this matter with me directly, at the time or at any time since. Indeed, the tone of his December 17, 1982 letter to me is utterly at odds with Judge Gordon's August 24, 1987 letter to the Committee.

After reading for the first time Judge Gordon's letter to the Committee, I can understand why some members of the Committe raised questions. But I cannot help but conclude that, had Judge Gordon consulted the several documents that were sent to him by me and Judge Robb at the time, which I have attached to this letter, he would not have written the August 24 letter to the Committee.

Apart from this detailed account of my recollection of the panel's deliberations in Vander Jagt, I am compelled to respond to Judge Gordon's accusation that I somehow intended to have my view on standing serve as the holding of the case and become the law of the circuit, without obtaining knowing concurrence of at least one other judge. As I indicated during my testimony, it is simply preposterous to suggest that I could or would have attempted any such thing. The record that is at my disposal, and which I submit to the Committee, in my view refutes any such idea. In particular, the discussion I had with Judge Robb, and the explanatory memoranda I wrote to Judge Robb and Judge Gordon belie this notion.

Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done on my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing en banc and put the law back in its prior position. Any judge who tried such a maneuver would certainly fail and would, moreover, forfeit forever the respect of his or her colleagues. The facts show that I attempted no such thing.

I hope this letter responds to any questions the Committee has concerning Judge Gordon's letter about the Vander Jagt case.

Sincerely,

Robert H. Bork

Robert H. Bork

Attachments

cc: Honorable Strom Thurmond

TL

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

September 24, 1982

The Honorable James F. Gordon
United States District Court
Western District of Kentucky
P.O. Box 435
Federal Building
Owensboro, Kentucky 42301

Re: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

Dear Judge Gordon:

It occurs to me too late that I should have notified you in advance that I had changed the rationale in the Vander Jagt case to one of lack of standing.

After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in Valley Forge, on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate.

In any event, I regret not having apprised you of my thinking earlier in the process of writing.

Best wishes.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/hh

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 1, 1982

Attached is the letter I sent to Judge Gordon.

Falmouth, Mass.
October 5, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

My post-conference memorandum in this case said:

> At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

Now I am surprised to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the result I regret that I cannot concur in the opinion. I would apply the _Riegle_ theory to this case. The _Valley Forge_ case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the _Riegle_ theory in a congressional plaintiff context.

I think it can be argued here that in many ways plaintiffs have suffered injury. Although the proposed opinion says their votes have not been nullified, it is certainly true that the power or weight of their votes has been substantially diminished. I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.

If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork RHB

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear *en banc* later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in *Goldwater* v. *Carter*. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in *Riegle*. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

United States District Court
FOR THE
Western District of Kentucky
Owensboro, Kentucky 42302

Chambers of
James F. Gordon
Judge

December 17, 1982

The Honorable Robert H. Bork
Judge, U. S. Court of Appeals
District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Washington, D. C. 20001

RE: Vander Jagt v. Speaker O'Neill, No. 81-2150

Dear Judge Bork:

I have not as yet received your most recent rewrite in the above-styled matter; however, in the interest of time, I enclose herewith two copies of the final draft of my opinion.

The final draft attached hereto contains some changes on pages 3 and 8 of the opinion and on Footnote pages 9, 10, and 11, plus the further fact I have rewritten the same so that it becomes now only my opinion as opposed to mine and Judge Robb's opinion.

Inasmuch as you are now, in Judge Robb's absence, the presiding Judge, I assume that you will see to the proper processing of my opinion through the Clerk's office there, and that there is nothing further for me to do. I would however appreciate it if you would have your law clerk give us a ring here when you have received this.

May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season.

Sincerely,

James F. Gordon

JAMES F. GORDON

JFG/ddt

Attachment

DECLARATION OF
PAUL J. LARKIN, JR.

I, Paul J. Larkin, Jr., being duly sworn, state:

1. I served as a law clerk to the Honorable Robert H. Bork, Circuit Judge for the United States Court of Appeals for the District of Columbia, from February 12, 1987, through August 13, 1982.

2. The following account is my current recollection of the events concerning the Judge's participation in the Vander Jagt v. O'Neill case, which was heard by Judge Robb, Judge Bork, and Judge Gordon.

3. At the conference following the oral argument in the case, Judge Bork was given the assignment of drafting the opinion for the panel. Judgment was to be entered in favor of the defendants, O'Neill *et al*. I believe that the panel's tentative rationale was to be that the plaintiff's claim presented a nonjusticiable political question. I remember that the rationale was not to be that the plaintiffs lacked standing.

4. Judge Bork decided to draft the opinion himself, rather than ask me to prepare a draft. After working on the opinion, Judge Bork concluded that the panel should rule instead that the plaintiffs lacked standing to sue. I believe that Judge Bork

concluded after reading the Supreme Court's January 1982 decision in the Valley Forge case that standing was the appropriate basis for disposing of the Vander Jagt case. Judge Bork told me that he would speak with Judge Robb about his new proposed rationale.

5. Judge Bork spoke with Judge Robb in Judge Robb's chambers about the standing rationale. Judge Bork spoke with me after he returned to chambers. Judge Bork told me that Judge Robb had agreed to dispose of the case on a standing basis, rather than on the rationale to which the panel had originally agreed.

6. I finished my clerkship in late summer. I was surprised when I received a copy of the opinion in the case, because Judge Bork's proposed opinion had become a separate concurrence, rather than the opinion for the court.

7. In my view, there is no foundation to the accusation that Judge Bork's conduct in this case was improper. I find it impossible to believe, and know of no evidence to support the claim, that he sought to take advantage of Judge Robb's illness and to "pull a fast one" on the other members of the panel or on the District of Columbia Circuit.

Paul J. Larkin, Jr.

Subscribed and sworn to me this 25th day of September, 1987.

District of Columbia

Carol L Miles

Notary Public Carol L. Miles

My Commission Expires August 14, 19[illegible]

DECLARATION OF JOHN HARRISON

1. I was a law clerk to Judge Robert Bork, U.S. Circuit Judge for the District of Columbia Circuit, from August of 1982 to August of 1983. During that period I was the clerk primarily responsible for the case of Vander Jagt v. O'Neill, a responsibility I took over from Paul Larkin.

2. My recollection of the events concerning Vander Jagt and their order is not perfect, but I do recall what happened with the case and have several specific recollections.

3. As Judge Bork's files reflect, he circulated his draft panel opinion in the case on September 17, 1982. The cover memo did not mention that the rationale was standing rather than political question or the Speech or Debate Clause. A week later, Judge Bork wrote a letter to Judge Gordon in which he explained the change of rationale and apologized for not having discussed the matter with Judge Gordon earlier. Although I do not remember the specific dates, I do remember circulating the first draft of Vander Jagt and I do remember Judge Bork writing the letter to Judge Gordon.

4. I also remember Judge Bork remarking on (1) his conversation with Judge Robb in which they discussed the new rationale and (2) the fact that Judge Robb later did not remember the conversation. Judge Bork said that another of the judges on the court had spoken of a similar problem with Judge Robb. I think that Judge Bork talked about this after receiving Judge Robb's memo of October 5, but I am not certain.

5. After he decided not to go along with the standing argument, Judge Robb asked Judge Gordon to write an opinion for the two of them based on equitable discretion. That ground of decision is not mentioned in Judge Robb's conference memo of March 19, as Judge Bork noted in his memo of October 8.

6. I specifically remember Judge Bork drafting the October 8 memo. In particular, I recall his expression of regret about the confusion into which the case had been thrown as a result of his failure properly to communicate with Judge Gordon. Judge Bork seemed quite upset with himself for not having called Judge Gordon at the time he talked to Judge Robb about the change in rationale.

7. Our chambers exchanged drafts with Judge Gordon's so that we could comment on one another's work. I discussed the case at some length with Judge Gordon's clerk and do not remember the change of rationale as a source of any friction between the clerks.

8. On at least one occasion, Judge Robb's wishes in the case were communicated to Judge Bork through Judge Wilkey. My recollection is that Judge Wilkey told Judge Bork that Judge Robb had decided to join Judge Gordon's opinion; earlier, Judge Robb had planned to issue a short statement of his own saying simply that he thought the case should be disposed of under the equitable discretion doctrine.

9. Based on my experience as a law clerk on the D.C. Circuit, the implication that Judge Bork hoped somehow to mislead the other members of the panel by changing his ground of decision without telling them is implausible. A judge could hope to do this only if he believed that no one else would read his draft.

John H

John Harrison

Subscribed and sworn to me this 28th day of September, 1987.

STATE OF: District of Columbia

Carol L Miles

My Commission Expires August 14, [illegible]

Carol L. Miles/Notary Public

AFFIDAVIT OF RUTH LUFF

I, Ruth Luff, being duly sworn on oath, state:

1. I served as personal secretary to Judge Roger Robb, Circuit Judge on the U.S. Court of Appeals for the District of Columbia, from his appointment in 1969 to June 1983 after Judge Robb assumed senior status.

2. The following account is my recollection of the events concerning Judge Robb's involvement in _Vander Jagt_ v. _O'Neill_, a case heard by Judge Robb, Judge Bork and Judge Gordon in March 1982 and decided by the court of appeals in February 1983 in an opinion by Judge Gordon joined in by Judge Robb.

3. I was contacted several days ago by Tony Fisher, the Clerk of the U.S. Court of Appeals for the District of Columbia, who had been approached by someone from the Senate Judiciary Committee. I was told that the Committee wished to interview me. A staff person from the Committee called me later but did not mention the _Vander Jagt_ case. He asked me about certain people and I told him I no longer maintained close contact with anyone from the court, and probably could not answer any of his questions. I mentioned that I was busy with a new career. At that point he thanked me and the conversation ended.

4. After I read the article in the Washington Post, concerning Judge Gordon and the Vander Jagt case, my memory was refreshed and I recalled the case and many of the circumstances surrounding it.

5. I recall specifically that Judge Bork visited Judge Robb in his chambers on this case after the case was heard, because Judge Robb asked me to locate the file on the case and give it to him. Although I cannot remember precisely when this meeting took place, I believe it was in the spring of 1982.

6. I remember that at one point later, perhaps in October 1982, Judge Gordon called Judge Robb, and I got the impression that Judge Gordon was upset by something Judge Bork had written. After Judge Robb ended his conversation with Judge Gordon, he made a critical remark about Judge Bork to me, and said something to the effect of "He never came to see me, and he never let Judge Gordon know." Judge Robb apparently did not recall his meeting with Judge Bork and apparently had told Judge Gordon that. Although I knew that Judge Bork had seen Judge Robb on this case, I did not mention it at the time. I remember Judge Bork's visit to Judge Robb on this case because of the controversy that ensued after this telephone call.

7. It is not surprising that Judge Robb did not recall his meeting with Judge Bork, because Judge Robb was going through a difficult period at this time and shortly thereafter went into the hospital.

8. I do not understand all the attention this case has received. The exchange of draft opinions between judges, sometimes incorporating different rationales than that to which the panel members had initially agreed at conference, is common practice. I do not recall any hard feelings among judges in the past in any case in which this practice occurred.

9. I am making this statement because I believe that, based on my memory of the events, the accusations of improper conduct by Judge Bork are unfounded and unfair, and the questions about Judge Bork's integrity caused by this matter deserve to be put to rest.

Ruth Luff

District of Columbia

Subscribed and sworn to me this 25th day of September, 1987.

Notary Public Carol L. Miles

My Commission Expires [illegible] 14, [illegible]

Senator SIMPSON. Then, Mr. Chairman, we had a very dramatic presentation this morning by Senator Metzenbaum of a telegram from a woman who was involved in the lead case, the sterilization case. And the lady sent the telegram. We found now this evening, or this afternoon, that she—this is Betty J. Riggs—was contacted approximately 2 weeks ago by an organization requesting that she do a TV ad opposing your nomination. She refused to do that.

She was contacted today, September 18th, at approximately 1:00 p.m. by her attorney, Joan Bertin, an ACLU representative out of New York, as well as her attorney in the *Cyanamid* case. Ms. Bertin requested that she send a telegram to the Senate Judiciary Committee. Ms. Bertin then prepared the text of the telegram for Ms. Riggs and Ms. Riggs sent the telegram from Harrisville, West Virginia, rather than Parrisville, but she actually lives in West Virginia.

She does agree with the statement as prepared by her attorney and Ms. Bertin advised Ms. Riggs that she would not be contacted by anyone else concerning the matter. However, she stated—that is, Ms. Riggs stated—that she has already received calls from the press. She does not know whether anyone had contacted Ms. Bertin who requested that the telegram be sent.

Well, I think that is offensive conduct for a lawyer. It was called in my day, solicitation. It is an example of the ends pursued and I think such activity is not attractive.

So I want to get that in the record, Mr. Chairman, and thank you, Mr. Chairman.

[Material follows:]

ALAN K. SIMPSON
WYOMING

ASSISTANT REPUBLICAN
LEADER

United States Senate
WASHINGTON, DC 20510

VETERANS' AFFAIRS COMMITTEE

JUDICIARY COMMITTEE
RANKING MINORITY—SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE POLICY

ENVIRONMENT AND PUBLIC WORKS COMMITTEE
RANKING MINORITY—SUBCOMMITTEE ON
NUCLEAR REGULATION

September 30, 1987

Joan E. Bertin
132 West 43 Street
New York, New York 10036

Dear Joan:

Thank you for your letter of September 23, 1987. I believe I related exactly what I wished to in my remarks as reported in the transcript of September 18, and the thoughts are there as stated.

I am fully aware of your representation and activity in the case, and you are fully aware that the decision of the women was voluntary and that there was nothing whatever in Judge Bork's attitude -- either formally, informally, or in the opinions -- that would have indicated that he was "pleased" in any way to do what had to be done. He said it was a very "unhappy" choice. You read that one totally out of context -- which is par for the course in these hearings.

You will have to ask Judge Bork about his feelings. He knew exactly what a painful and hideous decision it was for those women. No one has ever challenged that. The facts of the case are quite clear. You know that as a lawyer. The Occupational Safety and Health Review Commission gave the same decision, and there is really nothing to be developed by going back through the case at this time. The facts of the case were that the lead levels apparently could not be reduced, and all of that was quite clear to all concerned. You have cruelly distorted Judge Bork's views when you would say he "welcomed" this painful decision. That is distortion -- plain and simple. Nothing in the record discloses that at all. I would hunch that as you explained Judge Bork's testimony at the hearings to Ms. Riggs, it just might not have been quite objectively presented. I would not doubt a whit that Ms. Riggs was "inflamed" by hearing of Judge Bork's comments if you were right there fanning the flames and planning your drafting of the telegram which I still consider offensive. It is that plain and simple.

There are many definitions of the word "solicitation." Soliciting need not have a monetary objective. The definition also includes the activity of "stirring up the pot." I was fascinated at the decision you cited. If you were out protecting your client from "public misrepresentation," that is exactly what I was doing for Robert Bork. We both practice law, and we both know what we are saying. I assume you do "receive fees" from some source in your practice. I would inquire as to what that is.

I was interested in that crack about speech writers. I have never used a speech writer in any capacity throughout my entire public life -- or private life. You missed the target on that one. That is something that is repugnant to me.

Your last paragraph says it all -- that it is simply my attempt "to divert attention from the question of Judge Bork's insensitivity to the devastating effect of his opinions on the lives of real people and his willingness to justify those opinions by misstating the facts." That has never happened in Judge Bork's life on the bench and all of his decisions disclose that. Indeed, if you review his record, you will find that Judge Bork has participated in 396 majority opinions while on the Circuit Court. He authored 117 of those and joined in the majority on the other 279 occasions. Absolutely none -- not a single one -- of those have been reversed by the United States Supreme Court. He voted with Judge Skelly Wright 75 percent of the time, Judge Ab Mikva 82 percent of the time, Judge Pat Wald 76 percent of the time, and Judge Ruth Bader Ginsburg 87 percent of the time.

We both have been involved in the law profession long enough to know that we all live by the sword and die by the sword. Yes, indeed, I think you went too far. I feel no need whatsoever to extend a public apology.

Perhaps Ms. Riggs would wish to come and testify, and we can inquire of her as to all of the real circumstances.

Most sincerely,

Simpson

Alan K. Simpson
United States Senator

AKS/rj
cc: all members of the Committee on the Judiciary

ACLU NEWS
AMERICAN CIVIL LIBERTIES UNION

Washington Office • 122 Maryland Avenue, N.E. • Washington, D.C. 20002 • 202/544-1681
Morton H. Halperin, Director

For further information contact: Joan Burton 212-944-9800

PRESS RELEASE September 29, 1987

ACLU has just released the attached material on Judge Bork's testimony about, and opinion in, OCAW v. American Cyanamid Company.

ACLU National Headquarters: 132 West 43rd Street, New York, N.Y. 10036 212/944-9800
Norman Dorsen, *President* • Eleanor Holmes Norton, *Chair, National Advisory Council* • Ira Glasser, *Executive Director*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

WOMEN'S RIGHTS PROJECT

132 West 43 Street
New York, NY 10036
(212) 944-9800

Isabelle Katz Pinzler
DIRECTOR

Joan E. Bertin
ASSOCIATE DIRECTOR

Deborah A. Ellis
Joan [illegible]
STAFF COUNSEL

Norman Dorsen
PRESIDENT
ACLU FOUNDATION

Ira Glasser
EXECUTIVE DIRECTOR
ACLU FOUNDATION

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

September 29, 1987

Senator Joseph R. Biden, Jr.
Chairman, Judiciary Committee
United States Senate
Washington, D.C.

Re: Nomination of Judge Robert Bork to the Supreme Court

Dear Senator Biden:

Enclosed are some materials regarding Judge Bork's testimony about, and opinion in, OCAW v. American Cyanamid Company. Included is a statement by Betty Riggs, the woman who sent a telegram last week refuting certain testimony by Judge Bork. I request that this material be made part of the Committee's record.

Very truly yours,

Joan E. Bertin

Joan E. Bertin

JEB:pc

cc: Members of the Judiciary Committee
(with enclosures)

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Memorandum and Analysis: OCAW v. American Cyanamid Co.

In OCAW v. American Cyanamid Co.,[1] Judge Bork held that federal law requiring employers to provide a workplace "free from recognized hazards that are causing or [are] likely to cause death or serious physical harm"[2] did not prohibit a policy requiring women workers to be sterilized to retain employment, allegedly to protect against fetal injury. Five women did unwillingly submit to surgical sterilization to secure their right to continued employment.

Judge Bork relies on four critical misstatements of fact and law:

1) Only Fetuses Were at Risk. Judge Bork says the company was justified in requiring sterilization because of the health risks to a possible fetus. But OSHA found that the substance from which fertile women were excluded, lead, "has profoundly adverse effects on the course of reproduction in both males and females" at the same exposure levels.[3] (Emphasis added.) It is true that fetuses were at risk - so were non-pregnant females, males, and their future children.

2) Harmful Exposures Could Not Be Reduced. Judge Bork testified that the company could not reduce hazardous exposures, but an Administrative Law Judge found that "technically feasible engineering controls" were available to reduce exposures. No one knows whether they would have made this workplace really safe for everyone, since the Company did not want to spend the money to find out.

Judge Bork defends his position by saying that cleaning up would force the operation to close. But the department closed anyway, even after five women had gotten sterilized to keep their jobs. Besides Congress had already decided that workers should not be required to barter their health for their jobs.

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[1] 741 F.2d 444 (D.C. Cir. 1984).

[2] Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1).

[3] Attachments to Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 54421 (1978).

3) The Company Had No Choice But to Require Women's Sterilization. Contrary to Judge Bork's statements, the Company had numerous options which would have prevented the sterilizations. For example, the union contract entitled medically restricted employees to "bump" less senior employees and transfer into other jobs, but the women were not offered this option. OSHA requires that employees with high lead levels be given "medical removal protection," which protects both their jobs and their health. Better personal protective equipment, like respirators, were readily available as an interim measure. Just assuring women that they would be transferred somewhere, and not fired, would probably have been enough to prevent the sterilizations.

4) Employers Can Fire Workers Instead of Cleaning Up the Workplace. Judge Bork assumes that it would have been lawful for the company to fire women, if they faced work-related health risks. He does not cite any legal or legislative authority for such an assumption, which is inconsistent with the OSH Act's stated purpose to assure "safe and healthful working conditions" for "every working man and woman." (29 U.S.C. § 651(b)). It is inconceivable that Congress intended to allow employers to escape their responsibilities to clean up workplace hazards by firing a major segment of the workforce - fertile women.

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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132 West 43
New York, NY
(212) 944-9800

Isabelle Katz Pin
DIRECTOR

Joan E. Bertin
ASSOCIATE DIRECTOR

Deborah A. Ellis
Joan Gibbs
STAFF COUNSEL

Norman Dorsen
PRESIDENT
ACLU FOUNDATION

Ira Glasser
EXECUTIVE DIRECTOR
ACLU FOUNDATION

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNC

September 23, 1987

Senator Alan Simpson
United States Senate
Washington, D.C. 20510

Dear Senator Simpson:

On national television Friday evening in the hearings on Judge Bork's nomination to the Supreme Court, you characterized certain actions I took earlier in the day as "offensive conduct" and "solicitation". Your characterization was false, and I am therefore writing to demand a public apology.

I represented thirteen individual women and a class of women applicants in a sex discrimination case challenging the American Cyanamid Company's policy that caused five women employees to submit to surgical sterilization in order to secure their employment. (This case involved the same facts as the case on which Judge Bork ruled, but was based on a different legal theory.) Betty Riggs, who recently sent a telegram to the Judiciary Committee refuting testimony given by Judge Bork about facts in the case, is one of my clients.

On Friday, Judge Bork testified that the women at Cyanamid "welcomed" and were "glad" to have the choice to get sterilized or get fired, and that they must not have wanted to have children. This characterization of their reactions and intentions is a gross distortion, and I knew they would resent it.

Betty Riggs was 26 years old and had one child when she was confronted with the choice to get sterilized or risk losing her job. Although she thought she might want more children, she could not afford to lose her job. For Ms. Riggs and other blue-collar working women in this part of the country, there were few well-paid job opportunities. She felt powerless against this large corporation, and she reluctantly submitted to surgery. Later, she learned that the federal Occupational Safety & Health Administration had determined that the chemical she worked with, lead, poses a similar threat to the reproductive health of both men and women. Slightly more than a year after Riggs and four other women submitted to surgery to secure their jobs, the company closed down the section of the plant in which they worked, making their sterilizations purposeless. Whether or not the federal law at issue in Judge Bork's opinion prohibited the challenged policy, his attempt to rationalize and justify the result by stating that the policy was necessary and that the women involved either "welcomed" it or were unaffected by it is both inaccurate and profoundly insensitive.

I informed Ms. Riggs and others of Judge Bork's testimony. Although she had previously not wanted to submit to further publicity about the case, Ms. Riggs was inflamed by Judge Bork's public misrepresentations, and felt the need to set the record straight. We discussed appropriate ways to do that, and she decided to send a telegram, which I drafted for her consideration based on my eight year attorney-client relationship with her and my extensive knowledge of the facts and her views. As she told you when you called her on the telephone to confirm that she had in fact sent the telegram, I "toned her down" - her own words would have been "too harsh" to be read on television. There can be no question but that Ms. Riggs sent the telegram of her own accord and that it was an accurate reflection of her views.

Your attempt to deflect attention from Ms. Riggs' statement by attacking me is not surprising as a political tactic but is ethically inappropriate. As you must know, the Lawyers' Code of Professional Responsibility distinguishes solicitation - the attempt to persuade a person to become a paying client - from the vigorous representation to which every client is entitled. It is axiomatic that a lawyer cannot solicit her own client. Moreover, according to Supreme Court precedent, lawyers like myself who do not receive fees for services are not governed by the solicitation rule as it applies to private practitioners. (See In Re Primus, 436 U.S. 447 (1978)). In assisting Ms. Riggs, I did nothing improper, unethical, or unprofessional. In accordance with the Code's precepts, I was protecting my client from public misrepresentation.

Your assertion that it was improper for me to draft Ms. Riggs statement, which she reviewed, is ridiculous. Lawyers regularly assist their clients in this fashion, just as speechwriters assist senators without any implication that the senators' speeches lack credibility as a result. My long-standing relationship with Ms. Riggs enabled me to draft a statement which accurately reflected her views, as revealed by the fact that she adopted and endorsed it.

Because you have wrongly impugned my professional integrity, you owe me a public apology. More importantly, your unjustified personal attack on me is a transparent attempt to divert attention from the question of Judge Bork's insensitivity to the devastating effect of his opinions on the lives of real people and his willingness to justify those opinions by misstating the facts. This is what Betty Riggs was trying to convey to you and the rest of the Committee.

Very truly yours,

Joan E. Bertin

JEB:pc
cc: Senator Biden
Senator Metzenbaum

Sept. 28, 1987

Dear Senators,

I'm an individual who has been a victim of Judge Borks ruling, in the case of OCAW v. American Cyanamid Co..

In this case we were given a policy that excluded fertile women from working in all production positions in 8 departments. We were told if we had proof of sterilization of any sort we could remain in these departments, others would be offered jobs elsewhere if any vacant positions were available. At that time there were about 25 women and 7 possible openings. We were told the rest would go out the gate. We were told the same policy was going into effect in other Cyanamid plants and other plants all over.

I did have surgical sterilization on Feb., 1978, and was absent from my job 4 to 6 weeks which the Co. Insurance paid for and I recieved sick pay. I had surgery because I had to have the job and felt I had no choise. If I lost my job I would have lost my home and I also needed it to help support my parents, my father is totally blind and my mother had emphysema.

By Oct. 1, 1978 the policy was then implemented that fertile women would be excluded in only one department, Pigments.

During this time we were harassed, embarrassed, and humiliated by some supervisors and some fellow workers. They referred to us like animals, such as dogs being spaded or neutered. They told us we were branded for life.

This policy only affected women workers. The substances in which I worked in was lead pigments and would of had the same affect on males, but were told they had to support their family.

In Jan. 1980 Cyanamid closed Pigments down and as a result I was demoted and transferred to another epartment. I submitted to surgical sterilzation because I was told I could retain my current high rated job in Pigments. I had surgery also because at that time I believed Cyanamids representation that federal regulations would require the exclusion of fertile women from my position. I felt I was a small object against a large Compan I only submitted to sterilzation because I was threatened of losing my employment and I needed the money to support my family.

I feel I was discriminated on and my privacy was invaded, and I believe that Cyanami ade false statements to me which induced me to have surgery. I had and still have emotional stres

I feel Judge Bork done me an injustice whe he ruled against ASHA and for Cyanamid. I don't see how any Judge could rule that way. I don't think he realized we were human beings with feelings, and further more I don't think he cared, no one should have that power to alter or destroy reproductive organs of any human being, or rule for such a company to allow such a policy to exist, only if so person desires that kind of surgery. I feel we had no choice, we were forced there fore our rights were taken away. This Country is known for Freedom I think we'd better backup and take a good look at these issues. Do we want someone who can dismiss this very important issue so easily to have this power. I'm thinking of other human beings whom I certainly don't want them to have to make a choice like I did. It's something that is very hard to live with, and accept. I feel it destroyed me and my right of freedom. It takes something from a person that they can never fulfill or replace, you feel very empty. No one should ever feel this way. Since all this I have remarried and would desperatelly love to have a child, but that can never be.

Respectfully,

Betty J. Riggs

Senator SIMPSON. Then, finally, we have been very helpful in trying to present to you—and you have been totally courteous with us—but we have asked again and again for a list of witnesses so that we might prepare ourselves as well as the people who are opposed to Judge Bork have prepared themselves.

If we are going to have Lawrence Tribe here—Professor Tribe—then we want to have an opportunity to prepare our case. We want to be prepared to go into the provocative statements of Professor Tribe, which we will, and his writings. And we want to do our research but we do not know if he is going to be here.

I know you will provide us the list of the witnesses we have asked for for a week, and I think it only fair—and you have been imminently fair—that we have those. There is no need to go to Monday and only know the Monday witnesses and not know who is going to be here Tuesday and Wednesday and Thursday and Friday and we need that if we are going to do our work and we are really insisting upon it.

The CHAIRMAN. Yes. The answer to the question is, I believe you already have Monday's list. You will have all the lists by Saturday. Part of the problem is juggling witnesses, not knowing when we would end here. But you will have it in plenty of time, I assure you. And I further assure you that when we have it—and we have already spoken with the ranking member's staff and with the Judge's—or what is Korologos? [Laughter.]

Senator LEAHY. We have been wondering for years.

Judge BORK. Do I have to answer that under oath, Senator? [Laughter.]

The CHAIRMAN. No you do not. Anyway, I spoke with Mr. Korologos about it on behalf of the Judge. We will alternate. We will see to it there is not going to be, you know, a day of people testifying against and then no one testifying for. I have not quite worked it all out yet but it will be worked out tomorrow. If there is an antitrust panel for, there will be an antitrust panel against. If there are professors for, there will be professors against.

I promise you it will work out that way. I just do not have the list yet.

Now, we will have one more deviation which will be helpful. You need not answer any more questions tonight, but rather than take his 3 minutes to close tomorrow, Senator Thurmond is going to take those 3 minutes to close this evening and then we will begin tomorrow as we had indicated.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, we had all felt that the Judge would complete his testimony today and since I have moved my family back to South Carolina now, I had planned a commitment with them tomorrow, and since Senator Hatch, the ranking member next to me, is here and will be here tomorrow, I am going to ask him to take the hearing.

I feel that I should keep this commitment with my family since there are others here that can carry on this work, and I wanted to make a brief statement this evening before Judge Bork leaves.

Judge Bork, as you conclude your testimony tomorrow, Saturday, before the committee, I want to make a few comments at this time.

In my 33 years in the Senate I cannot recall a nominee who has been more open, more frank, and more effective. Judge Bork, your intellectual power, your honesty and your courage have left an indelible imprint on this committee. Never before has a nominee to the Supreme Court, or any other court, for that matter, subjected himself to such an intense, probing examination.

Speaking of examinations, several comments have been made about how the committee has turned the table on you as a former law professor so that now you had to answer questions and be examined. Well that being the case, permit me to grade you. I would like to indicate that you have passed with honors and with honor. I grade you A-plus.

I also believe that you and those who have watched these proceedings understand what we in Congress as public officials have long known—it is easy for an opponent or a critic to make charges and accusations but it is often a laborious process to methodically disprove those charges.

However, your testimony has shown us again what we all know, and that is, when enough light is cast on a situation and all the facts are known, truth eventually triumphs. If I may borrow a phrase we have heard before, your testimony has vacated, has made null and void charges that you are an ideologue, that you are anti-civil rights, that you do not support the first amendment, and other issues discussed here.

Perhaps some people do not agree with your philosophy. That is fair and accepted in America. But philosophy should not be the only factor in these proceedings. Your testimony across the board has indicated that you are indeed qualified to serve with distinction on the Supreme Court.

Judge, I want to compliment you as well as your wife and family, who have been here with you throughout these proceedings. I know as they leave the hearing room tomorrow that they will take with them a well-founded pride in you and in your appearance before the committee.

I want to say that nothing has come out in this testimony that shows contrary position with the American Bar Association. The American Bar Association mainly considers three points: Integrity—there has been nothing here to denigrate your integrity; professional qualifications—there has been nothing to downgrade that; judicial temperament—there has been nothing to downgrade that.

You have met every qualification that is considered by the American Bar Association. On the matter of philosophy, people differ. We understand that. But as I said, that should only be one factor to be considered.

So I just want to compliment you for the way you have handled yourself, for the way your family has stood by you here, and I hope and pray that you will be confirmed by this committee and by the Senate to be on the Supreme Court. You deserve it, the country deserves it, and good luck and God bless you.

Judge BORK. Thank you very much.

The CHAIRMAN. Thank you, Senator.

Judge BORK. May I say thanks to the Senator?

The CHAIRMAN. Sure.

Judge **Bork**. Thank you very much, Senator. That means a great deal to me, particularly coming from you.

The **Chairman**. Thank you, Senator. Thank you, Judge. I hope you enjoy your dinner tonight.

[Whereupon, at 8:10 p.m., the committee adjourned to reconvene the following day at 12 noon.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SATURDAY, SEPTEMBER 19, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 12:03 p.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Heflin, Simpson, Hatch, Specter, and Byrd.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator **KENNEDY** [presiding]. The committee will come to order.

We will continue the hearing on the nomination of Judge Bork to be Associate Justice of the Supreme Court. The chairman of our committee, Senator Biden, will join us very soon. He had indicated that he was going to see his son in a football game. And Judge Bork indicated, I think, last evening that he was desirous that our hearing conclude by 3:00 o'clock so he might see the Boston College game on television. I think we have found something that we both agree on here.

Pursuant to our agreement, we will recognize the Senator from Alabama for questions.

Senator **HEFLIN**. Well, I demure to the football agenda. This hearing is causing me to miss a part of the Alabama-Florida game.

I am going to cut my questioning very short. I think almost every subject has been fully covered.

Many of us have had to miss a good deal of the questioning on this matter because of action on the floor that required us to be there—votes and other things. Some of us had to go to other committee meetings and have been called out for various other things.

But every Senator has had staff representatives here, and there is a transcript being made.

This Caucus Room, which I have been in now for many, many months with the Iran-Contra hearings and these hearings, has problems sometimes with the acoustics. So I am going to read the transcript to be sure that I have not misunderstood any question that may have been asked and then any answer that may have been given.

There are only a few things I want to go into. One, yesterday I asked you about your speech. "The Crisis in Constitutional Theory:

Back to the Future," to the Philadelphia Society on April 3, 1987, which has also been labeled the "Bork wave theory of law reform." You basically said that what you were speaking to there pertained to the movement, the waves, that would sweep out to sea the debris of the nonoriginalism philosophy that had prevailed in the Court, was directed to law schools.

Well, of course, I think you can look at the speech and come up with different interpretations, and that is one.

Just as a matter of the record, I think that that speech ought to be made a part of the record, and Mr. Chairman, I ask unanimous consent that the entire speech be included in the record for interpretation of those who wish to read it.

Senator **Kennedy**. No objection, so ordered.

[Speech follows:]

"The Crisis in Constitutional Theory: Back to the Future"

The Philadelphia Society
April 3, 1987

I have been looking at your program and I am impressed. Any Society that can get through a program billed as "Constitutional Government: The Design, The Reality, The Prospect" in one day is an intellectual force to be reckoned with. The list of speakers can be compared only with the batting order of the 1927 Yankees. When I read it and realized I was leading off, I was tempted to bunt just to get on base.

The title of my talk is "The Crisis in Constitutional Theory: Back to the Future." Anybody who uses the word "crisis" after dinner had better be prepared to prove that there is one before he undertakes to rescue you from it. There are few things more annoying than being rescued gratuitously.

The "crisis" is that constitutional theory, and hence the future of constitutional law, appear to be at a tipping point. The American ideal of democracy lives in constant tension with the American ideal of judicial review under the Constitution. This tension arises from what has been called the Madisonian dilemma.

The United States Constitution creates a Madisonian system, one that allows majorities to govern wide and important areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. To trust the one is to court tyranny by the majority. To trust the other is to ensure tyranny by the minority.

It has come to be thought that the resolution of this dilemma is primarily the function of the judiciary, and ultimately and most especially, of the Supreme Court.

That is an awesome responsibility and judges require a strong theory of how to go about discharging it. In Alexander M. Bickel's words, judges must achieve "a rigorous general accord between judicial supremacy and democratic theory, so that the boundaries of the one [can] be described with some precision in terms of the other."

Have we achieved that accord? Most certainly not. Instead, we have lost what we had. Though occasionally violated in practice, in the last century and for half of this, it was unquestioned dogma that judges were to interpret the Constitution according to the intentions of the men who ratified it. When Justice Joseph Story discussed the constitutional role of courts, he stated, as self-evident, there being no opposing theory, that "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."

We know from reading their opinions that many of today's judges do not think themselves bound by original intent, and now we have judges saying so openly, to the apparent approbation of the press and certainly of most law professors. The professors are quite explicit that the intentions of the founders are ultimately irrelevant. You will have difficulty, I think, naming even one full-time professor at a major law school who writes in favor of original intent. The five professors who once did have all been appointed to the federal bench by the present administration. That is why I often say that, while my colleagues at Yale do not like much else about Ronald Reagan, they regard him as a great reformer of legal education.

The central question of constitutional theory is the legitimacy of power. I will attempt to demonstrate that no philosophy of judging that is not based on original intent can confer legitimate power upon the judiciary.

The non-originalist or non-interpretive theorists now dominate constitutional debate. It is well to understand them for they attempt to justify what some courts are, in fact, doing. These theorists contend the judges must create new rights by pursuing moral philosophy, or sensing the morality of our society, or reading the words of the Constitution for the meaning they have to us rather than the meaning they had to the founders.

How can that conceivably be justified? The answer comes in two parts. The first is one of relative institutional capacities; courts are simply better than legislatures in dealing with principles of long-run importance as opposed to immediate problems. Alexander Bickel said: "[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."

Professors, apparently, have very romantic notions about judges' lives. But were we to assume that courts have superior capacities for dealing with matters of principle, it does not follow that courts have the right to impose more principle upon us than our elected representatives give us. Governmental decisions involve a mix of, or a tradeoff between, principle and expediency. By placing decisions in the legislature, the Constitution holds that the mix or tradeoff we are entitled to is what the legislature provides. Courts have no mandate to impose a different mix merely because they would arrive at a tradeoff that weighed principle more heavily.

The second step in the argument is that the courts' commands are not really final and hence not undemocratic, or at least not fatally so. It is true that an outraged people can, if it persists, overturn a Supreme Court decision. Given the number of decisions to be scrutinized, however, the political process would exist in a state of permanent convulsion. As we know from history, it may take decades to accomplish the reversal of a single decision. In the meantime, the American public must live with it. The theory assumes, as one of my clerks put it, that in the long run none of us will be dead.

What is the point of all this scholarship -- I use the word generously -- devoted to replacing text and history with moral philosophy in constitutional adjudication? If you look at the new rights these theorists would create -- rights that lead to a society far more egalitarian, socially permissive, and morally relativistic than the one we have or any that the American electorate wants -- the answer is clear.

As John B. McArthur put it: "Noninterpretivists are eager to discard written systems of law, including that based on the Constitution, because written law is the barrier between law and politics. If the judicial process can be reduced to political choice, then the noninterprevists' views will be heard along with other views. When text-based methodologies are rejected, the Constitution, formerly the trump card in the political debate, can be excluded from discussion."

Why this desperation to abandon the historical Constitution? Because the political values of the non-originalist professors are far different not only from those of the Constitution but from those of the American people. The trick is to appropriate the veneration we feel for, and the obedience we give to, the actual Constitution for non-originalist political results. As Herbert Schlossberg said, the intellectual class "has found a vehicle for giving its values the force of law without bothering to take over the political authority of the state." Judges who behave as the non-originalists wish upset the Madisonian balance and impose the tyranny of the minority.

Why should we care what that lowing herd of independent thinkers, the legal academics, think and write in journals that, by and large, only they read. Because, as the very existence of this Society and this program shows, we believe that ideas have consequences. The teaching of non-originalism in the law schools means that generations of law students, many of whom will be coming onto the federal bench in the years ahead, have been trained to believe that judges may, indeed should, remake the Constitution. What used to be a shameful secret, and is now just beginning to be admitted, may one day be universally and proudly avowed as the judge's duty.

Forty years ago no one could have imagined the extent to which, in area after area, judges would claim ultimate power over our lives. If the non-originalists' teaching has its intended results, forty years on the nation may be governed by judges to a degree that seems unimaginable today.

This debate between originalism and non-originalism, long hidden in the academic world, is now going public. For that we must thank Justice Brennan and Attorney General Meese, who have made the question of original intent one of national discussion. Unfortunately, that discussion is too often guided by that most venerable maxim of constitutional analysis: "Magnopere interest cujus bovem confossum esse," or "It makes a big difference whose ox is gored." (If you don't like the translation, see my clerk.) It is essential that we keep bringing the debate back to the basic issue.

The central question in constitutional theory is said, the legitimacy of power. A judge is unelected, unaccountable, and unrepresentative, and has no source of legitimate power other than law. That means that any intelligible and legitimate theory of constitutional adjudication must rest on the idea that the Constitution is law -- not moral philosophy, not the values judges and professors hold dear -- but law. What does it mean to say that the words in a document are law? One thing it certainly means is that the words constrain judgment. They compel the obedience of judges every bit as much as they compel the obedience of legislators, executives, and citizens.

Constitutional guarantees not only have contents, they have contours that set limits. The fact that there are edges to the Constitution's guarantees means that the judge's legitimate authority has limits and that outside the designated areas democratic institutions govern.

There are those in the academic world who deny that the Constitution is law. A year or two ago I made this argument at a small conference and an eminent constitutional theorist said to me: "Your notion that the Constitution is law must rest upon some obscure philosophical principle with which I am not familiar." He was intelligent enough to see that if the Constitution is law, the non-originalists' party is over. Indeed it is.

If the Constitution is not law, what authorizes a judge to set at naught the judgment of the representatives of the American people? If the Constitution is not law, why is the judge's authority superior to that of the President, Congress, the armed forces, the departments and agencies, and that of everyone else in the nation? Why should anybody obey us? No answer exists.

The only way the Constitution can constrain judges is if the document is interpreted according to the intentions of those who ratified it. That is the way judges deal with all other forms of law; any other approach makes the judge the ultimate legislator.

The philosophy of original intention has been parodied as meaning that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless. Since we cannot know how the framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

There is a version that is adequate to the task. Dean John Hart Ely has described it:

> What distinguishes interpretivism [or originalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there -- because the situation is not likely to have been foreseen -- is generally common ground.

In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. Courts perform this function every day when they apply a statute, a contract, a will, or, indeed a Supreme Court opinion to a situation the framers of those documents did not foresee.

Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's free press clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the commerce clause to state regulations of interstate trucking.

Does this version of intentionalism mean that judges will invariably decide cases the way the framers would if they were here today? Of course not. But many cases will be decided that way and, at the very least, judges will confine themselves to the principles the framers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the framers intended it. That is better than any non-intentionalist theory can do. If it is not good enough, judicial review under the Constitution cannot be legitimate. I think it is good enough.

What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations this will be known, and revered, as "Bork's wave theory of law reform." It will be known and revered, that is, unless some wiseacre develops a quantum theory of law reform.

What I have discovered is that courts make law before they have any adequate theory of what they should be doing. They are forced by the urgencies of litigation to give answers before anyone knows the questions. Matters are made worse by the legal technique of reasoning by analogy. Only theory can tell you which characteristics of a situation are relevant so that you know which situations are analagous for your purposes. Without a theory, the judge will find false analogies and move the law in harmful directions.

It is at this point that the first wave of theorists appears in the law schools. It is their function to shoot the wounded and make matters worse. They start from the deformed notions judges have created and extrapolate them. A rich, erudite, and mindless literature grows up. The courts then begin to adopt the extrapolations. The future of the law begins to look extremely bleak.

But eventually, to some people, the fact that the law and its theorists make little sense begins to become apparent. The result is not only meetings of the Philadelphia Society and good dinners but a second wave of theory. The second-wave theorists return to first principles. They ask what the purpose of the law is, what legitimates the courts' behavior, and they begin to construct better theories of how courts should decide cases. Since the second-wave arguments are much better, they slowly come to dominate the intellectual world, the new ideas slowly percolate through to the courts, and the law is on the road to respectability.

These reflections were prompted by the history of antitrust law, which in its use of highly general provisions and its open texture, resembles much of the Constitution. At the beginning, courts were forced to decide cases for which neither they nor the economics profession were prepared. Law that, in retrospect, looks very odd began to grow up, law that was based on an inadequate understanding of the limits to the judge's role and on what can only be described as folk economics. Judicial economics is to economics as judicial writing is to a sonnet.

It was at this stage that the first wave of antitrust theorists hit. They wrote books and articles about the political and social values that should influence antitrust judges. They wrote books and articles about barriers to entry, leveraging monopoly power from one market to another, vertical foreclosure, oligopoly behavior, market failure, and much more, most of it arrant nonsense. But, in addition to achieving tenure and consulting fees, these theorists encouraged the courts to even greater policy fiascos. The law came to suppress as much competition as it preserved.

Then the second wave began to gather. This is not the time to tell the story of what has been called the Chicago school of antitrust. I need only say that a thoughtful and intensely rigorous economist, Aaron Director, was invited into Edward Levi's antitrust course. He began to question, and to train a few interested students to question, the shibboleths of antitrust. This was the germ not only of antitrust reform but of the law and economics movement.

When I first started at Yale I thought the situation of the law was hopeless, that the intellectual content of antitrust was corrupt beyond redemption and would be kept that way by political forces hostile to the free market. That accounts for the tone of much of my early writing -- sarcastic and confrontational. I thought if you couldn't win, at least you could cause pain on the way out.

The fact is I underestimated the power of ideas. That is a very natural error for a professor. If you sit in enough faculty meetings, you are very likely to underestimate the power of thought.

But the second wave Director's students started grew and achieved a theory of the goal of antitrust based on separation of powers concepts, and new, much more plausible views of business behavior and the law's proper role in the market. Scholarship was gradually transformed and so widely has its influence spread that it became possible for people like Bill Baxter, Jim Miller, and Dan Oliver to be appointed to head the Antitrust Division and the Federal Trade Commission and to survive politically in a way that would have been impossible even ten years previously. The battles are not over yet and I am far from claiming that the economic phenomena of the market are fully understood. But matters are immeasurably improved and antitrust has been recaptured for a free market rather than an interventionist, statist philosophy.

I suggest to you that we are witnessing the beginning of the second wave in constitutional theory. The courts addressed what they regarded as social problems after World War II and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from the academies, in sympathy with the courts politically, began to construct theories to justify what was happening. So was non-originalism born. That wave has become a tsunami and its intellectual and moral excesses are breathtaking. Like the first-wave theorists of antitrust, these theorists exhort the courts to unprecedented imperialistic adventures.

But the second wave is rising. When I first wrote on original intent in 1971 one of my colleagues at Yale told a young visiting professor not to bother with it because the position was utterly passe. And so, indeed it was. But it was more than passe; it was, I think, the future as well. On that side of the issue there are now, to name but a few, Judges Ralph Winter and Frank Easterbrook, Professor Henry Monaghan, and former professor, now Chief Justice of the High Court of American Samoa, Grover Rees. There are many more younger people, often associated with the Federalist Society, who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years, for the second wave to crest, but crest it will and it will sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea.

The struggle for possession of antitrust was crucial, because antitrust's ideas and symbolism go to the heart of capitalist, free-market ideology.

The intellectual struggle for possession of the ideas and symbolism of the Constitution is equally, or more, crucial, for constitutional theory goes to the heart of the American ideology of balanced democratic order and individual freedom.

We have come a long way into scholarly intellectual corruption and judicial imperialism. We have come a long way from the founders' vision of a Madisonian system. But we are going back to the future. Constitutional theory will return to Story's assumptions about original intent. But now we go back with a far more sophisticated, and hence a stronger and more durable, philosophy. That is the one, and the only, blessing for which we must thank our friends, the non-originalists.

Senator **Heflin**. Now, I do not know whether or not Judge Gordon is going to attend, but there was a letter he wrote, and I think it ought to be a part of the record. And if you have not seen that letter that he wrote to Senator Biden, I would hope that you would be furnished a copy sometime today, so that if you want to respond to any aspect of it you have a copy.

Judge **Bork**. Whose letter is it, Senator?

Senator **Heflin**. That is Judge Gordon.

Judge **Bork**. Oh, yes.

Senator **Heflin**. Have you seen a copy of the letter that he wrote to the committee?

Judge **Bork**. I have not read it yet, but I suggested yesterday that I would like to make a filing with this committee on that subject.

Senator **Heflin**. All right. It may well be that all of this is a misunderstanding. I happen to know Judge Gordon, and know that he is a very fine individual, and so it could be that he will testify, and then again he may not, but I do think that that letter ought to be a part of the record.

Senator **Kennedy**. Without objection.

[Aforementioned material follows:]

James F. Gordon
Senior United States District Judge
422 Spring Road, Unit 5
Louisville, Kentucky 40207

August 24, 1987

The Honorable Joseph Biden
United States Senator
Senate Office Building
Washington, D.C. 20510

Re: Judge Robert Bork

Dear Senator Biden:

You may, after reading this communication, have no interest in pursuing the same further; however, I feel duty bound to communicate the facts set forth herein for your consideration.

Perhaps I should first make clear what this letter is not. It is not a complaint against the legal position taken by Judge Bork in the litigation hereinafter discussed, for he had the perfect right to take any position in the matter legally he wished. Nor is this letter a complaint arising from Judge Bork's well known conservative legal views, for even I am sometimes referred to in the local media as the "crusty old conservative."

Rather, it is a story of actions taken by Judge Bork which I believe reflect serious flaws in his character. So serious, in my judgment, that they go to his basic honesty.

This is the story. On several occasions between 1972 and 1983, I was designated, pursuant to 28 U.S.C. 294(d), to sit on the United States Court of Appeals for the District of Columbia in order to render assistance to them in a more speedy disposition of their appellate caseload. One such occasion was in the spring of 1982 when I was designated to sit with, among others, Judges Roger Robb and Robert Bork, to hear, among other appeals, the important case of Guy Vander Jagt, et al. v. Thomas P. "Tip" O'Neill, Jr., et al., 699 F.2d 1166, cert. denied, 464 U.S. 823 (1983). Copy attached. I believe this was the first appeal Judge Bork heard after his appointment to the federal bench, for I recall that on the morning of March 19, 1982, I found him understandably lost in the hallway and directed him to the robing room of the Court.

After hearing the arguments in the Vander Jagt case, Judges Robb, Bork and I retired to the conference room to voice our individual beliefs as to what the Court's final holding should be. All three of us were in instant agreement that the relief be denied Appellants Vander Jagt. Judge Robb directed our attention to the fact that he had written the prior opinion of the D.C. Circuit in Riegle v. Federal Open Market Committee, 556 F.2d 873 (1981), which he, Judge Robb, considered to be the law of the Circuit. I agreed.

After discussion, it was agreed by all and ordered by Judge Robb that Judge Bork would write the unanimous opinion of the Court, denying relief to the Appellant Vander Jagt on the ground of "remedial discretion," relying on the Riegle case. We then turned our attention to the other appeals heard that morning, their decision and opinion writing assignments thereof.

As we were departing the room at the end of our conference, I recall Judge Bork alluding to the "lack of standing doctrine," to which both Robb and I, particularly Robb, took immediate vigorous exception and reiterated our views that the Riegle case controlled and was the opinion of the majority of the Court. There is no way Judge Bork could have misunderstood Robb's and my position.

Ten days later, I returned to Kentucky and heard nothing further from Judge Bork in the way of his proposed majority opinion in the Vander Jagt case. Months passed, and I began to become concerned lest the Court would not get its order released before the Congress adjourned December 31, 1982 when, though the issue would not become moot, it seemed to me it would be "undercut" in importance and result in somewhat unfair delay toward the Appellants Vander Jagt, who were basing the thrust of their case on the facts existing in the House of Representatives as it was constituted in that session.

Though I was concerned, I took no steps of inquiry, as that was Judge Robb's responsibility as the presiding Judge of our panel. I did not then know that Robb had taken senior status May 31, 1982, and Bork had become the ranking Judge of our panel.

Finally, around the first part of November, 1982, I received a proposed majority opinion from Judge Bork, denying relief to the Appellants on the narrow ground of "no standing." There was no note or cover letter, just the bare bones opinion. I was shocked, to say the least, at the tenor of the opinion; however, my first thought was that perhaps Judge Bork had, since my departure for Kentucky, changed Judge Robb's opinion as to the doctrine of "no standing."

Of course, Judge Bork was freely entitled to his individual judicial opinion as to "no standing" but he was not entitled to make it my opinion or Robb's opinion without our individual consents.

Recognizing that if, in fact, Bork had changed Robb's thinking, I would be required, in truth to my own beliefs, to write a sole concurring opinion denying relief to Appellants Vander Jagt on the ground of "remedial discretion," I concluded to telephone Judge Robb to ascertain the true situation. When I did so, I discovered Judge Robb to be hospitalized with what I was advised was a serious cancer condition and that he was unavailable for a telephone conversation with me. I then learned, for the first time, that Judge Robb had taken senior status. Immediately, I instructed my law clerk to contact Judge Robb's senior law clerk and instruct him or her in my name to visit Judge Robb if possible, and acquaint Judge Robb generally with Judge Bork's submitted proposed majority opinion and ascertain his (Robb's) reaction thereto.

Several days later I received a call from another Judge of the D.C. Circuit Court of Appeals advising me that Judge Robb was upset by developments in the Vander Jagt case and instructing me, on Judge Robb's behalf, to immediately prepare for the two of us a majority opinion on the basis of "remedial discretion" and to advise Judge Bork to that effect. I was admonished to accomplish this task so that our final order could be issued before the end of the calendar year 1982.

I accomplished this task and the final order was signed by Robb and me on December 23, 1982, and the opinions were issued February 4, 1983, being delayed by the process of preparing a majority opinion and circulating it to Judges Robb and Bork. Judge Bork wrote anew his individual concurring opinion on "no standing" after receiving the majority opinion on "remedial discretion."

In sum, I now recall (a) Judge Bork's actions by way of changing his original position, unknown to Judge Robb and me; (b) Bork's delay in preparing his so-called majority opinion until late in 1982; (c) Bork's failure to dispatch his opinion with some explanatory cover letter; (d) my absence as the junior Judge in Kentucky; (3) Judge Robb's illness from cancer, from which he subsequently died; (f) the creation of a "time of the essence" situation. These considerations give me grave reason to suspect that perhaps Judge Bork intended to have his narrow "no standing" view become the majority opinion of the Court and the law of the Circuit when, in fact, it was the minority opinion.

As a man who has been honored by appointment to and service as a Judge of the United States, I do not believe one who would resort to the actions toward his own colleagues and the majesty of the law as did Judge Bork in this instance, possesses those qualities of character, forthrightness and truthfulness necessary for those who would grace our highest Court.

Senator, you and your Committee may give this such weight as you wish, but I shall be forever convinced that there was a design and plan in Judge Bork's actions and activities. I apologize for the great length of this communication, but I could not conceive of any less lengthy way to give you the entire story for your consideration.

With highest personal respect and with every good wish, I remain,

Sincerely,

James F. Gordon
Senior United States
District Judge

JFG:gel

Senator **Heflin**. I have a question or two about court-stripping. As you know, section 2 of article III refers to the appellate jurisdiction of the United States Supreme Court and has the exceptions and regulations clause contained therein.

You have been interviewed in the Conservative Digest and may have made other statements pertaining to this. Would you set forth your views on whether or not, first, the Congress, by an act of Congress, can in effect strip the lower Federal courts of jurisdiction pertaining to a subject matter; and second, as to whether or not the Supreme Court can be stripped by an act of Congress of certain jurisdiction pertaining to such matters—for example, there have been efforts made in busing, prayer in school, and other things of this sort—if you would.

Judge **Bork**. Senator, I think it is conventional wisdom, and it has been so held in some cases whose names I cannot now recall, that Congress, since it need not have created the inferior federal courts, may deprive them of jurisdiction if it wishes—in which case, constitutional cases and so forth would start in the State court systems.

It has been argued that the exceptions clause of article III would allow Congress to take away jurisdiction from the Supreme Court in whole classes of cases; and as I recall, attempts have been made to do that in the abortion area, in the school prayer area, and so forth.

I have always taken the position that the exceptions clause was not designed for that purpose, and therefore cannot be used for that purpose.

It seems to me that had the framers and the ratifiers wanted a mechanism to curb a Supreme Court that was doing things they did not like—and return power to the Congress instead of to the courts. They would have written a clause that did that.

This clause, in fact, if you take away the jurisdiction of the Supreme Court, everything would go to the State court systems. And I do not think you can get the constitutional cases out of the State court systems. I do not think you can deprive the State court systems of constitutional cases, because the Constitution says that every State judge shall be bound by this Constitution.

Well, there are two reasons, then, why the exceptions clause was not intended for use in this fashion. One is that it does not return power to the democratic legislatures. The other is that it spreads the decision of the issue out into 50 different court systems—then it would have been 13 different court systems, but the principle is the same. That means the exceptions clause could not be used in the most important cases.

For example, if a challenge to a draft law were made, and Congress took away the jurisdiction of the Supreme Court to decide the constitutionality of a draft law, you would have 50 different systems deciding that. And you cannot have a system in which the draft is constitutional in Ohio and unconstitutional in Indiana, and so forth across the country.

All these reasons lead me to believe that that clause was never intended as a way of checking the Supreme Court when Congress thinks it has created an excess. So I think it is really a housekeeping clause, a clause to be used for making court jurisdiction more efficient, and making things run better—not a checking device.

Senator HEFLIN. I suppose you are familiar with the 1869 case of *Ex Parte McCardle,* which in effect somewhat ruled a little bit different—it may have been circumstances, and there may be distinctions between it. But would you address how that case and that case looked at from stare decisis has an influence or lack of influence on your opinion?

Judge BORK. *Ex Parte McCardle,* I think, is a somewhat ambiguous case, Senator. I think, if I recall correctly—I have not read it for a long time—I think there was a suggestion in there that perhaps this was not a flat rule. But in any event that case, as you and I know, involved a man who had been arrested, as I recall, by military authorities.

Senator HEFLIN. A Mississippi editor. He was arrested and being charged; it was a habeas corpus case.

Judge BORK. Yes, during the Reconstruction Era. And he petitioned for certiorari, and as I recall—not certiorari—a petition for habeas corpus, as you said, Senator—and I think the Supreme Court had actually heard argument in the case when Congress removed its jurisdiction over that kind of habeas corpus. And the Court held that it was without jurisdiction.

Now, later, I think the Court has said that there were other writs of habeas corpus that could be used so that Congress had not really effectively prevented the Court from hearing that kind of issue; it just took that particular case away. And then following *Ex Parte McCardle,* there was *U.S.* v. *Klein,* another somewhat ambiguous precedent, and they do not even cite *Ex Parte McCardle* in *U.S.* v. *Klein.* But that was a case in which Congress—I guess the Court of Claims or some court had ruled that if a Confederate whose property had been seized received a pardon, he could get the value of his property back—and Congress passed a statute saying that acceptance of a pardon was proof of guilt, and therefore you could not get your property back. And the Supreme Court said, as I recall, two things. One was that that denied the President's power to pardon, turned it into a condemnation rather than a pardon, and Congress could not constitutionally do that; and also that it prescribed a rule of decision for the courts, which Congress also could not do in a constitutional case.

Now, I do not know what the upshot of *Klein* and *McCardle* together is—and then, of course, there was *Glidden* v. *Zdanok,* a more recent case, in which I think it was Justice Harlan who referred to something about *McCardle* as the law, and Justice Douglas, in either a concurrence or a dissent, said he did not think a majority of today's Court would approve *McCardle.*

So I do not really know where the matter lies as a matter of precedent or stare decisis; I think it is somewhat confused.

Senator HEFLIN. In your history, of course, as a law professor, you had pretty well complete freedom to be provocative or to write for any other cause that you wanted to. And of course, as Solicitor General, your individual beliefs were somewhat restricted by the responsibilities of that office. And as an appeals judge, of course, some of your own personal views are restricted by certain decisions, and are narrowed to the issue that might be before you.

If you are confirmed and go on to the United States Supreme Court, while there will be some restrictions, you will be pretty well free to express your own beliefs as you see fit to do so on the issue that is before you; is that not true?

Judge BORK. Yes. I would not say I was free in the sense that I was free as a professor; not at all. But obviously, a Supreme Court is freer than a court of appeals is—although there is much latitude on the court of appeals, Senator. I do not mean to say that everything is mechanical.

Senator HEFLIN. One other question, just as a bit of levity. In reading about you and your past history, I understand that you would someday like to be a mystery-fiction writer, and that your detective about whom you would write would be known as "Dirk Dork"——

Judge BORK. When I was back at the law firm, another fellow and I who were working—we were in our twenties then—and when we were working late at night, we used to have these fantasies about this. And occasionally, sitting around the library late at night in the law firm, we would fantasize about this fictional character and the wild escapades we would put him through.

But I have not planned to write a novel about that character, Senator, for 35 years.

Senator HEFLIN. Well, I think the sales might be pretty good of "Dirk Dork" by Bob Bork. [Laughter.]

Judge BORK. I accept your suggestion, Senator; I will do it.

Senator HEFLIN. Mr. Chairman, I yield back my time.

Senator KENNEDY. The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Bork, yesterday, before my time ran out, you and I were talking about the subject of judicial review and the finality of Supreme Court decisions and the importance of having the Supreme Court as the final arbiter of constitutional issues.

You have spoken about this subject on a few occasions, and I would like to pursue the matter with what you have said on those occasions.

At a speech before the American Jewish Committee back on May 14th of 1982, you said that: "Judicial enforcement of the Constitution is a powerful national tradition"—this appears on page 7. "It is thinkable that we need never have developed that tradition and that we would be as free as we are, as free as other Western nations whose judges never acquired the power ours have acquired."

Then you go on to say that tradition and history make weighty claims, and we should not abandon it lightly. But the thrust of what you have said there is that it would be thinkable not to have judicial review.

And in two later speeches, one at UCLA on April 24th of 1985, you said, in considering the issue of interpretivism of original intent—and the term "interpretivism" means original intent as you use it, and "noninterpretivism," judges who do not go for original intent. You say, "The choice before us therefore is clear. It is not a choice between interpretivism and noninterpretivism, but rather, between interpretivism and the abandonment of judicial review under the Constitution."

And then you made a similar statement in 1987 on June 12th, at the American Studies Center, where you said: "But the more important point is that if originalism or interpretivism is impossible, then there can be no legitimacy to judicial review."

Now, my question is, if it is thinkable that we could proceed in this country without judicial review, and it is impossible not to have a doctrine where judges rely upon original intent, do you think that we have to abandon judicial review?

Judge **Bork**. Senator, there is simply no possibility of anybody abandoning judicial review at this stage in our history. It is an absolutely firmly-rooted tradition in our law, and it is justified by the way—you know, the First Congress that wrote the Judiciary Act of 1789 gave the Supreme Court jurisdiction when State courts ruled a federal statute unconstitutional under the Federal Constitution.

That pretty clearly indicates to me that the people who knew most about the Constitution—that is the First Congress, who knew a great deal about it—intended judicial review, because they did not tell the Supreme Court that it had to reverse any State court judgment holding a Federal statute unconstitutional under the Federal Constitution, nor did they say that State courts could not review constitutionality.

So that—I want to come along to my speeches here for a moment—so that I think judicial review was intended from the beginning, and for that reason alone, I would not abandon it.

Now, the talk before the American Jewish Committee—when I said it is thinkable we need not have started with judicial review, all I meant by that is we have other democratic free societies like England, France and so forth, which have a long history of freedom without judicial review. We have it. We are not going to give it up. Nobody is going to cut back on it.

At the UCLA talk, I was meeting the charge of people who say that, oh, discerning anything called an original understanding of the Constitution is impossible.

Well, if it is impossible to know what the Constitution means, then I do not know where judges get their power to override democratic decisions, because I have always thought that it is the judge's job to interpret the law and not to make it; and if you cannot understand the Constitution—which I think is a ridiculous claim; I think you can understand the Constitution—but if you could not, then I do not know what would authorize a judge to make law. That is all I was saying.

Senator **Specter**. Well, but if you find that it is impossible to find original intent, can you still have judicial review—because your speeches, at least, are pretty categorical in saying——

Judge **Bork**. Oh, yes.

Senator **Specter** [continuing]. That if you do not have original intent, you cannot have judicial review.

Now, you and I both agree—and I think this is rock bottom—that constitutional law in this country mandates judicial review.

Judge **Bork**. Yes.

Senator **Specter**. But in the context where a presidential candidate is talking about judicial review being inappropriate, unnecessary, and in the context of an Attorney General's speech last year which raises a suggestion, although not perfectly clear, as we discussed yesterday, that the Supreme Court may not be the last word, but the executive and the Congress has the authority to interpret the Constitution, and then you look to some of your speeches, where you say that in the absence of applying original intent, you cannot have judicial review—I just want to be sure that you stand firmly for judicial review whether or not you have a common understanding of original intent.

Judge BORK. Well, I stand firmly for judicial review. I have never questioned judicial review. I have always thought it was an important part of our culture and our tradition and our law. And in America, it is an important part of our freedom. Perhaps we require judicial review more than England and France did, because we have a much more pluralistic society and many more minorities to take care of.

But let me say one thing, Senator. What I mean by saying that if you cannot understand—if a judge sits down and he cannot understand what the Constitution is driving at, he has no idea, then I do not know what he applies. And if his job is to interpret the law and not to make it, I do not know what he does. But I think from my point of view, I was just meeting those who say you cannot understand the Constitution. I think that is dead wrong. I think you can understand the Constitution.

Senator SPECTER. Well, but suppose you came to a point where you said that determining original intent is impossible. Would it follow, then, that you could not have judicial review in this country?

Judge BORK. I think you would require a consensus of the people that they wanted judges to rule, even though the judges had no law.

Senator SPECTER. There is pretty much that consensus by the tradition of our Court, isn't there?

Judge BORK. I do not think so, Senator. I think the American people want judges to interpret the law and not to make it. I think that is pretty clear.

Senator SPECTER. Well, I agree with you about that. But the interpretation of the law does not depend upon an understanding of original intent.

Judge BORK. Well, when I say original intent—I understand, you are making a good point, Senator—but when I say original intent, what I mean is really original understanding, because law is a public act, and it is really what was understood generally at the time the Constitution was framed, not the subjective intentions of James Madison.

And when I say original understanding, when I sit down and look at the Bill of Rights, and it says "freedom of the press," right away, I know what they are driving at. I may not know exactly what they mean, but I know what they are driving at. I know the central freedom, or the core of the freedom, that they are driving at. When they say "no unreasonable searches or seizures," not only from the language but from the history of the British and the way they behaved in this country with their searches and seizures and general warrants, I know what they are driving at.

So I do not think there is any difficulty in understanding the basic principles of the powers granted to Congress or of the freedoms preserved in the Bill of Rights and the Civil War Amendments.

Senator **Specter**. Well, Judge Bork, this theme has run through the hearing and I think is a central theme, and I think there is some difference of opinion as to whether you can really find original intent, whether the tradition of U.S. constitutional interpretation looks to specific constitutional rights as, for example, privacy, which we have talked about so often, or whether in a more generalized context, Justices who advocate restraint, like Frankfurter, talk about values rooted in the conscience and tradition of the people, and that the history of U.S. constitutional jurisprudence, as I see it, has in many, many cases not been grounded on original intent—sometimes, yes, but frequently not.

And it would be my thought that as the Court goes forward, and that if you are confirmed, that there would be more flexibility in the application of constitutional law. And I look to your own writings on the question of whether you can really find original intent.

In 1968, in the article that you have referred to a number of times in Fortune Magazine, where you set forth a theory of constitutional law, you had written this at page 141: "The text of the Constitution, as anyone experienced with words might expect, is least precise where it is the most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them."

So that, from that statement, it seems to me a fair reading is that it is pretty hard to find intent of the framers.

Then, you go on on the same page: "History can be of considerable help, but it tells much too little about the specific intentions of the men who framed, adopted and ratified the great clauses. The record is incomplete. The men involved often had vague or even conflicting intentions."

In the often-quoted Indiana Law Review article, you talk at page 22 about the first amendment, and you say: "The framers seemed to have no coherent theory of free speech." Then, you say: "The first amendment, like the rest of the Bill of Rights, appears to have been a hastily-drafted document upon which little thought was extended."

Then, at page 26, you say: "The framers of the first amendment probably had no clear view of that proposition."

And in your later speeches, you discuss repetitively the question about it is really the ratifiers as opposed to the framers and the conflicting views.

Now, in that context, where I think you are exactly right in what you have written and said, because of the great difficulty of finding intent, how much validity is there in searching for original intent as a necessary prerequisite for a constitutional decision, without which the Court has no legitimacy?

Judge **Bork**. Well, I think that is right, Senator; there is a lot of difficulty. But let me discuss this. Unlike the Ten Commandments, the Constitution and the Bill of Rights and the Commandments have a similar—the Bill of Rights and the Ten Commandments have a similar generality, but we are closer in history, and we have a lot of evidence about the Bill of Rights now.

The remark I made in Indiana, which you have just quoted, I took from Leonard Levy's book on the first amendment. That book is now about 30 years old; I think he has found further evidence, and other people have found further evidence since then.

But we do have, in the case of the Constitution—I referred to the fact that we cannot know the framers' specific intentions; I think you read that in one of those pieces, that we cannot know their specific intentions, and indeed we cannot. And indeed, their specific intentions would not help us a great deal because our task is to apply their public understanding of what they were protecting to modern circumstances as to which they could have no specific intentions.

But when I talk about the original understanding, what a judge needs from the Constitution is a major premise—what is it he is supposed to protect—and then he has to protect it.

Now, we have the text. For example, the first amendment tells us that it deals with religion, no establishment, free exercise. Right away we know that we are in an area, so that we know it is not just a free-floating liberty; we know what they are talking about. They are talking about not establishing religion, and they are talking about free exercise of religion.

Then they say Congress shall make no law abridging the freedom of speech or of the press. So I know now that I am talking about speech and press, and the freedom of those two, so I know that I am not talking about a generalized liberty; I am talking about a freedom of the press.

Now, when you want to flesh that out, for example, you have a lot of contemporary debate about what was going on. You have, in the case of the main body of the Constitution, the Federalist Papers, the Anti-Federalist Papers, and many debates. In the case of the Bill of Rights, we are a little short on debates in Congress, but you have some contemporary discussion; you have actions by the early Congresses which shows what they understood themselves to have proposed; and you have actions by the early courts, which show what they understood to have been done, and some of those courts for people who were at the convention or at various ratifying conventions.

And then you have, for example, in the case of the free speech clause, or the free press clause, episodes of early history, such as the passage of the Alien and Sedition Acts and the terrible controversy that raged around those, so that we now understand that the Alien and Sedition Acts were in fact unconstitutional statutes, which, in all this way, we begin to get a principle whose contours are not clearcut. That is granted. But at least we understand the basic freedom they wanted to preserve.

Now, judges who look for original understanding and look at the same evidence and think as hard as they can will, in the borderline cases, often come out differently. I do not mean to say that original understanding gives anybody a mechanical way to approach a problem. It does not; but it gives them a pretty firm starting point.

Senator **Specter**. Judge Bork, as you define it, it does not seem to me that original intent provides any more specificity than the Frankfurter definition or the Cardozo definition of rooted in the tradition and history of our society.

When you talk about fundamental values—and you have written on surveillance and electronic surveillance, which the Founding Fathers could not have anticipated; similarly, they could not have anticipated birth control devices. You talk about the concept of privacy, it runs through the Constitution, in a number of amendments as you described them yesterday. Why is the doctrine of original intent sacrosanct in terms of the great difficulty of applying it with specificity, as you say—because you point out that their specific intent is not clearcut.

Does that definition really advance the definition of constitutional values more so than Cardozo and the nature of the judicial process?

Judge **Bork**. Well, Senator, you are making a very powerful argument from a very strong tradition. I hope—I think what I am saying also comes from a very strong tradition in our constitutional law, going back to Joseph Story and the first Marshall Court.

Let me say this. If the concept of ordered liberty, which Cardozo and others used, turned out to be a continuing tradition on the Supreme Court—and I do not know where it stands now—and if it had a defined category so that judges were not free to make law at will, then I would not have so much difficulty with it.

But as you know, Justice Black, who objected strongly to what he called the natural law/due process version of making law, in fact incorporated, tried to get and succeeded, various parts of the Bill of Rights, now almost all of the Bill of Rights, incorporated against the States through the 14th amendment, and in large part his motive for doing that, as he said, was to prevent judges from roaming at will. He thought if you could incorporate the Bill of Rights against the States, then judges would apply the prohibition to the Bill of Rights and secure liberty, but they would not use this what he called natural law method of making up rights.

And on that point, Senator, reasonable men can differ. Strong arguments can be made on both sides. I adhere to my view that I want judges to be confined by the law, not make it up. There are others who disagree with that, but as I said, I believe in interpreting it, not creating it.

Senator **Specter**. Well, Judge Bork, it is true that the specific provisions of the Bill of Rights were taken into the due process clause of the 14th amendment. But that was not the sole basis used by the Court. And before the Court came to the incorporation doctrine, there were many wrangles. And the first time the Supreme Court interfered, or took jurisdiction of and changed, a State criminal proceeding was the very famous case of *Brown* v. *Mississippi*. And if you read through that case, a 1936 opinion of the Supreme Court of the United States, it is an abject horror story—and I am not going to go through the facts. Sufficient to quote Chief Justices Hughes' characterization of it as a medieval account as to what was done to the black defendant in that case by the law enforcement authorities of Mississippi.

And the Court then, for the first time, strikes down a State criminal conviction on the ground that it offends principles of justice rooted in the tradition and conscience of our people, so as to be ranked as fundamental. And that got it started.

And then Justice Black comes along in the case of *Ashcraft* v. *Tennessee,* which involves really grilling. And as I was rethinking *Ashcraft* v. *Tennessee*, I thought you might have standing, Judge Bork, to object to what has been going on here. Ashcraft was questioned for 36 hours by half a dozen law enforcement officials. You have been questioned for longer than that, by more.

But *Ashcraft* is a Black opinion, and it is pretty hard sometimes to separate procedural due process from substantive due process. And Black strikes down the conviction on grounds of an involuntary confession.

But perhaps it is sufficient, Judge Bork, if you say that the argument is a powerful argument from strong tradition, because part of our process here, in our checks and balance system—this is the only time that anyone gets to talk to a potential Supreme Court nominee or to a federal judge, and it is a great thing in our system, and it is the strength and rockbed, life tenure. And I think of all the traditions in our country, that is the strongest; that has been the backbone freedom in this country for 200 years.

So that if you are confirmed, we will never have a chance to talk to you again——

Judge BORK. Well, you can talk to me, Senator; it may be not under these lights.

Senator SPECTER. Well, it will not be under these lights, and it will not be quite this way. And this is, I think, part of the beauty of the system of checks and balances.

I had the occasion on Thursday, day before yesterday, to join the President in going to Philadelphia and then to come back here in the afternoon and participate in this proceeding, and the President had some very good things to say about you, Judge Bork. And it is the beauty of the system where the Court has the last word, and the President makes the appointments, and you have to clear the Senate. So this is an experience which is a very unique one.

You and I were talking a few moments ago, and I think that this will set a pattern for the future, and a very good one, for the benefit of the country, because this is a very different confirmation proceeding than we had last year with Justice Rehnquist for Chief and for Judge Scalia for Justice and for Justice O'Connor in 1981. Many people do not realize that these proceedings where nominees appear before Senators are of relatively recent duration, starting with Justice Frankfurter.

But we have gone farther in this line, I think, than at any time in the past. And it may be that there will be some imprint on your thinking if you are confirmed about what may be a strong argument—a powerful argument, as you put—from a strong tradition. That is part of what the process is and what I would hope would be accomplished.

And when I look at the question of original intent, I think it is fine in some cases where you can find it, and I think if you can find it, you ought to apply it. But I think so much of the time you cannot find it, and that you ought not be hidebound by it, and that Frankfurter is right when he talks about the contours of the law being reasonably specific and not really subjective, and you do not have to have an articulation of privacy to find it as a fundamental right in the Constitution to apply it, if the facts of the case require it in accordance with the needs of the Nation, which is your language from a few days ago as you talked about the commerce clause.

Judge **Bork**. Yes.

Senator **Specter**. If you look beyond the issue of original intent to the issue of legislative intent, there is a very interesting comment by Justice Scalia in the case of *Edwards* v. *Aguilar*, where he says at page 27 of the opinion—and he is talking about legislative intent—"Discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." Going on to page 28, he says, "To look for the sole purpose of even a single legislator is probably to look for something that does not exist."

And legislative intent in the statutes is very much akin to original intent of the drafters or of the ratifiers, and I am sure that every one of my colleagues here today would agree that if you seek legislative intent, it is nebulous and really nonexistent as you try to carve it out for an entire body of 100 Senators or 435 Congressmen.

So the question arises to what extent can you really bottom your opinions on what the Congress intended.

Judge **Bork**. Well, in the statute, Senator, I have always had to—and I did not think I did too badly at getting at what Congress is driving at——

Senator **Specter**. How do you know?

Judge **Bork**. Well, sometimes Congress will tell you if they do not think you got it right.

Senator **Specter**. We say very little on those subjects. Our reply power, our timing, is almost nonexistent. You might get a call—well, we would not call you up, either——

Judge **Bork**. I meant you might amend the statute so that we got it right.

Senator **Specter**. Well, you can ask Senator Byrd about how difficult it is to pass anything through the Congress in terms of responding when something occurs. We are very good at inaction. You cannot tell anything by what we do not do.

Judge **Bork**. All right. I think Justice Scalia—and he is a friend of mine, so he will not take this amiss—I think he was taking an easy target when he talked about subjective intent.

I do not think—that is right—I cannot tell what the subjective intent of various people is, but I can tell from what they wrote and what they said what the general understanding was. And in the case of the Constitution, we have a lot of historical records which are constantly being improved—I mean, the research into them is constantly being improved—to show what the public understanding of the Constitution was.

Senator **Hatch**. Would the Senator yield for a comment on that?

Senator **Specter**. No, Senator Hatch. I would prefer to finish my questioning. I have limited time, and there will be time later, and I am right in the middle of a train of thought here.

Judge Bork, moving to the issue of legislative intent in the antitrust field, a subject which I had broached with you yesterday, in your book on antitrust, turning to page 412, you say this: "Congress as a whole is institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of a rational antitrust policy requires."

Now, if that is so, Judge Bork—and you may be entirely right—where does that leave the courts on enforcing Congressional intent?

Judge **Bork**. Let me just read the next sentence, so I get off the hook here a little bit.

Senator **Specter**. Sure.

Judge **Bork**. No group of that size, the size of Congress, could accomplish the task. I mean, large bodies simply do not reason coherently together. There are just too many people to sit down and draft a detailed antitrust law according to the teachings of microeconomics.

Where it leaves me, Senator, is this. The antitrust laws are remarkable statutes, and as the Supreme Court has said, they have the generality of provisions of the Constitution. The Sherman Act, according to John Sherman, the Senator whose Act it really was and who did most of the explanation of it, he gave examples of things that were to be illegal, and he said for the rest, it was left to the courts to evolve—to protect competition from case to case, as they saw it, as they understood the facts and the competition.

The later antitrust statutes, the Clayton Act in particular, directs the courts to deal with certain kinds of events—mergers and so forth—which may tend toward monopoly or tend toward a lessening of competition. That is really a delegation to courts to use their best understanding of what preserves competition and what harms competition. And that is the kind of principle that Congress is perfectly capable of thinking of and enacting, and leaving it to the courts to protect competition.

Senator **Specter**. But Judge Bork, in your writings, you complain about searching for congressional intent, and you refer to one Congressman who wants to have small businesses and not conglomerates or concentration, in order to avoid slum housing in big cities. And with all due respect, you ridicule that sort of a legislative objective, and you say that, given the vagaries of what Congress has intended or what some Congressmen have spoken about in the antitrust field, it is too vague for judicial enforcement.

Judge **Bork**. Senator, I think I did say that, but I think I was making a somewhat different point. There are—and this goes back to the main theme of my view of judging—there are commentators in the field of antitrust who want courts, through the antitrust laws, to impose or implement multiple values, often having nothing to do with competition. And I was making the point—and then they point to somebody who said in the legislative history of the Clayton Act, Section 7, who talked about the fact that where you have big business, you have more smog and a higher lung cancer rate, or something of that sort—and I was ridiculing the idea that a judge should take that and start measuring smog and lung cancer rates to decide whether or not a merger was legal, because the statute—a judge cannot—that is just a complete delegation to the judge to make any social policy. What a judge can do is look at the words of the statute, which say competition and monopoly; promote one, avoid the other.

Senator SPECTER. But Judge Bork, if the Congress is giving you multiple values, and then you say that they have nothing to do with competition, you are the judge; you are supposed to carry out, under your theory, the legislature's intent. This is Madisonian majoritarianism. Who are you to say that these multiple values are not worthwhile?

Judge BORK. Oh, I did not say that, Senator. I——

Senator SPECTER. Well, but you are saying they have nothing to do with competition.

Judge BORK. Well, if you look at the legislative history, Senator, as I have for my sins in these statutes, no Congressman ever says preserve competition, but if there is a conflict between that and smog, or a conflict between that and something else, make a tradeoff between them; let a little injury to competition occur in order to reduce smog. No Congressman ever says a thing like that.

What they do is say, "We are passing a statute to improve competition," and then everybody gets up and makes a talk about all the other good things it will do. But those are side effects, I think, of the statute to preserve competition, not independent values that a judge is supposed to weigh.

Senator SPECTER. Well, Judge Bork, the thrust that I read from your writing in the antitrust field is a conclusion of not a very—"high regard" would be the wrong word, for the congressional intent—but not a kind of dedication to carrying out congressional intent which you have written about in other fields.

Let me refer you to the section on price discrimination, page 382. You start off here: "The genesis of the Robinson-Patman Act is an oft-told tale. Enacted in 1936, the statute was a child of the Depression, as was so much pernicious economic regulation. Robinson-Patman shared with much of that regulation, notably the National Industrial Recovery Act, the premise that free markets were rife with unfair and anticompetitive practice which threatened competition, small businesses and consumers."

And then you go on, on the next page, in the first full paragraph: "Antitrust concerned with vertical mergers is mistaken."

Judge BORK. I am sorry, Senator. Where is that?

Senator SPECTER. This goes back to page 220. It is my next page; it is not your next page.

Judge BORK. Okay.

Senator SPECTER. "Antitrust concerned with vertical mergers is mistaken. Vertical mergers are means of creating efficiency, not of injuring competition."

Let me put these two questions in one, because I am going to run out of time here, notwithstanding how much time it appears to be.

Let me start with the first question. When you call an act "pernicious," does that mean it is unconstitutional, by the way?

Judge BORK. No, not at all. There are a lot of——

Senator SPECTER. How do you enforce a pernicious act, Judge Bork?

Judge BORK. You have to enforce it. You may not like it, but you have got to enforce it.

Senator SPECTER. Well, how do you do it on the curved lines? How do you do it on the complex factual issues which are presented to you where, as the finder of fact, you have the discretion to find the facts, and you could arguably find them in a variety of ways so that an appellate court would not reverse you.

Does it color your thinking to find set of facts A, so that you do not have to apply this pernicious law?

Judge **Bork**. Well, Senator, I do not know. I have never been a trial judge, and I hope not. If I were a trial judge, I would try to find the facts as best I could from the contentions of the parties.

I think, by the way, Senator, it should be said that the scholarly opinion on all sides of the antitrust issue is that the Robinson-Patman Act is a peculiarly pernicious statute.

Senator **Specter**. I do not care, Judge Bork. The Congress passed it——

Judge **Bork**. Oh, I agree with that.

Senator **Specter** [continuing]. And you say—well, I do care, of course—but for purposes of carrying out your approach to the law, legislative acts govern, Madisonian majoritarianism: that is what is to be enforced, unless there is a specific constitutional provision to strike it down. Absent that, no legitimacy in the Court.

Judge **Bork**. Right.

Senator **Specter**. You have got a pernicious statute. What do you do with it?

Judge **Bork**. I apply it——

Senator **Specter**. On the subject of vertical mergers, "are means of creating efficiency, not of injuring competition."

"Congress prohibits vertical mergers," you say a fair reading of the statute says. What do you do?

Judge **Bork**. I strike down the vertical merger if a fair reading of the statute says that.

I am not out there as a judge to make the economy wonderful. I am out there to follow Congress' intentions. And when Congress has delegated to a judge, to the courts, the task of deciding when competition is threatened and when it is not, you do the best you can.

On the other hand, if Congress says "This thing threatens competition; strike it down," I have to do that, even if I do not think it threatens competition.

Senator **Specter**. And how do you do that when Congress as a whole is institutionally incapable of a sustained, rigorous and consistently thought out fashioning of a rational antitrust policy?

Judge **Bork**. Well, I was talking about whether Congress could write a detailed set of antitrust regulations which made economic sense, and that would require a debate of economists for about a year, and I do not think the Congress has the time and has too many people to have that kind of a debate. But Congress is certainly capable of adopting the general principle of preserving competition and giving some illustrations of what they mean.

Senator **Specter**. Judge Bork, the New York Times, on March 8th of 1983, wrote this about you: "Last week, at a day-long workshop sponsored by the Conference Board, a business research organization, Judge Bork, who sits on the U.S. Court of Appeals for the District of Columbia, made it plain that he felt free to apply his economic theories, whatever the law says. Take his view on the Robinson-Patman Act, which prohibits price discrimination." And there is a quote here, presumably your statement. " 'If the new economics is right, there is never a case in which price discrimination injures competition,' Judge Bork said. 'In the Robinson-Patman Act, when Congress said it wanted to forbid price discrimination to protect competition, they said it with a wink. I do not think it is a judge's job to enforce winks.' "

I think the first question must be: Did you say that?

Judge **Bork**. No. I think I wrote a letter to them, because I was—I think I did—I was quite furious about that statement that I felt free to ignore that law and enforce my economics. And when I saw that, I was quite angry.

Senator **Specter**. Did they publish your letter?

Judge **Bork**. I do not know. Does anybody know if I have a letter? We do not know.

Senator **Specter**. Are you sure you wrote a letter?

Judge **Bork**. I either did that or called somebody, because I was——

Senator **Specter**. Whom did you call?

Judge **Bork**. I do not know. It might have been Betty Bach, who ran the conference, or it might have been the reporter.

But in any event, I have never——

Senator **Specter**. But you are not sure?

Judge **Bork**. Well, I will have to check it. But the fact is——

Senator **Specter**. I would like to know if you made a contemporaneous denial of that.

Judge **Bork**. All right. Well, I may even be able to find a transcript of the speech, because that is the reporter's interpretation of what I said.

Well, I do have here a transcript of the speech—I guess—except I do not think this is——

Senator **Specter**. Judge Bork, I did not see that speech among those you provided to the committee.

Judge **Bork**. Well, I did not see it before myself, either. Maybe somebody found it with a nexis search or something. We will provide it to you.

I do not want to go through it now. It would take the rest of your time if I did. But I have never taken the position that I am free to apply my economics no matter what the law says.

The reference to the "wink"—oh, here is a letter.

Senator **Specter**. Good.

Judge **Bork**. "To the Editor: The reporting of my remarks at the Conference Board seriously misrepresents my views of my obligation as a Judge. I most definitely did not make it 'plain that I felt free to apply my economic theories whatever the antitrust law says.' I stated emphatically that as a lower court judge, I have an absolute duty to follow the law as laid down by the Supreme Court. At most, a lower court judge can give us reasons for doubting the usefulness of a rule. That practice is both common and beneficial * * *," and so forth.

And I do not want to read the whole letter, because it goes on for a while, but I will provide you that, too.

But the reference to the "wink" is one I have made before, and the reason I said that—and I think I said it in the book—I was once discussing what struck me as a peculiarly outrageous Robinson-Patman Act decision by the Supreme Court in which they in effect made competition impossible in a local market—and a decision that everybody has criticized. And I was discussing it with a young man who had just left a clerkship on the Supreme Court, and he said, oh, the Justice thinks sure, the Act says competition, but Congress passed it with a wink; they did not mean competition, they meant protect competitors—protect people from competition.

Well, I thought that was a terrible judicial role. I think you do not enforce a congressional "wink" because Congress should pass its statutes so the people know what is being passed——

Senator SPECTER. Judge Bork, what is a "congressional wink"?

Judge BORK. This Justice apparently thought that Congress said competition, but he had some reason to believe when they said it, they did not mean it.

Senator SPECTER. You are saying some Supreme Court Justice said he thought that Congress passed something with a wink?

Judge BORK. That is what I heard.

Senator SPECTER. Do you think Congress passes laws with a wink?

Judge BORK. No, no, I do not think so. And I think furthermore that if a Justice thinks that, he ought not to accept the wink; he ought to read the statute and apply the statute that they passed. That is what I was saying in this thing. I said it in the book.

Senator SPECTER. So you were misquoted on the article which appeared in the Times?

Judge BORK. I never—Senator Specter, not only is that inconsistent with my entire philosophy, but I would never be unintelligent enough to run around, saying I am free, I do not have to apply the law.

I think there are people out there who are worried about what they call the "Chicago school of economics," and there are people in the "Chicago school of economics"—it is not a Chicago school; it is just basic price theory—there are people who think that economics governs everything, or almost everything. I am not one of them, and I——

Senator SPECTER. Were you ever?

Judge BORK. No. I used——

Senator SPECTER. Close?

Judge BORK. No. I used to think that economics governed marketplaces, but I used to think that by analogy, you could take sort of a libertarian position with respect to social processes, too, and governmental processes. The analogy, I have given up. I do not think it makes any sense.

Senator SPECTER. Well, I have seen some of your writings on that, and perhaps we will have time to get to it. It is a fascinating field.

Judge Bork, I do not disagree with your interpretation of antitrust law, and I do not intend to pursue it any further. The limited point that I seek to make here on the references to the antitrust laws is the difficulty of finding congressional intent and the wide range of judicial discretion which necessarily applies, and the practical effect of a judge's role is to apply that discretion and not to be able to really find what legislators' intend, and to try and make some sense out of what a judge may conclude to be a pernicious law, and to try to make some sense out of conflicting legislators' statements in the Congressional Record; and that a judge's role goes much beyond interstitial legislation, as the term is used, to really try to pull the whole picture together; and that that is the tradition of the law, and I think appropriately so. And I think your antitrust writings make a lot of sense, and I think that that is what judges have to do.

But I do think that as you apply that beyond the antitrust field, into other legislative lines and into constitutional lines, there is a broader traditional role of the judge in applying values to the needs of the nation against, again, your word, beyond what you can find in some specific intent.

So let me move on to the subject of federalism, which you have written about extensively and spoken about. This involves the question of federalism as it relates to a more central topic which has been a very important one in these hearings, and that is your statement that the time has passed for upsetting certain constitutional doctrines, which are too deeply embedded in the fabric of the Nation to change those doctrines.

I think that is a very important point, Judge Bork, because it relates to your own interpretation of original intent, and on some lines, where you think that even though original intent was followed, as you gave the example of the commerce clause, it is too late, and it is part of your judicial philosophy which you articulate on stare decisis, which may apply to other cases, and you enumerated a string of values and criteria which would not upset established cases, trying to give some regard for expectation, stability in the law, and so forth, as you have testified to.

A statement that you made in a speech in 1986, last year, raises some question about that, and I just want to ask you that. This is a speech on federalism which was delivered at the Attorney General's Conference in Williamsburg January 14th to 26th, 1986, and I am referring now to page 10. You say this: "The protection of federalism from national legislative powers is more difficult. There are so many laws on the books, so many Supreme Court decisions upholding them, and the federal government is involved in so many areas, that a new, sharp-edged definition of national powers, such as commerce, taxing and spending, would create chaos politically, economically and socially." And I will leave some out here—it does not apply to the meaning.

Then you go on to say: "Does it mean that we must give up judicial protection of federalism? It was this thought that for a time led me to think that we had passed the point of no return. I am no longer so sure, though. I am no longer so sure. So what I am about to say is to be understood as tentative and indeed, speculative." Then I omit some material, again not germane.

Then you say: "If federalism is to receive judicial protection, I think courts will have to admit that bright line tests are unavailable; that prior cases are irreconcilable, and that decisions will turn on such matters as the degree of federal intrusiveness and the vitality of States as policymakers." Then I leave some out.

"Would this be unacceptable judicial activism? Perhaps not. There is nothing wrong with judges being active in the defense of real constitutional principles." Close quotes.

Now, my question is this. If you go to rockbed, as you articulate it, in the commerce power—and you have written about this repetitively—and if you are not so sure last year that you may not be able to revitalize judicial activism which, as you say, is appropriate, and I agree with you, in defense of the Constitution and articulation of constitutional principles, my questions are, first, do you believe that it is now not too late to revive the questions on the commerce clause and federalism? And, if it is not too late there, perhaps it is not too late anywhere, in any of the cases, to go back, take another look, and change the Court interpretations of the Constitution.

Judge **Bork**. That is a good question, Senator, but none of this suggests rolling back any commerce clause decisions. And the sentence, right after you say, "The decisions will turn on such matters as the degree of federal intrusiveness and the vitality of States as policymakers, perhaps a presumption can be established against federal invasions of areas traditionally reserved to the States," what I was thinking about is, you know, we have not yet said that the commerce clause could be used to enact a national law of divorce, or to enact—maybe it can—but there are certain local, moral matters—divorce, marriage and so forth—that it has been traditionally thought simply was not the business of the federal government.

Now, that would be a considerable extension of anywhere that Congress has gone yet with the commerce clause. And as I said, this was tentative, but it may be that there are some local matters so traditionally reserved to the States that the commerce clause should not go there.

But I had no intention of rolling anything back that has been done.

Senator **Specter**. Well, Judge Bork, the thing that concerns me about your statement there, and the reason I raise the question, is that you had written extensively and spoken extensively prior to that 1986 speech about you cannot unscramble the eggs on the commerce clause; it is just too late.

Judge **Bork**. You cannot.

Senator **Specter**. But here, you come up in 1986, and you say you are not so sure. And I just want to be sure that you are sure.

Judge **Bork**. I am sure, Senator.

Senator **Specter**. Okay.

Judge **Bork**. But I am sure of this. I would not for a moment go back and reverse the cases that give Congress the power that it has exercised. There may be some things, like marriage law or divorce law or something of that sort. Justice Holmes said in his dissent in *Northern Securities* that of course the Congress could not make laws about marriage and divorce under the commerce power. I do not know if they can now or not. But I was speculating that there might be a presumption against reaching into that area. I have no idea. But I am not going to undo anything that has been done.

Senator **Specter**. Judge Bork, I now want to move to the question of the executive/legislative conflict. This is a subject that Senator Byrd questioned you about extensively yesterday, and I had intended to ask you about *Barnes* v. *Kline* and the consideration that we ought to renounce outright the whole notion of congressional standing, but that has been done in some detail, so I will move on.

But at the outset, I want to raise a question that troubles me as to the appropriate degree of deference which the Senate should give to a Presidential nominee. And this is a matter, like judicial philosophy, which is widely debated. And as I said in my opening statement, you had made the comment to me when we sat down early on that you thought judicial philosophy was appropriate for discussion, and you have certainly proved it in the course of the past five days.

There has been a general thought that there is a certain deference owed to the President under our advise and consent function, and of course, each Senator has to decide for himself as to what that means. And a little different consideration has crossed my mind on the advise and consent function as it relates to legislative/executive conflicts, because here we are—the President nominates, the Senate confirms, and if the Court, and if the judicial nominee has a position which is likely to upset the balance between article I powers, the Congress—we still are article I—and article II powers, the executive, then perhaps that kind of deference, if any exists, is not owed. And that is a theoretical issue which I have not found any writing on.

I would invite any observation you would care to make, but I would understand if you would not care to make an observation, because it may really be a question solely for the Senate. But if you care to make an observation, I would be pleased to hear it.

Judge **Bork**. Well, I do not know that I have any, or could properly give any advice to the Senate or to a Senator on that subject. However, I think my case is not one in which there is any unusual view of the relationships between the President and the Congress.

Senator **Specter**. So we do not have to deal with the law on the subject, because the facts do not fit the doctrine?

Judge **Bork**. I think that is right, Senator.

Senator **Specter**. Okay. Let us go to the facts, then.

Judge **Bork**. All right.

Senator **Specter**. The first question is the War Powers Act. [Laughter.]

Judge **Bork**. I am sighing, because I cannot find that paper.

Senator **Specter**. You can have my copy. It is very short. All of these deep issues are expressed in very brief terms.

In the Wall Street Journal, March 9, 1978: "As expiation for Vietnam, we have the War Powers resolution, an attempt by Congress to share in detail decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional, and certainly unworkable."

Now, this is an issue which we do not care very much about. It has not been on the Senate floor since yesterday afternoon, and we took up the question as to whether the War Powers Act was applicable to the Persian Gulf situation. I voted that it was, and I feel very strongly about the limits of executive authority and of balance.

In 1984, there was an effort made to frame a test for constitutionality of the War Powers Act. Senator Baker participated in it; I went to the trouble of drafting a complaint—I had not done that for a while. And we talked to the Department of Justice about framing a case. And the standing issue, we think we can get by by legislation; the case in controversy, we are not so sure about. You fellows, the Court, you fellows, if confirmed, have the final word on that.

But there is a real hot argument about the War Powers Act, as to whether it is constitutional or not. It says if U.S. personnel are in imminent hostilities, danger of hostilities, then the President has to report to Congress, and there are a whole series of procedures to be followed because the Congress has the authority to declare war, and it has been taken over by the executive branch.

In 1984, we had extensive debates on the subject, and I asked Senator Percy, who was managing the administration's bill, about whether Korea was a war, and he said yes, it was; and was Vietnam a war, yes, it was. And Congress did not declare war, and the Congress came back with the War Powers Act, and the President has made submissions choosing a form of language not to recognize constitutionality.

Now, as to the issue of standing, isn't the Congress entitled to have the Court make a decision where the President ignores the Act? We may be right, and we may be wrong. But take the standing question first. Why shouldn't we have a right to have the Article III Branch, the Supreme Court, decide the case?

Judge Bork. I would like to—I do not think I had better discuss that particular case, because that is in the courts, I think. I think it is in my court right now, the D.C. Circuit—isn't it?

Senator Specter. No. It is in the district court. It will never get to the circuit court in time to be anything but moot.

Judge Bork. Oh, all right. But even so, I think I should not discuss standing in a particular case that is in fact a live case.

Senator Specter. Well, I think that is fair, Judge Bork, and I will not press the issue. I bring it up because you have written so extensively on it.

You are a very different kind of a nominee, because on all of these questions you have stated an opinion. Senator Simpson agrees. And I ask you these questions only because you have written, and you have made sweeping declarations about renouncing congressional standing.

Judge Bork. Well, yes——

Senator Specter. Let me ask the question in a different way, to give you a chance to respond.

Here, you have the War Powers Act. On the procedure, from what I read about you, I do not think you will give us standing. Maybe I have a conflict of interest here, as a litigant. I have not gotten involved in any of the cases, but as a potential litigant. But then there is the doctrine of necessity, so we have to either confirm you or not.

But we have reason to believe that you are against us on the merits——

Judge Bork. On the War Powers Act?

Senator Specter. War Powers Act, yes; you say it is probably unconstitutional.

Judge Bork. Well——

Senator SPECTER. Let me finish the question. Then we have reason to think you are against us on the procedure. Now, given the concern of the U.S. Senate for having this law interpreted, number one, and then interpreted as the Senate sees it, why should we confirm a nominee who is likely to find against us on both those important grounds?

Judge BORK. Well, I do not want to tell you why you should confirm me, Senator.

Senator SPECTER. Well, I cannot ask you the question as to whether it is unconstitutional that we have standing——

Judge BORK. Let me discuss what I meant back then, when I wrote that one sentence leading into a different subject.

The War Powers Act at the time, I thought, had a problem because it has a legislative veto in it—as I recall it—I have not looked at the War Powers Act for——

Senator SPECTER. It does.

Judge BORK [continuing]. Yes—and I did not really have any trouble when I looked at it, a long time ago, with the reporting or the consulting aspects of the Act. I thought that on the part about controlling the introduction of troops, or withdrawal of troops, and so forth, that that could be constitutional in some cases and possibly unconstitutional in others. Let me describe what I mean.

The ultimate power in this society about war and peace is Congress. It can declare war—it can not only declare war, it can refuse spending, appropriations authority.

Senator SPECTER. Judge Bork, realistically, what has happened on that?

We really, in the Congress, do not have the power to declare war anymore, given the realities of international events today. When the President acts in Lebanon, in Grenada, in the Persian Gulf, the reality is that the day of Congress declaring war is gone.

On the spending issue, the reality there again is that Congress lacks the power, because once the President has dispatched a fleet to the Persian Gulf, it is unthinkable and impossible for the Congress not to fund that operation.

If we do not have authority under the War Powers Act to require a certain Presidential response and then to say no to the President, where does the Congress in 1987 exercise its congressional authority to declare war?

Judge BORK. Well, maybe you can do it under aspects of the War Powers Act. I was really—I see your point, Senator, and it is a good point. I do not mean to dispute it. I had thought it would be a little easier to tell the President, "You have two weeks to, if you want to, get those ships out of there," and after that, no more money may be spent.

Senator SPECTER. Who is going to tell him?

Judge BORK. Well, I assume the Congress would.

But anyway, let me go on to the War Powers Act, because I was leading into a somewhat different point. I was merely saying that the ultimate question should be for Congress, about hostilities and war and so forth, but there are tactical decisions to be made.

To take an example which I have given before, I think Congress could have told the President to shut down World War II, clearly. But I think if Congress had told him he had to surrender the airborne troops at Bastonne, I think that is a decision for the President, not for the Congress. That is a tactical decision, and he is the Commander-in-Chief.

Now, my only thing about the War Powers Act—aside from the legislative veto aspect, which I do not know about anymore—it may be that if it leads to micro-management of tactical decisions in a conflict by Congress, then I think there is a constitutional problem.

Now, maybe it can be interpreted so that that problem never arises. I do not know. But that is all I meant in this brief one sentence as I was leading into something else.

Senator **Specter**. But Judge Bork, the concern that I have arises on the balance of your writing on executive/legislative relationships. And I would turn to the writing you made in the American Journal of International Law, where you deal with the question of the Cambodian incursion, as you characterize it.

You say: "I think there is no reason to doubt that President Nixon had ample constitutional authority." And I am going to come to other questions on intelligence and on other matters, and again and again, you come down, it seems to me, very squarely on Executive authority.

You take the question if independent counsel, which is a big issue right now, for all the reasons that you know. And your testimony back before the 93d Congress, as it appears on page 450 of hearings before the Judiciary Committee, you say that the establishment of a Special Prosecutor outside the executive branch would ultimately be held to be unconstitutional.

Judge **Bork**. Well, let me talk about that, Senator. I thought that was true. Of course, the statutes involved there were very different from the statute we are operating under now—which I have not looked at particularly, but I know it is very different. And what I said was that a Special Prosecutor outside the executive branch would be—I think it would be. I think that thing—those bills I was talking about, I think, contemplated courts appointing, controlling and removing Special Prosecutors, which I thought was not a Judicial function at all.

Now, I think I also testified, Senator, that in terms of congressional protection of a Special Prosecutor, it would be hard for Congress to protect him if he was an official nominated by and confirmed by the Senate, because the President's power over such officials is at a maximum. But I think I also testified that probably Congress could protect a Special Prosecutor by statute so that he could only be fired for cause, if he was a subordinate officer appointed by a department head.

So I did not say you could not have a Special Prosecutor. I just said under certain circumstances it would be difficult.

But may I—I want to say that the impression that I always rule or side with the President is wrong. I have discussed at length, I think, the episode that led me to tell the Attorney General that I would not argue a pocket veto case, and that I filed a 12-page—or 8-page or whatever—analysis with the Attorney General, and he forwarded it to the President, and we got President Ford to say he would not use a pocket veto when Congress had left somebody there during an adjournment or a recess to receive a return veto.

But also, I sat on a case in my court, the City of New Haven case, in which the President was claiming the power to impound funds, and that power to impound was in the statute, but also there was a congressional veto. I voted with the majority that since the congressional veto that Congress had was invalidated by *Chadha,* the President's power to impound was lost, because the Congress would never have given the President the power to impound if it had not had a legislative veto. So I voted with Congress and against the President on that one.

My record is not one of unvarying support for the executive branch.

Senator SPECTER. Judge Bork, I have had a note from the Chairman that it is time for a short break, so I will yield back to the Chairman at this time.

Senator KENNEDY. We will have a 10-minute break.

[Short recess.]

Senator KENNEDY. The Senator from Pennsylvania, Mr. Specter, will be recognized.

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Bork, when we broke for the short recess we were talking about the issue of executive and legislative authority and just another question or two on that subject.

You wrote about the subject of reforming foreign intelligence—again going back to the Wall Street Journal—and you commented about the bill, the Foreign Intelligence Surveillance Act, where the Congress was seeking to impose certain restraints upon executive authority. You referred to the congressional action as a, "certain lightheadedness."

The issue is likely to come up soon on the matter of cover intelligence where the Intelligence Committee is trying to work out a charter with the executive authority on what is timely notification, a subject which was of very much concern in the recent Iran/Contra hearings and some of us think really led to the execution of the sale of arms to Iran because there had not been notification to the Congress, and had there been oversight it would have been stopped.

Recently, the President wrote to the Intelligence Committee—and this is just within the past few weeks—saying that there would be new procedures; except in the most exceptional circumstances timely notification will be given within two working days.

I am sure there is going to be a controversy as to what are exceptional circumstances and I for one believe that this kind of a commitment has relatively little value because it leaves it up to the executive to decide what are exceptional circumstances. What I am looking for is the reassurance that if you are confirmed and if any of these cases get to the Supreme Court through the "standing morass" issue, that as an Article III Justice you will give us a fair shake.

I do not know how to articulate it any more directly than that.

Judge BORK. Well, Senator, I do not know how to say anything more than I will give you a fair shake. I will give everybody a fair shake.

Senator SPECTER. Well, I raise the question because of the writings which you have done but I think that these hearings are a good occasion to focus for just a moment or two in our process of checks and balances to give you at least this Senator's view of the importance of having the Court make an ultimate decision in some of these areas.

I am not proposing that all of these are susceptible to judicial decision and I understand the political process and the tug of war and I believe that that has a lot of applicability but I would restate what Senator Byrd had articulated yesterday about the necessity in some situations, short of missiles being in the air, for the Supreme Court of the United States to take these cases, and if the Congress and executive are irretrievably at loggerheads, for you to make the decision.

Judge Bork, now I would like to move on to the philosophical area that you have written about and talked about a great deal, and that is egalitarianism. I think it is very relevant on an understanding as to where you were heading on the equal protection clause of the 14th amendment in terms of application. You have questioned the desirability, as I read your writings on an egalitarian society. And one of your statements I would like your comment about, the speech at Carlton College.

You designated—and the materials provided us is 1977 or 1978—and at page 7 you say the following:

> Though it is obviously false, the trend of legislation continues to place increasing burdens upon business in the name of a wide variety of social ends, heavily freighted with the goal of redistribution, environmentalism, consumerism, energy control, racial equality, safety and health, investor protection, small business welfare and so on. Though each of these has much to be said for it, each has been over done and the costs are making business much less productive than before.

Now, you have handed down opinions on the environmental protection area to the contrary as to what you have generalized about here.

Judge BORK. Yes.

Senator SPECTER. But I would invite your comment as to whether you can ever really conclude that it has been, quote, "over done," unquote, with respect to some of these values, especially the value of racial equality.

Judge BORK. No. I have no feeling that that has been over done, Senator. I think what I was talking about there was that there may be a lot of regulation which is desirable in and of itself, but in the aggregate you may conceivably hamper business efficiency sufficiently that nobody will be better off because we will be a poorer nation.

I think I had just seen a study by the dean of the business school which traced the decline in real constant dollars of shares of corporations—that is, the Dow Jones Index should now be at around 4,000 or 5,000 if it had kept up with inflation. And I was just simply saying that that may suggest that the aggregate total regulation in the society may have damaged our efficiency and our ability to compete abroad and at home.

Senator SPECTER. Judge Bork, in a speech that you——

Judge BORK. May I add, Senator, that has nothing to do with my job as a judge. That was me talking in general about the society.

Senator SPECTER. Well, I understand that. But when you come to apply principles of law and you do not have bright line tests and you have wavering lines, as you have described them before, philosophy may be the determinant factor in the ultimate decision by a justice as you apply equal protection of the law with the fuzzy gradations that have been the subject of discussions in these hearing rooms for hour after hour after hour.

Does not the view that you express with some repetitiveness in your speeches about an uneasiness or an opposition to the egalitarian principles, which you equate with permissiveness, really have a very significant effect upon your own judicial philosophy?

Judge BORK. I do not think so, Senator. For one thing, I was really—I think when I am talking about these matters I am usually complaining about going too far toward equality of result. I never have any problem with equality of opportunity. And I understand that even more equality of result than free process would give us is desirable. Some redistribution is desirable, and it is not for me as a judge to judge the degree of redistribution.

As you say, on my present court I have repeatedly upheld regulations of business—repeatedly. And it would have been possible to write those decisions the other way, but I would not have felt that it was the law.

Senator SPECTER. Well, as a Supreme Court Justice you are going to have considerably more authority and latitude than as a Court of Appeals judge and that is why I raise the question, because it is so dominant in the speaking which you have given. And repetitively the issue arises about your opposition to what you define as egalitarian principles.

You do not spell them out as they would relate necessarily to decisions, but taking at look at the speech you made at Yale University on April 24, you talk about values as measured in the survey are quite egalitarian and permissive.

Judge BORK. What is, Senator? I missed part of that sentence.

Senator SPECTER. You are talking about values as measured in a survey—a Public Opinion survey—and with some repetitiveness you refer to the—as you do here at page 5—to the left liberal, and from time to time your speeches refer to the press and to the professorial ranks as having a very heavy orientation to the left. You talk about that philosophically in terms of an egalitarian principle and as permissive.

As you say at page 6: "Their values as measured in this survey are quite egalitarian and permissive."

My question to you is, if you care to elaborate upon what you mean here, what would be the predictability or your expectation as you would apply this kind of a philosophy, if any, in the interpretation of equal protection of the law.

Judge BORK. I do not think there is any, Senator. What I was saying here was—there was a survey in the Public Opinion Magazine in which in every election since 1968 over 80 percent, and often well over 80 percent of people working in the media and the press voted for the democratic candidate, which I thought was a relevant statistic in this connection.

Senator SPECTER. You thought it was what?

Judge BORK. A relevant statistic in what I was talking about here. But, you know, when I have faced the freedom of the press the press has done very well. It does not affect my attitude toward the press as a constitutional matter, and it does not affect my attitude toward regulatory agencies. And as far as the equal protection clause is concerned, I do not regard that as requiring equality of result. I regard that as requiring equality of opportunity, if that distinction makes any sense in that context.

Senator SPECTER. Judge Bork, going back to your Carlton College speech, you have this sentence which is really illustrative of a fair amount of your philosophy.

You say, quote—this is the bottom of page 10: "Men in democracies"—well, you quote De Toqueville on this, but with apparent approval—"Men in democracies"—well, you insert it in your writing, I guess you are quoting De Toqueville—"are well aware of the danger of anarchy inherent in a condition of equality."

My question is, aside from your articulation of equality of opportunity, what impact does your overall philosophy of equality have as you would interpret the equal protection clause of the 14th amendment?

Judge BORK. None whatever. I have told this committee how I would interpret the clause. I think what I was saying in this Carlton speech was that if you try to enforce too much equality of result through statute and regulation, De Toqueville said that you—this is him: "You cover the surface of the society with a network of small, complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate. The will of man is not shattered, but softened, bent and guided."

I do not think we are on that road any more. I thought for awhile that this drive towards more regulation of everything was going to continue for a long, long time. I do not think it has.

Senator SPECTER. Then de-regulation came in in 1981.

Judge BORK. Even the state of regulation where it stood was less worrisome to me than I thought what might be a continuing trend.

Senator SPECTER. Judge Bork, let me take up just one more philosophical issue that you have written about and written about extensively—there is not time enough to go into other matters—and I would refer to the speech you made at the University of Chicago on November 13, 1984.

This picks up a thread which you write about with repetitiveness on John Stuart Mill and his book on liberty and the privatization of morality away from governmental regulation. Picking up at page 10, you write this:

> One thinks of developments in free-speech doctrine in which it has been held that government may not, for example, deal with obscenity and pornography except in the most extreme cases because, as one opinion puts it, one man's vulgarity is another man's lyric

The Justice Harlan quotation that you referred to otherwise. Then you go on to write:

> One notes in the rise of the so-called right-to-privacy cases which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases. All of these trends, from interpretations of the religious clauses, to readings of the speech clause, to the privacy cases share the common theme that morality is not usually the business of the government but is, instead, primarily the concern of the individual. Whether or not so intended, these cases may be seen as representing the privatization of morality.

And then you go on to talk about John Stuart Mill's "On Liberty" and as I read your writings—and I am going to have to boil this down because of time limitations and ask you for your interpretation—you seem to me to object to the privatization of morality and you look for more governmental authority on matters like pornography as opposed to hardcore obscenity, which the first amendment cannot reach. And you look to more governmental regulation on matters, as you put it, of sexual morality.

You do not like the stringent application of the establishment clause and the free exercise clause which you come to later on page 11, that, as you articulate, the principles of majority rule—Madisonian majoritarianism, as you write so frequently—that you object to the interpretations of the law privatizing morality as it would apply in those cases—sexual conduct, speech, pornography and religion.

The thrust of my question is, where does that leave you in terms of sitting on the Supreme Court, if confirmed, on enforcing majority rule in a context where the Court has cut back very sharply on State legislative activity in all of those lines?

Judge **Bork**. Well, Senator, I did not denounce those things. I said that these were aspects of a privatization of morality. It is a trend, I think.

Senator **Specter**. Well, you speak about—you do denounce Harlan's "one man's vulgarity is another man's lyric."

Judge **Bork**. That is right.

Senator **Specter**. And you do denounce the privatization of morality in terms of excessive sexual conduct, and you do not come to a conclusion on the religion cases. You raise the question.

Judge **Bork**. Well, let me say about that—I guess our time is short so I will try to do it briefly. As I said yesterday, it seems to me very odd to say that a reason why a community may not punish what was an obscenity, I think, is that one man's obscenity is another man's lyric. That is an odd statement. That means that if anybody thinks it is a lyric you cannot punish obscenity.

Senator **Specter**. No, only if the Supreme Court thinks it is.

Judge **Bork**. Well, I know. But the reason they gave was that one man's lyric is another man's obscenity. On the establishment and free exercise clauses, I did not criticize those at all. All I said was—and it is a common observation that has been made by law professors and justices—is that they have managed to get them into a position where they conflict with each other. And it just seems to me as a matter of doctrine it would be nice if the two major clauses about religion did not conflict.

Senator **Specter**. You do not make that point in this speech. Your Yodell point on the Supreme Court decision you make otherwise but not here. In this speech you are really looking to the concept of privatization and morality which does not give the majority, the State legislative bodies, authority to deal with religious issues.

Judge **Bork**. Is this the speech at—oh, yes, the University of Chicago, Religion in the Law. I think in that speech later on, Senator, I think I explicitly said, one of the odd things—I know I said it at Brookings and I think I said it here—and the reason I say the same thing so much is not that I am obsessed with the point Senator. It is that I give speeches and I cannot keep writing a new one every time and I tend to shuffle the paragraphs around and give the same speech.

Senator **Specter**. Those of us who read your 80 speeches were appreciative.

Judge **Bork**. But in any event—well, I do not see it. I cannot find it right here and I do not want to take up your time hunting for it.

Senator **Specter**. Judge Bork, I really do not think you make that point here about the conflict——

Judge **Bork**. Well, I meant to.

Senator **Specter** [continuing]. Between the free exercise and the establishment clauses. I think the point you are really making there—and you do not come to a conclusion but you are suggesting—that the concerns you have about the privatization of morality which you expressed in "one man's lyric is another man's," et cetera, apply in the field of religion as well.

Judge **Bork**. No. I do not think they apply in the field of religion except for the fact I—the reason I am sure I said this about the conflict between the clauses is that I was asking how they could have got themselves to a point where, under the free exercise clause, a State was required to do what if it had done on its own would have violated the establishment clause.

On page 7 and 8, Senator, of that talk I discussed the case of *Wisconsin* v. *Yoder* and I was making the observation which many professors have made—my speeches get less original as I get busier; I tend to use other people's thoughts—I made the point which others have made that when the Supreme Court said that the free exercise clause required Wisconsin to make a special exception for the Amish to let their school children out early before they were 16, that was an exception which if Wisconsin had made for the Amish in its statute book would probably have been held to be a violation of the establishment clause.

It is a conventional point and it has been made by others many times before.

Senator **Specter**. I am familiar with that point, Judge Bork, but you move from that point to another point when you go three or four pages later to pages 10 or 11. And then you take up the concept of privatization of morality, which is different from the conflict of establishment and free exercise.

Judge **Bork**. Oh, yes.

Senator **Specter**. It is plain that you have objected to Harlan's conclusion about one man's vulgarity is another man's lyric under the privatization concept.

And then you move from that into the discussion of the, ". . . stringent application of the establishment clause"—this is at page 11—"one might expect then the privatization by a stringent application of the establishment clause to keep the community through government from advancing religion, and an equally or almost stringent application of the free exercise clause to permit the individual maximum freedom in his beliefs," which leads me to the inference that you do not like the stringent application of establishment or free exercise, although I readily concede you do not say so. It is a suggestion.

Judge **Bork**. I not only do not say so, Senator, what I was doing here was suggesting that perhaps a general mood of privatization of morality was leading—I was trying to explain how could these two clauses have gotten themselves in a condition where they contradicted each other. That is all I was trying to explain.

Then I go on to say that the Bill of Rights is itself a way of privatizing some aspects of morality, and that is fine.

Senator SPECTER. Judge Bork, as I was afraid I was going to run out of time, I have only got four minutes left. So let me just make a few concluding observations.

But I want to compliment you for being so cooperative with this committee. I believe that these hearings will set a new standard for Supreme Court nominees, which I think is really important. Last year, on the record, I expressed concern about the proceedings as to Justice Scalia not being able to get into issues.

You came to talk to me for more than 3 hours privately. We were interrupted on the first occasion by a vote, and I have had the opportunity to question you for more than 3 hours now. Not that it is necessarily enough, but you have been very generous with your time and, more than the generosity with your time, you have been in responsiveness.

I think you have really dealt with the questions as best you can on very complex subjects, not to say that all the answers are going to please all of us, and I think you have had tough questions, perhaps questions at the belt—I don't think that they have been below the belt—by the committee. Depending on your perspective or someone's perspective there might be some differences to that, but you have tried to respond to the questions.

The hearings present a real opportunity for the Senators to tell you what is on our minds, and to tell you what is on the minds of our constituents, as we really expressed them, and the one opportunity we have. And I know it is an experience—I will remember it, and I am sure you will remember it.

And when you talk, as you did, about a powerful argument from a strong tradition, perhaps that will have some influence as you consider some of the doctrines, as you apply them in the future—on the Supreme Court, if confirmed; and on the District of Columbia Court, if you are not confirmed.

Judge Bork, I have not made up my mind on the confirmation process as of this moment. At the outset, I was very concerned about what I considered to be a sharp variance on your writings as opposed to the tradition of U.S. constitutional jurisprudence.

You have made significant shifts in accordance with this testimony which I think, candidly, has to be evaluated. We don't expect a man to be in concrete on his thinking, and I understand that what you had written in the past was speculative and tentative, and I respect that. And I also respect the consideration that law professors—you, as a professor, and those today and those in the future have to be free to write in a vibrant, lusty manner without being concerned that should they come to the Senate Caucus Room for a confirmation proceeding that they will be ruled out of consideration for the Supreme Court of the United States.

The issue of equal protection of the laws is a very important one, and I think that—and I know that your testimony in this room is materially different from what you had written. You had written that equal protection applied only in a racial context, and you have testified here today about your willingness to apply it to women and to aliens and beyond race and ethnic consideration.

We have questioned you at great length, and there are few questions and answers that I am going to reread, and that is one area. You have testified extensively on the first amendment, and I have questioned you extensively on the issue of original intent and whether you really can use original intent to decide the cases and whether you really can use legislative intent; and my suggestion to you is that they only take you so far, and beyond that you can rely on Cardozo or Frankfurter to effectuate the values and the tradition of the people without being able to pull out a specific constitutional right which would guarantee privacy. And of course, you have to decide that, if you are confirmed.

If I had to boil down, perhaps, the crux of an issue which I have to think about, and we look for predictability, and you pose a very unique situation here because you have written more extensively, I believe, than any nominee who has come to this position. And we search for predictability, and that is our job.

And personalities have to be put aside. On this Senate Judiciary Committee we have a responsibility to uphold the Constitution, just as you do as a judge, and the personalities are all out.

And there is a question of what risk is involved, risk to the Constitution and risk to the Court, and that is a judgment which has to be made. When you and I talked extensively about *Brandenburg* v. *Ohio* and we traced the history of the Holmes opinion on clear and present danger, and we went through *Abrams* and *Gitlow* and *Dennis* to *Brandenburg* and to *Hess,* and you said that you accepted the principle of *Brandenburg* and you would apply it but you disagreed with the philosophy.

And a concern I have is that when the next set of facts come up—and they aren't going to be exactly like *Brandenburg* because no two cases are exactly alike on the facts—if you disagree with the philosophy, how will you decide the case. And you answered it I think the only way a man can answer it: You are going to do your best to uphold your oath of office and to uphold the Constitution and to uphold the principle of the *Brandenburg* case.

I don't know that there is any better answer that any man can give, and, as a Senator on this panel, I have to weigh that. That really is an ultimate consideration.

In closing, I would call your attention to the case of *Turner* v. *Saffley,* which is a decision of the Supreme Court of the United States handed down on June 1, 1987, just a couple of months ago. It involves the right of an inmate marriage regulation in the Missouri jails. And it is an opinion written by Justice O'Connor and it turns, as I read the case, on due process grounds.

And it holds that the Missouri inmate marriage regulation is unduly restrictive, and it is joined in by Chief Justice Rehnquist, Justice Scalia, Justice White and Justice Powell.

I would say that to reach the level of a constitutional right on an inmate marriage regulation goes a fair distance beyond what is articulated in the Constitution of the United States. And I would hope that, if you are confirmed, that there will be a broader view than specifically articulated rights in the Constitution, the Cardozo view, the Frankfurter view, the O'Connor view, even the Rehnquist view and the Scalia view; that it is really the needs of the nation which you articulate and you will accept. And the commerce clause, I would hope as a Justice you would accept and articulate, if confirmed, in a broader range of cases.

I am not saying how you decide them because you may decide the right of privacy doesn't extend to abortion. But the authority of the Court to decide these constitutional questions and the recognition of rights which are not spelled out in minute detail would be your lodestone.

Thank you very much, Judge Bork. Thank you, Mr. Chairman.

Judge BORK. Senator, may I just say one word? I agree with a great deal of what you say, I just want to talk about—you talk about significant shifts. I really haven't shifted that much. I have told you where I have changed my mind, explicitly political speech, and so forth.

I think the difference is my role. As a judge, I accept lines of precedent that I criticized as a professor, and that is a shift in my role rather than a shift in everything I have ever thought.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

Senator KENNEDY. Judge Bork, you asked us to judge you on your record as judge rather than on your record as a professor. And, as you told Senator Thurmond yesterday, and I quote: "In the classroom, no one gets hurt; in a courtroom, somebody always does, and that is a wholly different function than being a professor."

It appears that in your courtroom ordinary Americans have frequently been hurt. We heard about the sterilization case yesterday, and I would like to ask you briefly about two other cases.

The first is the *Bartlett* v. *Bowen* case in which you ruled that a senior citizen could be kept out of court when her medicare benefits are unconstitutionally denied. Josephine Newman, of the Christian Science faith, suffered from a terminal illness which required skilled nursing care. She died and the executor of her estate filed a medicare claim, and the claim was denied because she had earlier received medicare benefits for a previous stay in a Christian Science facility.

Her executor, named Bartlett, brought a lawsuit claiming that the denial of benefits violated her first amendment right to the free exercise of religion, and your court ruled that her estate was entitled to pursue her claim in federal court and that the medicare law was not intended to stop senior citizens from taking their constitutional claims to court.

Judge Bork, you dissented from that decision and ruled that a sick, elderly American could be denied all access to a federal court to challenge an unconstitutional denial of her medicare benefits.

My question is a simple one. Aren't all Americans, including senior citizens, entitled to their day in court?

Judge BORK. They certainly are, Senator Kennedy. It should be said that I didn't deny that woman access to court. I wish she had had access to court. The statute passed by Congress said if you had a claim for less than $1,000 you could not go to court. That seemed to me very clear. It is flat on the face of the statute, and there is an ancient doctrine of sovereign immunity when the suit is against the Federal Treasury that says Congress may deny access to courts to make a claim against the Federal Treasury.

I would have been delighted to hear that case if the statute hadn't said she had no right to bring it.

Senator KENNEDY. Well, the fact is that there is a cut-off amount of $1,000 approximately, but the case was raised under a constitutional issue, under the free exercise clause. The court majority ruled that the Congress did not cut off the judicial review when constitutional claims were at issue. That is what the majority ruled, and I quote:

"Challenges to the constitutionality of the Medicare Act itself may be reviewed in federal court consistent with congressional intent as expressed in the Act."

So the majority of the court found that the constitutional issues were sufficiently significant and important to consider, rather than the limitation of $1,000, which is written into the law.

Judge BORK. I would have been delighted to do that, Senator, except the statute was flat, no review, and the legislative history showed no intention to make an exception for constitutional claims. And I thought it was an exercise of Congress' power of sovereign immunity.

I think most of our full court agreed with me because six judges voted to rehear that case en banc. Then one judge later said it wasn't important enough and shifted his vote, so we only had five votes to hear it en banc.

But that is, you know, if a statute that is flat, $1,000 or no review and no legislative history indicating a contrary intent, must be read to have an exception, I can't imagine a cut-off statute that will ever be upheld.

But, I mean, you know, it is up to Congress. If they want to say unless it is a constitutional claim, I will be delighted to hear it.

Senator KENNEDY. Well, clearly the majority drew the conclusion that it was the intent.

Judge BORK. Oh, yes, the majority did.

Senator KENNEDY. That is what a majority of the court decided, and I think it is quite clear that that is what Congress had intended.

Now I would like to ask you about your ruling on worker safety in the *Prill* case. Ken Prill was a truck driver with a good work record. After complaining repeatedly about the unsafe conditions of his truck, Prill had an accident. His truck jack-knifed and two vehicles ended up in a ditch, and the accident was caused by the unsafe condition of the truck, not through any fault of Mr. Prill.

And after complaining again to his supervisors, Mr. Prill went to the Tennessee Public Service Commission. The commission issued a citation to the company for operating an unsafe vehicle; and for bringing this matter to the attention of the public agency, Mr. Prill was fired.

Mr. Prill brought an unfair labor suit against his employer, and a majority of your court supported his claim. You dissented from that opinion. You took the view that the labor laws do not protect a worker in Mr. Prill's situation from reporting his unsafe truck to the proper authority.

My question is simple. Why not?

Judge BORK. Well, the statute, as I recall that case—by the way, I agreed with the National Labor Relations Board, so I wasn't out there by myself. And I was giving deference to the administrative agency that decided this case.

And, as I recall the statute protects concerted activity, and this was one person acting. And it seemed odd to the Board, and to me, to say that one person acting was concerted activity. It is purely a question of statutory construction, with which I agreed with the relevant federal agency.

Senator KENNEDY. Well, the majority of your court took a different view. They, as I understand, viewed the situation that when truck drivers and other drivers report unsafe conditions it protects their fellow workers. It protects all those that may be driving that truck, and that is certainly a matter of concern; let alone those people who are going to be using the highways, for their safety as well.

We want to feel safe, Judge Bork, not only on the roads, but in the courts as well.

Judge BORK. Senator, I quite agree with you. The problem is the statute seemed to the Board and to me to be clear, and in keeping with my view of my function as applying the law as written and not making up social policy, I tried to follow the statute, as did the Board.

Senator KENNEDY. But the majority of the court differed?

Judge BORK. The majority of the court differed.

Senator KENNEDY. They, as I believe, held that the concerted activity requirement would be satisfied by the fact that there would be other drivers driving the truck and that the public interest in terms of using the highways would be affected.

Well, Judge Bork, in my remarks yesterday I emphasized the concern that many of us have about, whether Judge Bork can be fair if he becomes Justice Bork and whether he has sufficiently genuine commitment to the basic individual rights that we have as Americans and that are at the heart of our democracy and freedom.

We are not a perfect society, but the overwhelming majority of Americans are proud of the progress we have made in recent decades in making this a better land in achieving a greater measure of racial justice and providing genuine equality for women, in guaranteeing the right to vote free from poll taxes and literacy tests, and in protecting the basic liberties such as freedom of speech and freedom of religion, and in some ways the most fundamental right of all in a free society, the right to privacy and the right to be free from intrusions by the government into the most fundamental and personal aspects of our private lives.

We are all aware of the enormous power that a Supreme Court Justice has, and over the past five days Judge Bork has shown us that he is a brilliant lawyer. But the controversy over Judge Bork is intense because Americans care very deeply about their basic rights, and we do not want to risk the danger that Judge Bork will misuse the Supreme Court as a platform to turn the clock and require us to refight the settled battles of the past.

I want to close by quoting some words by the man whose integrity and whose commitment to the rule of law cast such a long shadow over Judge Bork in these proceedings. Archibald Cox declined to testify here for reasons that all of us respect. Professor Cox cares deeply about the rule of law and he does not want this to appear to be a personal contest between himself and Judge Bork.

But in a new book that he has just finished, Archibald Cox comments on the fundamental principle at issue in appointments to the Supreme Court and other federal courts, and I would like to read one brief passage from his book.

> To pack the bench with men and women of a single narrow political ideology has a tendency to erode long range public confidence in judicial institutions. The legitimacy of judicial decrees depends on public confidence that the judges are predominantly engaged, not in making personal political judgments, but in applying rules of law. The farther a President goes in proclaiming an intent to p[illegible] course of decisions, the more he will undercut the foundations of legitimacy. The avowed selection of judges whose minds are already closed on the cases that may come before them in the future erodes the respect and support for judicial rulings that flow from public confidence that cases submitted for adjudication are being decided by individuals with open minds as free as humanly possible from political or economic self-interest, from the obligations of loyalty to a political party or other organization, and from most forms of ambition.

And I think that most Americans would agree with Archibald Cox, and I think most Americans would agree that the man who fired Archibald Cox does not deserve to be promoted to Justice on the Supreme Court.

Judge BORK. I have explained, Senator, that I fired Archibald Cox not because of any animus or any desire to stop the investigations. I have repeatedly explained that I was the last man in the Department who could hold the Department together. I then spent a lot of time trying to hold the Watergate special prosecution force together. It was held together. It went forward with the results we all know.

Now, as to that passage from Professor Cox, I agree with it entirely. I wish I could write it that well.

Senator KENNEDY. Senator Hatch?

Senator HATCH. Thank you, Senator Kennedy.

Now, Judge, we are coming down to the last few minutes of what has been almost 35 hours sitting in front of this panel. I think the longest of anybody I remember. And I might add, you have handled it with equanimity and good grace, humor, and I think with some confrontation from some people who maybe confronted you the wrong way, and certainly have been loose with their own interpretation of cases and the facts.

C.W. Corham once said that "Genius is the ability to reduce the complicated to the simple," and that is exactly what you have been doing for about 35 hours of actual sitting in front of us.

At this point, Mr. Chairman, I would like to point the unanimous pro labor case record of the Judge into the record.

Senator KENNEDY. Without objection, so ordered.

[List of cases follow:]

UNANIMOUS PRO-LABOR LAW CASES

Judge Bork's open-mindedness and impartial approach to principled decision-making are vividly demonstrated by his rulings in the labor law area, where he evidences a scrupulous regard for the rights of unions and their members, often ruling against the United States government in the process.

- In *United Scenic Artists v. NLRB*, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts *purposefully* to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by *Northwest Airlines v. Airline Pilots Int'l*, where Bork joined Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, *NAACP v. Donovan*, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the Government was rendered in *National Treasury Employees Union v. Devine*, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In *Oil Chemical Atomic Workers Int'l v. NLRB*, Judge Bork joined another Edwards opinion, reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In *Donovan v. Carolina Stalite Co.*, Judge Bork also reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- In an opinion he authored for the court in *United Mine Workers of America v. Mine Safety Health Administration*, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

- In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

- In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.

- Black v. ICC, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

Senator HATCH. And I might also comment, as the former Chairman of the Labor Committee and ranking member on it now, that I think it is unseemly for anybody to think that every plaintiff has to win every case a plaintiff brings. There are laws and even plaintiffs are bound by those laws. I think that has to be pointed out. And anybody who doesn't understand that, doesn't understand the law. And I think you well explained those two cases.

Let me just you a couple of questions. I don't intend to take all the time. I have 15 minutes. Senator Simpson has 15 minutes.

But it has been intimated that a judge may not fairly apply a statute with which he disagrees or thinks pernicious. I must say no judge agrees with the policy of all the statutes he has to apply. For example, one would not say—I don't think anyone would say that Judge Abner Mikva, a colleague of yours on the court of appeals, and a former Congressman, could not fairly interpret or apply a law which he voted against as a Congressman. I think anybody would say he could not fairly do that. I wouldn't, and I don't think any other member of this committee would. Do you agree with that?

Judge BORK. Certainly I agree with that.

Senator HATCH. And it shouldn't be said about you, either, just because you are up for the Supreme Court.

We heard yesterday that you should have deferred with regard to the *American Cyanamid* case, that you should have deferred to the Secretary of Labor on the question of offering a woman a choice in work hazard situations.

I have checked the documents in that case, and the Secretary of Labor had not filed a brief or in any way come before the court. Now how can you defer to a view if it is never presented to the court. Could you also further explain your views on that subject?

Judge BORK. On the *Cyanamid* case?

Senator HATCH. Yes.

Judge BORK. Well, I have it here, Senator. I think it is important that perhaps people understand it.

It was a case, as you know, involving a plant with a very high lead level in one department. And the question was—and the company gave the women a choice, and the question was whether that was a violation of the hazardous conditions policy of the OSHA Act.

This was a case with no satisfactory solution for anybody. I mean, there was just nothing to—there was no satisfactory way to solve it. Our court did not endorse the policy of the company. The policy was to protect fetuses by telling women that they—if they wanted to remain in the—they could not remain—if they were childbearing age, they could not remain in that department unless they were sterilized. But they had a choice.

That was a—that policy was not before us. We didn't have to choose. The best solution would have been to reduce the lead levels. I said that in the opinion. But the evidence before us supported the finding of the Commission, that the lead levels could not be further reduced. If you tried to reduce them further, you would have to close the department.

So the company and the workers were both faced with what I called in my opinion a most unhappy choice. Shut down the department, which would put everybody out of work, including a lot of women who had no—who were not of childbearing age, and have a devastating effect, perhaps, on a lot of families in the area, and children, or develop a policy that would protect women of childbearing years.

I would not want to be an official of that company trying to make that choice. I wouldn't want to be a worker faced with the choice. And fortunately, as judges, we were not faced with that choice.

There were several statutes that might have been involved, and I said in my opinion that there were other statutes that might apply besides the OSHA Act, and, in fact, some other statutes—some other cases were brought on that.

The administrative Commission that was assigned by Congress to make the decision found that the law had not been violated. And under the terms of the statute, we were not free to overrule that decision.

So let me, if I may, just read from the opinion. I think it is important that people understand what I decided.

Senator HATCH. All right.

Judge BORK. This is my opinion. It is important to understand the context in which this case arose and the task that is set for this court. American Cyanamid found, and the administrative law judge agreed, that it could not reduce ambient lead levels in one of its departments sufficiently to eliminate the risk of serious harm to fetuses carried by women employees.

The company was thus faced with unattractive alternatives. It could remove all women of childbearing age from that department, a decision that would have entailed discharging some of them and giving others reduced pay at other jobs, or the company could attempt to mitigate the severity of this outcome by offering continued employment in the department to women who were surgically sterilized. The company chose the latter alternative, and the women involved were thus faced with a distressing choice. Some chose sterilization, some did not.

This is still continuing:

> As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them, nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.

Then I said at the end of the opinion:

> It is clear that American Cyanamid had to prevent exposure to lead of women of childbearing age, and furthermore, that the company could not have been charged under the Act if it accomplished that by discharging the women or simply by closing the department, thus putting all employees who worked there, including women of childbearing age, out of work. The company was charged only because it offered the women a choice.

Then I said,

> Counsel for the union stated at oral argument that there would have been no violation if the company had simply stated that only sterile women would be employed because there would have been no requirement of sterilization.

We agree that such an announcement would not have involved a violation of the general duty clause of the statute, but we fail to see how that policy differs under the statute from the one American Cyanamid adopted. An "only sterile women" announcement would also have given women of childbearing age the option of surgical sterilization.

The only difference between that case and this case is that here the company pointed out the option and provided information about it. It cannot be that the employer is better shielded from liability the less information it provides. The case might be different if American Cyanamid had offered the choice in an attempt to pass on to its employees the cost of maintaining a lead concentration higher than that permitted by law. But that is not this case. The company could not reduce lead concentrations to a level that posed an acceptable risk to fetuses.

> So the company offered this option, but not as an attempt to pass on costs of unlawful conduct, but to permit the employees to mitigate costs to them imposed by unavoidable physiological facts. The women involved in this matter were put through a most unhappy choice, but no statute regresses all grievances and we must decide cases according to law.

I just wanted to make it clear what that case held, Senator, because there is some thought that we approved a policy. We did not. The only question was whether the Commission was correct in deciding that this particular statutory provision had not been violated, and we thought it was.

Senator HATCH. Well, I will reserve the balance of my time. But I also just point out that that was the unanimous, 3-judge decision as well. But I think that explains that case, and it should take the emotion out of it that I think was unfairly used yesterday against you, as we have seen throughout these proceedings.

So I will reserve the balance of my time, and Senator Simpson has the remaining 15 minutes.

The CHAIRMAN. The Senator from Wyoming?

Senator SIMPSON. Mr. Chairman, did your son win the game, or his team?

The CHAIRMAN. They won the game, and there was a goal line stand on the 2-yard line for four downs, and that is why I am later than I was supposed to be. We will get you to the Boston College game quickly.

Judge BORK. All right.

Senator SIMPSON. Thank you, Mr. Chairman.

Well, it is odd to me after a dazzling 5 days of listening, and it has been an education and like going to law school for me in many ways. Because in the private practice in Cody, Wyoming, for 18 years, you really don't do too many constitutional cases. Not many at all.

But really, to think that in the last day and a half we have talked about somehow that you favor sterilization of women, what an absurd situation that we could get to in this place? Trigger words, charged words, high emotion—and somehow that you, if you had your way, would sterilize men and women in the United States. That is beyond my comprehension how we get to that, but that is what we do.

And you remember when we started this I said, and it may be shocking but it is sure real to me, you either pass or kill a bill and you either confirm or reject an appointee to the United States Supreme Court apparently—didn't think it went this far, but it does in legislation—by using a deft blend of emotion, fear, guilt or racism. That is the way—I didn't think it worked with Supreme Court nominees. I knew it worked that way with legislation. I found that. But I didn't think it went that far with this.

And then, of course—and I shared it with you last night—to see that the dramatic telegram that was generated yesterday was done by the attorney for the woman who called her—and this lady was the lady attorney, Joan Bertin—called the woman and was her attorney in the *Cyanamid* case and told her to send a telegram to the Senate Judiciary Committee, and then Ms. Bertin, the lawyer, prepared the wire that we got and it says things like "Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired. Only a judge who knows about women who need to work could say that".

Then it says, "It's incredible. The judge, who is supposed to be fair, can support a company that doesn't follow the OSHA rules", and you have described all that. "It is the most awful thing that happened to me". It would have a greater ring of clarity if it were prepared by the person, but it was prepared by her attorney.

And I said last night, and I say again, that when an attorney prepares the text of something like that and was the attorney for the person and then to make it look like some voluntary wire that came forward out of, you know, whatever, I think that is offensive to me.

Well, let me share with you that, when I was in the Wyoming Legislature we adopted a thing called the Missouri Plan on the Selection of judges. There was a reason for that. It was to take judges out of politics. We spent decades trying to get judges out of politics. It has happened all over the United States. The States have gone further than, obviously, we have here, and that is really sad.

Because all this is, is politics right here. Nothing more, nothing less, not one whit. So we tried to take them out of politics so they wouldn't have to go up by direct election, which they did in many States—we appointed judicial selection committees, blue ribbon committees—because we all finally realized that judges who run for the supreme court of the States or run for district court judge are not very good at the plant gate with pamphlets in their hand. They really don't cut the mustard.

They are not too good at rallies, either. Kind of don't get down to the nub of things. They are not very good at pumping hands in the streets. We politicians like that. That is how we live. That is our lifeblood. That is our plasma.

So we tried to remove judges from that all over the United States, but not here in these proceedings. And you are deeply, deeply in politics here. Nothing more, nothing less. Let no one miss what is happening. And we will never come this way again.

I am as excited about my ability to participate in this as Arlen Specter has indicated. We will never see it again. This will never happen again. Doesn't matter whether you are confirmed or rejected.

Because the next time we have a Supreme Court nominee he or she will say: "There is a limitation to my response to this committee, and I do not believe as a nominee I can tell you how I might vote on a particular issue which may come before the Court or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again"; or "How I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter and that would result in my inability to do my sworn duty, namely, to decide cases that come before the Court"; or to say "I suggest that none of us really know how we would resolve any particular issue. At the very least, we would reserve judgment at that time, and I will not discuss how the statute will be interpreted in the future." Those are the remarks of Justice O'Connor at her confirmation.

Justice Scalia said: "I do not think I should, Senator, respond to the question because that may well be an issue argued before the Court and I do not want to be in the position of having in connection as a condition of my confirmation giving an indication of how I would come out on it." And the Senator responded: "I understand that." And that question was then shunted aside.

Then Judge Scalia said, as anyone will in the future and has always in the past, say, "I just cannot do it, and I think the only way to be sure that I am not impairing my ability to be impartial, and to be regarded as impartial in future cases before the Court, is simply respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right or wrong." And that was the end of that line of questioning. That was it. School was out.

And then Judge Rehnquist, and I am only citing the most recent three, he said: "Senator, I was reluctantly willing to answer your questions about the first amendment questions. I am a good deal more reluctant to venture an answer that would be any sort of a broader classification. In effect, I must say I am very much inclined to think that I best ought not."

That is the rest of our history right there, so we will never see this again. But what we have seen, again, is more of the authentic man or woman than we will ever see in a Supreme Court Justice nominee, and that has been exciting.

So I guess that next time and every time before we would have the same answers to the same questions, and especially they will be accepted by us, as they have in the past, and the sad thing is that we will not get a chance to really deal—and they will be more accepted by us if they have written nothing, done nothing and said nothing.

Is not that a tragedy?

We will get—you know, I do not know what we will get. Hopefully we will do well—and I think we will—under any future President—but we will never get the yeast and the zip that we have had here.

The Indiana Law Journal, this remarkable piece—well, you know, I referred to that. And what you said about it. You said it was a general theory. You said it was ranging shots. You said it was an attempt to stimulate. You said it is informal, presented informally, as original remarks and lectures. "I did not think it worthwhile to convert these speculations and arguments into any heavily researched, balanced and thorough presentation," you wrote.

You said that, but nobody has ever talked about that. Not once. And at the end of the article, you said it was tentative and exploratory, and they have been hammering you with that thing for 5 days. Well, I think it will be a good lesson to anyone that thinks of wanting to be on the Supreme Court, and I am sure there are young people and young lawyers and non-lawyers who would like to be on the Supreme Court.

It would be interesting, too, whether they have had their goal a little chilled in this process. That would be interesting for me to know.

But anyway, we are searching for predictability. I think that was a fair phrase and you ascribed to it. We are not searching for perfection. Everyone of us at this table have flunked that test, period. All of us, some publicly, some privately, but all of us, all 14 have flunked the test of perfection.

Some may say that they have not, but they may believe it, but I do not believe it. So I will not tell about being on federal probation for shooting those mail boxes when I was 18. I will leave that out. [Laughter.]

Then, you know, assault and battery charge when I was in the University of Wyoming, it was not my fault. [Laughter.]

In those days I weighed 260 and had hair and thought beer was food and was omnipotent. [Laughter.]

And I have got the scars on my head to show for that. And that is the way it is. It is called real life, and there is not anybody that does not understand that, nowhere.

Well, I did have some questions, but even though my good friend from Utah was good enough to toss me a little extra time, I just wanted to—there was one area that needed just a swift answer, and that is the area of the Human Life Bill. It seemed to me when you testified against that, it was a classic example of not letting your personal preferences influence your interpretation. Was that not what that was?

Judge **Bork**. Well, I——

Senator **Simpson**. The Human Life Bill.

Judge **Bork**. I do not know that I should talk about my personal preferences, but it was certainly a proceeding in which I testified entirely on constitutional grounds.

Senator **Simpson**. Well, I will conclude. But there is an old poem that I—and hang on tight because I am not going to go into romance—but the poem "If" by Rudyard Kipling is a dandy, and if you read it when you are 21 and then read it about every 5 years afterwards, it has ever more meaning as you chamber it inside of yourself.

Just a couple of lines from that. Of course, the openers are the greatest ones for you:

> If you can keep your head when all about you are losing theirs and blaming it on you; if you can trust yourself when all men doubt you and yet make allowance for their doubting, too; if you can wait and not be tired by waiting, or being lied about

> don't deal in lies, or being hated, don't give way to hating, and yet don't look too good nor talk too wise.

That is good stuff. And it is all good stuff. But the other one is:

> If you can bear to hear the truth you have spoken twisted by knaves to make a trap for fools; or watch the things you gave your life too broken and stoop and build them up with worn out tools;

and so it is, and:

> If you can walk with crowds and keep your virtue, or walk with kings nor lose the common touch; if neither foes nor loving friends can hurt you; if all men count with you, but none too much.

and, of course:

> If you can fill the unforgiving minute with 60 seconds worth of distance run, yours is the earth and all that is in it; and what is more, you will be a man, my son.

It is a good one. I read it to my three children and it seems topical and important here.

And I have one final question. Why do you want to be an Associate Justice of the United States Supreme Court?

Judge BORK. Senator, I guess the answer to that is that I have spent my life in intellectual pursuits in the law and since I have been a judge, I particularly like the courtroom. I liked the courtroom as an advocate, and I like the courtroom as a judge, and I enjoy the give and take and the intellectual effort involved.

It is just a life—and that is, of course, the court that has the most interesting cases and issues, and I think it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues. That is the first answer.

The second answer is, I would like to leave a reputation as a judge who understood constitutional governance and contributed his bit to maintaining it in the ways I have described before this committee. Our constitutional structure is the most important thing this nation has and I would like to help maintain it and to be remembered for that.

Senator SIMPSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, as I understand our agreement from yesterday, the minority has 4 minutes left, but I am not big on holding to minutes. What I would like to make sure we understand here is, I assume—may I ask the Senator from Wyoming, does he have any further statement to make at this hearing.

Senator SIMPSON. Mr. Chairman, I think in looking at the format there, there was a minority of 30 minutes, of which I think there is four, and then Judge Bork was to close, and then Senator Hatch and I were to divide 10 minutes.

The CHAIRMAN. Fine. Okay.

Senator SIMPSON. But I probably will not use the entire five.

The CHAIRMAN. Sure. Now, are there any more questions for the Judge?

[No response.]

The CHAIRMAN. Well, Judge, then we would yield to you for whatever statement you would like to make and then Senators Simpson and Hatch will each speak for approximately 5 minutes and then I will have a brief closing statement.

Judge Bork. All right, Senator.

Mr. Chairman, members of the committee, this has been a long, detailed, and often a profoundly interesting four and a half days of hearings. And I want to thank you personally Mr. Chairman for the courtesies you have personally extended to me and to my family during this week.

I also want to thank all the members of the committee for their patience, their attention, and their general good humor throughout these proceedings. For that I am most deeply grateful.

I have over the past four and a half days been asked a number of probing, highly complex and thoughtful questions covering a very broad range of subjects. I have answered those questions truthfully, openly and to the fullest extent possible without crossing the line that would place me in a position of speaking to specific matters that might come before either court.

If you have noted, there are views I have testified to here that reaffirm my acceptance of a body of jurisprudence as established and no longer judicially assailable, notwithstanding, that has developed in a manner different from a direction I had suggested some years ago. At the same time, there is much in my earlier writings—most particularly, my views on the proper role of judges and the need for faithful adherence to the text and the discernible intentions of the ratifiers of the Constitution and statutes—that I subscribe to just as fully today as I did before.

As a consequence, I have received criticism in some quarters for being too rigid and criticism in other quarters for being inconsistent or self-contradictory. Neither charge is, in my opinion, an accurate one. As I said to you in my opening statement, I am a jurist who believes his role is to interpret the law and not to make it.

If the members of the committee are looking, as you have said you are, for predictability, it is certainly predictable that I will adhere to my judicial philosophy as I have described it in these hearings and elsewhere. That may lead on occasion to results that conservatives applaud and on other occasions to results that liberals applaud, but in either event, it will not be because of some personal political agenda of my own. It will not be a desire to set a social agenda for the nation. It will be because the result, in my considered judgment, is required by the law.

On that point, let me simply add, as I also did in my opening statement, that when I say "the law," I regard precedent as an important component of the law. As I have described many times here, there are a number of important precedents that are today so woven into the fabric of our system that to change or alter them would be, in my view, unthinkable.

Mr. Chairman and members of the committee, you have my record before you. It shows not only a full sensitivity toward minorities and women, but a consistent record favoring the interests of minorities and women. I have given you my full view of the equal protection clause. It means what the words say: "All persons are protected against unreasonable legislative classifications."

You have heard me testify under oath, and I take an oath as a very serious and affirmative thing. I have affirmed my full acceptance of the Supreme Court's first amendment jurisprudence, including the *Brandenburg* decision, and I have affirmed by full acceptance of the incorporation doctrine, and there are many other areas in which that is true.

I have tried to be responsive to your questions. I hope I have succeeded. But to the extent any members have further questions, I will be glad to answer them at a later time.

Again, Mr. Chairman, I want to thank you and the members of this committee.

The CHAIRMAN. Thank you very much, Judge.

Gentlemen, which order do you wish to pursue? Senator Simpson?

Senator SIMPSON. Mr. Chairman, thank you.

Mr. Chairman, what we have been seeking these past 5 days from Judge Bork are certain things, certain things for us to determine. Among those are knowledge of the law. In these exchanges and discussions with the members of this committee on both sides of the aisle, this man, Mr. Chairman, has demonstrated a most formidable—nay, almost an awesome—knowledge. Surely even your most severest detractors just have to be impressed. There is no way that cannot be.

Number two, clarity of expression in your explanations of your decisions, your views, and of the Constitution, and you have explained to us some very complex and difficult concepts. And you have done that in a way that is so clear that not only those of us in this room, those members of the committee, but many of our fellow Americans have received a veritable primer in constitutional law. And I notice you have that little book in front of you a good deal of the time. It looks a little well-thumbed to me.

You know it. You really do know it, the Constitution. And what an appropriate time for your appointment when many people in the United States are reading it for the first time, just because of this year. And I think that is remarkable, too.

Then a willingness and a capacity to work hard, and that is something that is impressive to me. And another thing, you could have gone professorial on us at any point in time. You could have done that, become a bit pedantic and lectury, and you did not do that. In fact, I do not believe I saw one time when you spoke or gave an answer over 3 minutes, and then you deferred to the questioner and said, I hope I am not taking your time.

I think the only time you ever used the phrase, quote, "On the other hand," unquote, was in jest or good humor. And let me tell you, that was interesting to watch for me.

So you have had this willingness and you have let us see your writings and your speeches and your written decisions. You have shown this tremendous willingness to work—it is an extraordinary willingness to work diligently, and we have seen this capacity that you have to be here over these past 5 days while it has probably worn some of us out.

We are 14 and we had a 4 or 5 hour break between our rounds, and there you are. And that is extraordinary. And always done without a shred of impatience or irritation when we all know that it obviously had to be there. So I think that is impressive to me.

Then judicial temperament—what we always seek here—in the face of what has been referred to as fierce attacks, ferocious attacks, in the face of dramatic presentations, either in the form of writing or audio, and the reading of things from others. That has been interesting. And in that you have displayed the very essence and epitome of patience and courtesy and good humor which in my book is the definition of judicial temperament.

I have seen judges who really fired some lightening bolts from the bench at me and others in the courtroom. They lost their respect of lawyers in the process. And I am a spirited person myself, but I always felt of myself as an officer of the court and could always put aside my personal views.

Then, finally, your views and your philosophy. In response after response we have heard Robert Bork express, explain, discuss his views and his philosophy. And, again, not in the manner of the pedant or the lecturer or the professor but as what I see as an unthreatened man. Under oath, answering questions, often the same ones, over and over and over again in a very measured and thoughtful way. I was impressed by that.

As I say, I do not think we will ever see it happen again, regardless of what happens here. We will never see this again, because they will all say, no need to go through that. You do not have to. You do not have to do that.

And so in my mind, Mr. Chairman, such a person as this nominee will not pass this way again and former Chief Justice Burger was correct. I feel this is one of the finest nominees that we have had to this Court in 50 years, and it just seems difficult to imagine why at least a majority of our colleagues in the United States Senate who will read this transcript and see your responses cannot help but realize what a remarkable opportunity we have here to place a very unique and extraordinary man on the United States Supreme Court.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Senator from Utah.

Senator HATCH. Thank you very much, Mr. Chairman.

I am delighted to take these last few minutes. Over the last 5 days we have been judging a judge. Really, during that grueling time you have answered every question. In my mind you have dispelled every doubt, you have risen above every insult or indignity—and there have been some—you have disposed of every complaint.

I think this morning has been particularly interesting because you have had two very brilliant legal minds asking questions to yours, among others. But I particularly enjoyed Senator Heflin and Senator Specter and the erudite way they have asked questions of you and have expected equally erudite answers.

As I said at the outset of this trial, the standard for judgment has been political, and you have not been judged by your faithfulness to the law but by your critics' fidelity to politics or to a political agenda.

A judge is not a political officer and should not be measured by political standards and should not have to make campaign promises, and I have been impressed that you haven't made any. You have said what you believe, you have said what you are going to do, and I think it has certainly been very, very good.

I think you have forthrightly answered every question, and some of them four and five times, and you have done it with patience. By any standard of fairness, however, it seems to me the judgment would have to be reported in your favor.

If this body could rise above political measurements and be half as fair to you as you have been as a judge to others, then I think the verdict would be unquestionably rendered in your favor, and I think it will be in the end.

But just look at your record. Take women's rights. They have indicated that maybe you might endanger the equal rights of women, but what is a fair judgment? The judgment is, and from your statements here and from your record as a judge and as a Solicitor General and your actions, you would grant us much or more protection as the Supreme Court does, with great fidelity to the words of the Constitution itself.

The Constitution, of course, guarantees any person equal protection of the law, and you have reinforced that. You have proven this on the bench by your actions, by expanding women's rights under the Equal Pay Act and other statutes, and we have brought those cases out.

On privacy, they thought maybe you would endanger privacy rights. Well, your actions speak louder than words. You would enforce all privacy rights in the Constitution and you would strengthen the ability of Congress and the President to enforce any others that they choose to enact or choose to define. I think this is proven by your writing the opinion in the *Dronenberg* case, and I think that can't help but be considered by our colleagues.

With regard to free speech, are you going to only protect political speech? Well, you have made that clear by your actions. You have already protected commercial speech in the *Williamson Tobacco* case, scientific speech in the *McBride* case, artistic and expressive speech in the *Quincy Cable* case.

You know, would you narrow speech protections? What is the fair judgment on that? Well, you have already expanded speech protections beyond that of the Supreme Court in the famous *Ollman* case that you decided that now the Supreme Court has adopted.

So, really, what about overturning many precedents? You have made it clear you would not do that. You have been so in tune with the Supreme Court that in 423 cases that you have voted on, not one has been reversed.

Whether or not they have been listened to by the Supreme Court, they have rejected certiorari; they have not been appealed in some instances because the quality of your judging was so good. That is the point, after all.

Moreover, the Supreme Court has taken every one of your dissents over the majority of your brethren and has adopted them as their opinions. That is something nobody should ignore. It is really something.

With regard to Archibald Cox, my gosh, that doesn't even deserve to hear much comment about because you followed through on Watergate and were primarily responsible for having that come out to the effective conclusion that it did because that investigation that you backed up led to a President's resignation and several prosecutions, as you know, plus you were instrumental in getting Leon Jaworski to do it. And as much as I admire Archibald Cox, there is no question Jaworski really did the job, and where is the compliment for that?

Well, all I can say is you have wiped away any claims that you would sustain poll taxes or literacy tests. You have expanded civil rights in almost every case that you have had before you and you have enforced every civil rights statute that you have faced and several others as well.

On the racially-restrictive covenants, you argued the case that finally created a federal remedy for racially-discriminatory private contracts in the *Runyon* v. *McCrary* case.

You could go on and on, and let me just finish with these comments, and that is this: A lot of people have said minorities should be afraid of Judge Bork. Well, the fair judgment should be this: Should we fear a judge who strongly enforced voting rights in South Carolina in the *Sumter County* case?

Should we fear a judge who outlawed sex discrimination in the State Department in the *Palmer* case? Should we fear a judge who gave equal pay to stewardesses and other women in the *Laffey* case? Should we fear a judge who outlaws discrimination in military promotions in the *Emory* case?

Should we fear a judge who protected the due process rights of a homosexual in the *Doe* case? Should we fear a judge who won protections against private discriminatory contracts and covenants in the *Runyon* case? Should we fear a judge who went beyond the Supreme Court in protecting against pregnancy discrimination in the *Gilbert* case, and should we fear a judge who went beyond the Supreme Court in promoting free speech rights in the libel cases? Well, I don't think so.

I would conclude with these remarks: You have been very open, you have answered all these questions. I agree with Senator Simpson; it is never going to happen again. Nobody has been as open, nobody has put themselves forth as much as you have.

When these hearings began, the opposition accused you of being too rigid because they felt judges should be bound by the rule of law as well as those judged. You were too rigid because your mind was closed to new ideas and the rights of minorities, they said.

When they could produce absolutely no good evidence to support either claim, we began to hear a new allegation that you are too flexible; that you are too open to suggestions from this body.

Indeed, a judge who is bound by the law ought to be open to learn from the lawmakers, but these lawmakers ought to learn one critical lesson from this great jurist, and that is the lesson of fairness. In fairness, this body should provide no other verdict than that supported by the evidence, and that is the verdict of a magnificent performance.

Finally, every person is entitled to his or her own opinion, but no person is entitled to his or her own facts. The so-called facts used against you are totally manufactured by people who have made up their own facts out of the vacuums of their own minds.

To be honest with you, I have really been disturbed by the attacks that have come upon you, and it reminds me of a quote by

Albert Einstein. He said great spirits have always found violent opposition from mediocrities.

I think you are a great spirit, you are a great judge, you are a great legal mind. You are not only in the mainstream; you have got a lot of companionship there from the other great legal minds that we all admire in this century from the left to the right, and I want to compliment you for the way you have handled yourself and I hope our colleagues will read this record and pay strict attention to it, and I have no doubt that you will be confirmed if they will.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge, I won't trespass on your time very long. Let me begin by thanking your wife and your daughter and your two sons. I hope that you and your family have not felt you have been confronted by, to use Senator Hatch's words, opposing prosecutors.

But nonetheless, I am sure that, no matter how fairly or unfairly you feel the hearing was conducted or my colleagues may characterize it that, it is nonetheless difficult for your family to sit there under those lights for so long.

I have found in my limited experience of holding public office for 17 years that it is a lot harder on one's family than it is on the principal when a member of the family is undergoing any test.

You have been undergoing a test, but that is part of the process, as you well know, Judge. No judge, no nominee is entitled to the spot, nor have you ever implied you thought you were, merely because you have been nominated.

It is as much a responsibility of the nominee to prove why he or she should be on the Court. It is not a presumption automatically made any more than it is a presumption when one of us stands for election that we should be elected. That is the process.

As I said at the outset of this, I viewed my role as Chairman of this committee as not to persuade, not to attempt to persuade my colleagues, and obviously colleagues on both sides have attempted to persuade. You have heard two very persuasive closing arguments as to why you should be on the bench.

My function, as I have viewed it, is not to persuade, but to be part of assuring that all the issues were laid out; that you had a full and fair and thorough opportunity to respond, and to initiate any point that you wished to make.

I hope you feel that has been done.

Judge BORK. I do.

The CHAIRMAN. I do not feel this is—I have been around here a long time; I think—in fact, I know longer than anybody here except for Senator Kennedy and Senator Byrd. I have sat through a lot of these hearings.

I have difficulty characterizing any one of the questions, no matter how tough they were, as particularly harsh attacks. And, Judge, I hope you feel--I'm not asking you to respond in any way, but I hope you feel this has not been all about "politics" or only about politics, as some of my colleagues have suggested. I am sure they believe that; I'm not in any way suggesting they don't.

I hope you believe and understand that at least for some of us, and I think all of us, it is also about principle. And I hope that you don't feel that this committee has focused in any way on your background, your private life.

As you know and I am sure you are aware, I have done everything, and my colleagues have all agreed, to protect any inquiry into that area. There is nothing there. I have read your FBI report, I have read all those background checks. I think you are an honorable man.

But if you have noticed, no one has asked you about anything in there.

Judge BORK. I noticed.

The CHAIRMAN. And they could have; they have done it before to other people. If this were going to be pure politics, I think it would have been a little bit different, but it is not, because you are an honorable and decent man. There is nothing in your background that I have seen that in any way indicates that you are not, in terms of your character, fit to serve on any court in any position in this country.

So I hope that when all the dust settles, when you are either on the court—well, you will be on the court, on the circuit court or the Supreme Court—you will look back on this process and at least find some solace in the fact that none of that has occurred, nor will it as long as I am chairman of this committee.

The second point I would like to make to you is that I think it is fair to say that those of us who have taken issue with your philosophy, your judging philosophy, to use your phrase, have not, as was predicted, been single-issue people.

When you were nominated, this was allegedly supposed to be a great debate between pro-life and pro-choice, a great debate on all the other issues that the interest groups are out there talking about.

But the fact of the matter is, I think it is fair to say, that my colleagues on both sides of the aisle have not—they have asked about all those things, but I think it is hard to suggest that that has been a focus, a single issue.

I think this is about principle, not about whether you are principled—you are principled—but about whether or not your principled view of judging and how you interpret the Constitution is consistent with the principles that others of us have regarding that function and responsibility.

You have been very straightforward about how you view that interpretation of the Constitution. You have confused me a couple of times, and I acknowledge part of that may be because I have not fully followed you, not because you intentionally meant to confuse me.

Other times, I think we may have confused you a little bit, but one thing has come through for me throughout your testimony. I have been surprised a little bit about your development of your views on the due process clause. "Surprised" is too strong; I have been interested.

I have been interested in your fleshing out further than you ever had before your views on precedent—I think it is fair to say more than you ever have in public before. I have found them interesting—not provocative, but interesting—and I have to let it sink through my mind as to how I determine how consistent they are with what has been said before and what you say now.

Again, it is fully possible that they are totally consistent. I have not all sifted through all of it yet. I thought you were going to go some ways you did not go, and you went other ways I did not think, which again is what these hearings were about from the outset.

But a rock-bottom principle, I think it is fair to say, remains with you, and that is on choices of fundamental principle, decisions cannot be made by the court where constitutional material does not clearly specify the value to be preferred; judges can't go off and do that. There is no principled way to prefer any claimed human value over any other unless you find it in the text or the history of the Constitution, as I understand you.

You have written, and I think it is consistent with what you have said, that the truth is what the majority thinks it is at any given moment, precisely because the majority is permitted to govern and to redefine its values constantly consistent with the Constitution.

Now, I believe—I want to choose my adjectives properly here so I don't in any way in this closing statement misrepresent by implication anything you have said. Just let me say what I think.

I think the Constitution is more expansive than I think you read it, and I think judges have more latitude and should have more latitude than you think they should. I believe that the Constitution—well, from the Magna Carta to the Constitution, 800 years of English jurisprudential history, 900 years, have produced an abiding, consistent notion that I am who I am because I am, not because any constitution tells me.

When we delegated rights to a government, we expressly said that the ones set out as protecting in the Bill of Rights doesn't count them all. That ninth amendment, to me, is, and should be, expansive. I acknowledge it hasn't been used that way, but I think it should be.

I think it is necessary for an emerging society that is going to be faced with conflicts that are going to exceed those which we found, in my view, social conflicts, at any time in our history in the next 20 years.

As I said, I believe we are just born with certain rights as a child of God having nothing to do with whether or not the State or the Constitution acknowledges I have those rights; that they are given to me and you and each of our fellow citizens by a creator and it represents the essence of our human dignity, and even if the Constitution attempted to move them, I would still have them.

I agree with Justice Harlan, as we all have quoted Harlan. You have quoted him in agreeing with him; everyone here has quoted him. I agree with Justice Harlan—as we have all pointed out, one of the most distinguished conservative Justices of our era—who stated that the Constitution is a "living thing."

And I acknowledge you believe it is a living thing as it relates to whether you can find a textual basis for the principle in the first place, and you cite often, and I think forthrightly and which separates you from some other originalist folks, the fourth amendment.

You say, look, if it weren't a living thing, you wouldn't be able to outlaw wire taps. Obviously, they didn't think of wire taps back when they were talking about search and seizure. You expand it, but you must find it in the text first.

And I think the Constitution and its protections are enshrined in majestic phrases like "equal protection under the law" and "due process," and thus cannot be, as Harlan said, "reduced to any formula."

It is, as Chief Justice John Marshall said, and I quote, "The Constitution is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. Only its great outlines are marked."

In the end, Judge, whatever my reaction or anyone else's reaction to your testimony here, which has been long, I think it is fair to say we have tried to move it as fast as we could, but it has nonetheless been long and, I think, thorough.

And I agree with my colleagues; you have done your best to answer. You have not attempted to step back and say, "I can't speak to that issue." And I hope the confirmation process has been served well, and I hope that in our debate, our discussions—and the debate will take place on the floor of the United States Senate because it is my intention for your nomination to get to the floor of the United States Senate.

I hope that what we have done a little bit of, although none of us is trained as you have been, to the extent you have been in the law—I hope our discussions have demonstrated to our fellow citizens the majesty of the Constitution. I hope they have demonstrated the greatness that we think the American people require of those who interpret the Constitution.

Let me conclude, Judge, by saying that I do not find you to be racist or insensitive.

I find you to be a very bright man who has done his best to let us know what he thinks in a complicated set of principles and areas that we have discussed, and who has a view of constitutional interpretation and judging that is different than mine.

And there are some things I have to go back and look at now, and that is to what degree, to how much of a degree, that exists, and I will do that. And we will listen to testimony from others over the next couple weeks.

It is still my intention, Judge, to move this along as rapidly and as fast as possible, but I can't guarantee you when we will finish. We are shooting to finish this hearing so we can vote on October 1st, but I think it is fair to say we may not be able to make that, although that is our intention, based on when and to what degree witnesses are available.

But, Judge, we are going to keep the record open for my colleagues who may wish to ask you questions in writing, as you have agreed to earlier, but we will not burden you with many, I hope. At least my effort will be to see that that doesn't happen, and there will be plenty of time before this hearing is over for you to answer them.

So, Judge, I say to my colleagues I want to thank them, and I want to thank you. Senator Hatch, you are not going to get the last word now. I am the Chairman, I just want you to know.

Senator HATCH. I don't want the last word.

The CHAIRMAN. We have never been in a circumstance where Senator Hatch has not had the last word.

Senator HATCH. Oh, that's not true.

The CHAIRMAN. So I want to make sure that he understands one of the few prerogatives of a chairman is to have the last word.

Senator HATCH. Can I ask a question, Mr. Chairman?

The CHAIRMAN. You can ask a question. I thought you were about to make a speech.

Senator HATCH. The last thing I want is the last word today.

Mr. Chairman, Senator Thurmond asked me to request if we can get the witness list all the way through.

The CHAIRMAN. Yes, you will get the witness list.

Senator HATCH. We have given you ours, and we would like to have it today so we know——

The CHAIRMAN. I will try to do that, and I will also point out one other thing. Senator Thurmond has been here a lot longer than I have. [Laughter.]

Senator HATCH. A lot longer than any of us.

The CHAIRMAN. Duke just handed me a note. He said, don't forget Senator Thurmond came to the Senate when you were eleven years old. [Laughter.]

He is absolutely correct. Judge, I hope you haven't found it much more than physically tiring. I hope you believe you have been treated fairly. We have tried our best to do that.

I have enjoyed you. I appreciate your cooperation, and to the great relief of your family and to you—you will be able to catch at least the second quarter of the Boston College game—this hearing is recessed until Monday.

[Whereupon, at 3:27 p.m., the committee was adjourned, to reconvene at 10:00 a.m., Monday, September 21, 1987.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, SEPTEMBER 21, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SR–325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The **Chairman**. The hearing will come to order.

We are starting our first day of hearings with the public witnesses, and we have some very distinguished witnesses, both here to speak on behalf of and to express reservations about the nomination of Judge Bork to be on the Supreme Court.

Let me tell you how the ranking member and I have agreed we will proceed today. We will start with the morning series of witnesses made up of the former Secretary William Coleman, former Ambassador Andrew Young, former Congresswoman Barbara Jordan, Burke Marshall and former Attorney General Nicholas Katzenbach, although I believe Mr. Katzenbach cannot be here until the afternoon.

We will go with the first four witnesses that I have mentioned this morning. I would like to ask the witnesses to attempt to limit their statements to 10 minutes. We will have a single round of questioning. I would ask my colleagues to limit themselves in their questioning to 10 minutes, if that is at all possible. Obviously, if there is an area that warrants continued questioning, we will do so. It is my intention to have each witness testify for 10 minutes and then answer questions for up to 10 minutes from each of the panel members who have questions.

Now, at lunch, Senator Thurmond and I will speak as to whether or not we put the American Bar Association, Mr. Tyler and Mr. Fiske, immediately after lunch or how we are going to work that or, if we get finished early enough, before lunch if they are here. But we will start this morning's testimony with former Secretary William Coleman.

Mr. Coleman, if you would please take the middle seat, I would appreciate it. We welcome you and are flattered by your presence. I should say at the outset that I fully understand that when one is testifying in opposition it is never a joyous occasion. But we appreciate your coming.

Unless the ranking member has any comment he wishes to make, Senator Thurmond.

Senator THURMOND. Mr. Chairman, I have no comment except I just want to welcome these witnesses here today. We are glad to have them, glad to hear from them.

The CHAIRMAN. We will begin with Secretary Coleman. Mr. Secretary, please proceed.

STATEMENT OF WILLIAM T. COLEMAN, JR.

Mr. COLEMAN. Good morning, Mr. Chairman and the other Senators of this committee.

Written testimony was filed by me late last night. It is 52 pages; there are three appendices. Mr. Chairman, I would appreciate it if you would permit that to be transcribed into the record as my testimony.

The CHAIRMAN. The entire statement will be placed in the record.

Excuse me, Mr. Secretary. One of my colleagues has asked that you pull the mike very close to you. Thank you very much.

Mr. COLEMAN. Judge Bork's supporters have informed you that I was a member of the ABA Judiciary Committee which made the initial investigation of Practitioner Bork's fitness for appointment to the D.C. Circuit. At that time, the committee voted him exceptionally well qualified to be a judge on the United States Court of Appeals for the District of Columbia.

I have tried very hard to avoid this controversy. The Supreme Court has played such an important role in ending so many of the horribly racially discriminatory practices that existed when I first came to the Bar. As one who has benefited so greatly from this country's difficult but steady march toward a free, fair, and open society, the handwriting on the wall—"mene mene tekel upharsin"—would condemn my failure to testify against Judge Bork.

I urge this committee not to send this nomination to the floor of the Senate with its approval; if it does go to the floor, I urge the Senate not to give its consent.

The reasons are: First, Judge Bork has repeatedly rejected the leading substantive liberty cases since *Meyer* v. *Nebraska*, whose holdings have certainly become part of our constitutional fabric. These cases are the cases which established that the word "liberty" in the 14th amendment, in the fifth amendment, and in the Preamble of the Constitution has a meaning other than merely freedom from bodily restraint. Under these cases, it has been made clear that every American as part of his birthright has the right to marry, to procreate, to pursue an occupation, to determine whether his children want to go to public school or private school, and to determine what other languages the child wants or his or her parent want the child to learn. These freedoms are rooted in the Constitution, and, since 1923, they have been repeatedly recognized. And, indeed, last term Justice O'Connor struck down a State statute which prohibited prisoners from marrying, holding that where a person who was in prison had an opportunity to get married, it would violate his fundamental liberty for the State to say, "You cannot marry."

Now, Judge Bork stated his views before he went on the bench. He has written no decision on the bench which rejects them, but he has made speeches after being on the bench in which he continues to take this position.

Second, Judge Bork, with the exception of *Brown* v. *Board of Education,* Number 1, has criticized and rejected every landmark civil rights case since that time.

Third, Judge Bork in his writings—and I know that during his testimony he had said something slightly different, and I have referred to such statements in my testimony—has said that the 14th amendment is limited to blacks, and that women, the illegitimate child, the alien and the poor are not covered by that amendment.

Fourth, despite what some of his supporters will tell you, Judge Bork is not in the tradition of Justices Frankfurter and Harlan. He is not the type of judge who believes in judicial restraint as they used the term.

I support President Reagan; I agree that this country needed to increase its defenses; I agree that we must get better control of our budget; and I agree that many more things should be turned back to the States and the private sector. But I find myself in disagreement with the President's view that the present Supreme Court is not functioning the way it ought to function, and that we need to put people on the Court which, at least by their public statements, have said they would turn back decades of constitutional development.

As I said, I have put my reasons for opposition in the written testimony. Now I would just like to walk you through the 14th amendment cases. I realize—and I wish Senator Simpson were here—that I do not think I can convince him to change his position. But I hope when I leave here, at least every member of this committee will say that people who oppose this appointment are doing so for responsible reasons.

Let me talk about the 14th amendment. The first point is that Judge Bork has said that the 14th amendment was adopted primarily with respect to blacks—and then he includes ethnicity—but in his view once you move beyond that, the decisions are really judge-made law and there is no basis for them. I have cited in my written testimony a statement Judge Bork made in Aspen in 1985 where he takes that position.

That means that those cases which have struck down as unconstitutional State statutes discriminating against women are not, in his view, properly within the 14th amendment. I know he has shifted and now says that you can apply a reasonableness approach to such cases. I would like to walk you through that in a minute.

With respect to the alien, he says the same thing; likewise with respect to the illegitimate child. He says this shall all be left to the legislative process.

I just ask you gentlemen sitting there and I ask the rest of the Senate and I ask the rest of the people in this room: Do you think that when there is a State statute which says that an illegitimate child cannot recover for the death of his or her mother, but a legitimate child can, that that illegitimate child can muster sufficient force in the legislature to get that statute changed?

The great case, or one of the first great cases that every lawyer here knows that was won by black people was the restrictive covenant case in 1948. That case simply held that where there was a racially restrictive covenant on a property but the white owner decided to sell it to a black man, that it would violate the Constitution for another one of the white signers to go into court and get an injunction to enforce the covenant.

Now, Judge Bork has said that case was wrongly decided because there was no State action. But, Judge Heflin, I asked you, when you were a State court judge and somebody was paying your salary out of the Treasury, if you had decided to in such a case that if the parties are all white, the defendant wins, whereas if the plaintiff is white and the defendant is black you would grant the plaintiff relief—well, I find it hard and I think you would find it hard to say that such a decision is not State action and does not violate the 14th amendment.

Now, the first day when Judge Bork was here he testified that *Shelley* v. *Kraemer* was just a sport in the law and it has no constitutional basis. Well, *Barrows* v. *Jackson* seven years later upheld it. I ask you to reread the *New York Times* v. *Sullivan* case. That came out of Alabama. There you had a situation where the local official said that the New York Times and Reverend Abernathy libeled him. The jury brought back a verdict of I believe a half million dollars.

The Supreme Court of Alabama said there is no violation of the Constitution because when you just have two litigators and one is trying to enforce the common law of Alabama dealing with libel there is no State action.

The case comes to the Supreme Court of the United States. It is reversed nine to nothing in a decision saying there is State action. And just 3 years ago, Chief Justice Burger stated that whenever the State is acting through a court, it is State action.

Senator Specter, you remember the *Girard College* case. Stephen Girard wrote a will limiting the college to whites only. The black plaintiffs went into court. The State of Pennsylvania court threw them out on the ground that this was no State action. The Supreme Court reversed that case on the papers.

Now, why do I make such a point of this? At some time you get affected by your own life experiences. There was a beloved man in Philadelphia, an outstanding lawyer, Judge Raymond Pace Alexander. He wanted to move to a neighborhood in which there were restrictive covenants. He wanted to see a particular house before he moved into it, and that gentleman—an undergraduate from Central High School, which, with all due respect to you, Senator Kennedy, we think is as great as Boston Latin School, an undergraduate from the University of Pennsylvania, a graduate of Harvard Law School, his wife a Ph.D. recipient and a member of the Law Review person at the University of Penn—could get in and see that house only by dressing as a painter and getting in that way. *Shelley* comes along and changes that. We cannot have that type of decision be undone.

Now, in the Judge Bork's writings, he says so many of these things should be left to the political process: you come up to the Hill, you go to the State legislatures. Well, in 1963, after this country had paid a terrible debt—it lost Martin Luther King; it lost President Kennedy; it had over 10,000 young black people who sat in at lunch counters and had their heads beaten—we finally got a southern President—Lyndon Johnson—who really understood the aspirations of black people. So we get on the floors of the Senate and the House a public accommodation bill. We make a lot of compromises—Mrs. Murphy's house exemption, you name it. Yet when that debate was going on, Judge Bork writes an article in the New Republic in which he criticizes that whole effort, saying it is very "ugly" to visit on the white person the requirement to act like any other American and sell the house to a black person or serve one at the hotel or lunch counter.

Now, I realize that later Judge Bork has said, oh, gee, I made a mistake. I guess we all have made mistakes. But then that does not stop the tale. He still takes the position attacking Congress' enforcement power under Section 5 of the 14th amendment.

As you know, when the lawsuit was brought challenging the enforcement of the literacy requirement against a voter as violative of the 14th amendment, or the 15th amendment, the Supreme Court said no, it did not. Thereafter, there were 2 years of debates, and finally the Voting Rights Act of 1965 was passed. In passing that Act you, the Congress, had the sense to say that people who live in Puerto Rico, who get educated in Spanish, go to college, speak Spanish, pass a test in Spanish, but then come to New York and try to register cannot be denied the right to vote simply because they cannot read English.

The 1970 amendments to the Act extended the ban on literacy tests on a nationwide basis, thereby invalidating literacy statutes such as the one that existed in Oregon. Both the Act and the amendments were challenged. The Supreme Court said you had the constitutional authority to ban practices that are not themselves unconstitutional.

On the other hand, Judge Bork in his writing takes the position that anything that the Supreme Court would say was not unconstitutional could not be made illegal by statute. What that says to the black and to the woman is that this Congress cannot give the needed relief.

This view puts in serious jeopardy the matter we had the last time on the Voting Rights Act. The Court had said that unless you can prove intent to discriminate racially in connection with establishing voting districts, there is no violation of the Constitution. Yet this Senate in 1982 passed the statute which says if the result shows that there is racial unfairness, that that is illegal.

So here you have a judge who in every instance on these great issues publicly as a scholar always comes out the wrong way. Now I hear three things said in terms of why we should relax and not pay much attention to that.

The first is that obviously when you go in any court there is precedent. Judges do follow precedents. Well, if there is anything clear about the Supreme Court, it is that the justices there do not feel as bound by precedent as lower court judges should. And I have in Appendix C set forth some of the relevant cases. But, more importantly, I have set forth the statements made by Judge Bork where he says that you do not have the obligation to follow precedent, that an originalist—and what that means I do not know—who when he gets on the court finds out that there is a decision which he thinks he cannot rationalize as an originalist has no responsibility to follow it.

Secondly, and——

The **Chairman**. Mr. Coleman, I am not going to interrupt you except to say that obviously you are going over the time. But in order to accommodate this, I will yield my time to you and I will not ask questions, and apparently——

Senator **Kennedy**. I will be glad to yield my time, Mr. Chairman.

The **Chairman** [continuing]. So that we are able to keep on track, if you can continue, but I will not allow that to occur to any other witness.

Mr. **Coleman**. I think I am being very unfair to Congresswoman Barbara Jordan and——

The **Chairman**. No, you would be there this long anyway. It is a question of whether we ask the questions or you speak, and you are speaking very eloquently and let our questions not interrupt you. So you go ahead and anyone else who wishes to do the same, yield their time to the witness, can do so.

Senator **Metzenbaum**. We have ten minutes and I just have a couple of questions. I yield 5 minutes.

Mr. **Coleman**. I can finish.

The second——

Senator **Kennedy**. Mr. Coleman, I think you have to understand you are talking about the things that we would be questioning you about in any event, and you are doing it in a way that is, I think, of great information for the members of our committee.

Mr. **Coleman**. Secondly, as I indicated, one reason why I am here is that I know some of my friends who are supporting Judge Bork have been up here saying, "Well, Bill Coleman was involved in evaluating his nomination to the D.C. Circuit." And I have put in writing the reasons why I think the D.C. Circuit approval does not become the factor which should determine what you should do.

Senator **Heflin**. Would you tell me what page you are on in your testimony?

Mr. **Coleman**. Yes, sir. You start on page 41 and I tried to take you through the actual ABA rules, and they will tell you that the standard for a judge on the circuit is different from the standard for a Justice on the Supreme Court.

And when you look at page 43 and 44, I set forth the provisions that control when you are evaluating a person nominated to be a Justice, and that are not in the provisions when you are evaluating a person for the court of appeals. And I hope that you would feel, Senator Heflin, that if I were given the duty to review someone for the court of appeals, that it would be very irresponsible on my part to say in the back of my mind, "Oh, gee, since someday he may be on the Supreme Court, I am going to measure him by a different standard". I did not do that.

Secondly—and Senator Hatch, I think you have been very effective talking about the Judge's performance on the court of appeals, but I have checked. There is only one opinion that he has written dealing with the constitutional right of privacy and what liberty means, and there are no civil rights opinions dealing with the constitutional issues.

Nobody is claiming that if there is a statute properly drawn by Congress which says that if you do certain things you discriminate, that the Judge would not read that statute and apply it. But the problem is that when you are dealing with constitutional issues, where you do not have a statute, those are the cases that you have to be concerned about.

Now in conclusion, I would like to say—and I will be finished—I would like to point out that Judge Bork has made it clear in his writings that he would not feel bound to follow precedence if he is on the Supreme Court, and that the Justices in general are not.

Judge Bork wrote in the New Republic in 1963, "heretical though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle". That is his language. Putting aside constitutional sages, it certainly should come as no surprise to this committee that for black Americans and the majority of American women the Constitution and that Court are today matters of first principle. In fact, it is a first principle to all Americans.

Much has been written about whether certain rights can be found in the words of the Constitution or are merely creations of judges. I urge you to reread the cases beginning with *Meyer*, and I think you will conclude that the right of liberty and the right of privacy are found in the written words of the Constitution. They are also found in our constitutional history, and even if these rights were not found in the written words of the Constitution, it requires a far less expansive reading of the Constitution to find such privacy rights than it does to get out of the Commerce clause what everybody says is there.

Yet while Judge Bork is willing to read the Commerce Clause broadly, when it comes to the great clauses dealing with human rights, for some reason Judge Bork says such rights are not there.

Now black Americans, women, indeed most Americans, have seldom suffered because there were not enough words already in the Constitution. Most damage has come when former Justices did not read correctly what is in the Constitution. Thus what most Americans really want are Justices—men and women—who will carry out what is already written.

I urge you also to reread the decision in the *Dred Scott* case. That result was reached only because Chief Justice Taney said that a black, however free and wherever he lived and even though no longer in slavery, or even though he had never been in slavery, could not be a person or a citizen as those simple words were written in the Constitution.

I would beg you to go back and read them and see whether you can reach that result with those simple words.

The 14th amendment, as written, did not require the Justices to set up the phoney scale of separate but equal in *Plessy* v. *Ferguson*, or interpret the 14th amendment to permit a state to prohibit women from practicing law. And no literal reading of the 13th and 14th amendments required the results reached by the Court on the power of Congress to pass the Civil Rights Act of 1866 as written. This has been clearly demonstrated by the cases I cite on page 50, each one of which has now found that where a private person does something wrong to another private person, based upon his race or his sex, that that violates the Act of 1866, and Congress has the power to enact such a statute. That is the same act that the Supreme Court in the Civil Rights case in 1881 said Congress had no power to pass because there was no State action. Can you imagine where this country would be today if you had a Justice on the Court then (1881) who was the type that you had in Justice Potter Stewart, who recognized when you read those words that there was support in the Constitution for such an enactment?

I think—to me this is fundamental—if anyone can appreciate the full impact of an all-pervasive and intrusive government or media on individual privacy and substantive liberty, it is our elected officials. No principle is more fundamental to the preservation of a free society composed of diverse and sometimes fractious cultures, philosophies and individualists. We are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society. In this day and age can we really take the risk of nominating to the Supreme Court a man who fails to recognize the fundamental rights of privacy and substantive liberty, which means more than mere freedom from physical restraint, which are imbedded in the very fiber of our Constitution, or a man who questions Congress' power to enlarge protection for blacks, women and others under Section 5 of the 14th amendment or Section 2 of the 15th amendment.

Having come this far towards a free and open society, we should not stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discriminations against women.

I appreciate your patience. I will now try to answer any questions. As I indicated, I have filed a written document, and I have every confidence that every member of this committee will read it.

Thank you.

[Prepared statement follows:]

113

Written Testimony of William T. Coleman, Jr. on the Nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States

Submitted to the Senate
Judiciary Committee

September 21, 1987

Introduction p. 1

Summary p. 4

Part I - The Protection of Fundamental Rights p. 11

Part II - The Anti-Discrimination Principle p. 22

Part III - Effect of ABA Judicial Committee Rating in 1982 p. 41

Conclusion p. 46

Appendix A - Justice Frankfurter's Approach to the Due Process Clause of the Fourteenth Amendment

Appendix B - Justice Harlan and the Due Process Clause of the Fourteenth Amendment

Appendix C - The Role of Stare Decisis in Supreme Court Constitutional Adjudication and Judge Bork's Views with Respect to Precedents

Written Testimony of William T. Coleman, Jr. on the Nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States Submitted to the Senate Judiciary Committee

My name is William T. Coleman, Jr., member of the bars of the Supreme Court of the Commonwealth of Pennsylvania, of the District of Columbia, and of the Supreme Court of the United States. I began my legal career as law clerk to Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit and thereafter to Supreme Court Associate Justice Felix Frankfurter, whose views on judicial restraint I greatly respect. During almost forty years as a private practitioner, I have been privileged to practice actively before the Supreme Court of the United States and other federal and state courts, and to participate in a broad range of corporate, transactional, public and international matters.

In 1975, President Gerald R. Ford nominated me to be Secretary of Transportation and, with the consent of the Senate, I was provided a rare opportunity to serve the American people as a member of President Ford's Cabinet.*

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* Since 1955, I have been a member of the Board of Directors of the NAACP Legal Defense and Educational Fund, Inc. I served as its non-employee President until joining President Ford's Cabinet and since 1977 as its non-employee Chairman of the Board of Directors.

In 1981, I was a member of the ABA Judiciary Committee which rated then-practitioner Robert H. Bork "Exceptionally Well Qualified" for appointment to the United States Court of Appeals for the District of Columbia Circuit. As the member from the D.C. Circuit, it was my task to make the initial investigation.

I tried very hard to stay out of this controversy. As Chairman of the NAACP Legal Defense and Educational Fund, Inc., I was informed that members of its staff had raised serious questions about Judge Bork's suitability for appointment as a Supreme Court Justice. I told the Director-Counsel of the Fund and the staff that they had a duty to study Judge Bork's record thoroughly and fairly and to weigh the effects of the Fund's opposition if, nevertheless, he was confirmed. I assured the Director-Counsel and staff that I would not overrule them if, after a diligent and balanced inquiry, they concluded that opposing Judge Bork's nomination was essential to preserve and continue the progress in the effort to end racial discrimination and all remaining vestiges and effects thereof for which the Fund has labored so long. For, in fairness to future generations, white, black and others, male and female, the Fund's staff must consider the implications of any nominee to the Supreme Court for the extremely important and challenging work that remains to be accomplished over the next 20 to 30 years.

As the public debate continued, however, it became apparent that I cannot sidestep the controversy. On many occasions, I have come to this Congress, and to members of this Committee, asking you to take unpopular positions publicly -- for example, the 1982 amendments to the Voting Rights Act of 1965. My service as a public servant, career as a legal practitioner, and my participation in corporate and public policy decision-making simply would not have been possible if the Supreme Court had not changed so many of the discriminatory practices and attitudes that existed three decades ago. Many of these changes were the direct result of the persistence of our liberty-loving people, who invoked the aid of the courts, with ultimate review in the Supreme Court, in their pursuit of the Constitution's unfulfilled written and otherwise historically expressed promise of substantive personal liberty, equality and freedom from racial and gender discrimination. As the ultimate guardian of the constitutional legal principles that fairly resolve most controversial fundamental disputes, the Supreme Court, for the most part, has kept the protest against racial injustice and other forms of irrationality from exploding into violent confrontation in the streets. Instead, we have sought and found solutions in the courts, the board rooms, and legislative halls. As one who has benefited so greatly from this country's difficult, but steady, march towards a free, fair, and open society, the handwriting on the wall -- "mene mene tekel upharsin"* -- would condemn my failure to appear here and testify against the confirmation of Judge Bork.

I urge this Committee not to send forward the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. If his nomination does go to the floor of the Senate for its consent, I urge the Senate to refuse to consent to this nomination.

The reasons, briefly summarized, are as follows:

SUMMARY

I. Judge Bork's Rejection of Leading Cases on Fundamental Rights of Liberty and Privacy

Judge Bork, in his writings and speeches, has repeatedly rejected the well-established line of Supreme Court decisions holding that the "liberty" in the Fifth and Fourteenth Amendments and the preamble to the Constitution protects against governmental invasion of a person's substantive personal liberty and privacy. He flatly rejects as "wrongly decided"* the first decision in that line of cases, Meyer v. Nebraska, 262 U.S. 390 (1923),** that liberty in the Constitution means more than "merely freedom from bodily restraint." Meyer, 262 U.S. at 399. The decision in Meyer has been applied and followed in an untold number of cases from a decision handed down in 1925 -- Pierce v. Society of Sisters, 268 U.S. 510 (1925) -- to a decision handed down this past Term, Turner v. Safley, 55 U.S.L.W. 4719 (1987) -- in which the Court, in an opinion written by Justice O'Connor, held that the "liberty" in the Constitution encompasses the fundamental right of a person, including a prisoner, to marry. Judge Bork, by rejecting this line of cases, would exclude from constitutional protection "the right of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer, 252 U.S. at 399.*

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* In the Old Testament the language of the Aramaic phrase written on the wall in Balshazar's dream and deciphered by Daniel as meaning: "Thou art weighed in the balances, and art found wanting." Book of Daniel, ch. 5, verses 25-27 (King James version).

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* Bork, "Neutral Principles and Some First Amendment Problems;" 47 Ind. L.J. 1, 11 (1971)[hereinafter "Neutral Principles 1971"].

** In fact, the line of cases may be traced back to a Supreme Court decision in 1891: "In a line of decisions . . . going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 147, 152 (1973). See also, id. at 214-15 (Douglas, J., concurring); id. at 167-71 (Stewart, J., concurring).

Included in the substantive liberty interests that Judge Bork would remove from constitutional protection is an individual's right to privacy -- the right to be let alone. See Griswold v. Connecticut, 381 U.S. 479 (1965). No constitutional concept is more deeply embedded in our nation of diverse peoples and beliefs than the respect for, and need for constitutional protection against government intrusion into, individual privacy, and a distrust of, and need for constitutional protection against, a powerful government's capacity to infringe upon individual basic substantive liberties. And no concept is likely to be more important to the preservation of a free society over the next fifty years as advances in computer technology, science, communications, and medicine substantially increase the government's capacity to invade individual privacy. Justice Stewart, who dissented in Griswold, wrote in his concurring opinion in Roe v. Wade:

> Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such . . . . The Constitution

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* As demonstrated in Appendices A and B, Justices Frankfurter and Harlan embraced an interpretation of the liberty component of the Due Process Clause that Judge Bork would have to reject.

> nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.

Roe, 410 U.S. at 168-9.

Judge Bork's narrow view would also exclude the liberty of mobility, rejecting Justice Stewart's view in Shapiro v. Thompson that "liberty" embraces the fundamental right to travel:

> 'The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized. United States v. Guest, 383 U.S. 745, 757 [(1966)]. This constitutional right, which, of course, includes the right of 'entering and abiding in any State of the Union,' Truax v. Raich, 239 U.S. 33, 39 [(1915)], is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. '[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' United States v. Guest, supra at 760, n.17. As we made clear in Guest, it is right broadly assertable against private interference as well as governmental action. Like the right of association, NAACP v. Alabama, 357 U.S. 449 [(1958)], it is a virtually unconditional personal right, guaranteed by the Constitution to us all.

394 U.S. 618, 642-43 (1969) (Stewart, J., concurring) (footnotes omitted). Judge Bork's philosophy of almost total deference to the majoritarian will of local legislative bodies, which reflect the prevailing community mores and biases, and his rejection of the constitutional right to travel would make it impossible for minorities and the poor

to seek out communities which maximize their opportunity for individual fulfillment.

Let there be no doubt. Judge Bork, both before and after he became a federal judge, has in published articles and speeches criticized these decisions as having no constitutional basis, as being wrong, and indeed, in some cases, as being "unconstitutional." And, since becoming a judge, he has not written any opinion disavowing any of his publicly stated views.

To approve someone at this stage of our legal history who rejects the Supreme Court's decisions recognizing the constitutional right of privacy and liberty, whatever the scholar's background or standing at the bar, would be akin to approving for appointment a scholar who believed that the Fourteenth Amendment was improperly adopted and thus is not part of today's Constitution.*

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* There exists a body of literature advancing such a view as to the invalidity of the Fourteenth Amendment. _See e.g._, Suthon, _The Dubious Origins of the Fourteenth Amendment_, 28 Tul. L. Rev. 22 (1953); Ackerman, _The Storrs Lectures: Discovering the Constitution_, 93 Yale L.J. 1013, 1063 n.88 (1984) (sources cited therein); Murphy, Book Review, _Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?_ 87 Yale L.J. 1752, 1767 n.76 (1978) (sources cited therein) (reviewing R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977)).

II. Judge Bork's Criticisms of Landmark Civil Rights Cases Under the Equal Protection Clause

Judge Bork, in his writings and speeches, has concluded that several leading constitutional decisions protecting the rights of blacks were wrongly decided and had no basis in the Constitution. These include Shelley v. Kraemer, 334 U.S. 1 (1948), decided by a unanimous Court (with three Justices not participating) in 1948, in which the majority opinion was written by Chief Justice Vinson. The Court in Shelley held that the Fourteenth Amendment forbids a state court from enforcing a racially restrictive covenant which prohibits the sale of real estate to a black person. Other decisions criticized by Judge Bork include the state poll tax cases and the decision in Regents of University of California v. Bakke, 438 U.S. 265 (1978) (affirmative action case). In objecting to these leading civil rights decisions, Judge Bork, as a scholar, has often written that the Court has exceeded its constitutional powers and is attempting to legislate. But when Congress enacts civil rights legislation, he has sometimes concluded that Congress has in turn exceeded its constitutional powers. The committee should compare his comments on Shelley with his comments on Katzenbach v. Morgan, 384 U.S. 641 (1966). See infra at 29-30, 35-38.

III. Judge Bork's Skepticism About the Effective Use of the Equal Protection Clause to Protect Women, Aliens, the Poor or Illegitimate Children

Judge Bork also rejects or would greatly limit the precedential effect of several Supreme Court decisions that place effective constitutional restrictions on the use of the strict or heightened scrutiny test to review governmental actions that discriminate on the basis of sex, illegitimacy, poverty, or alienage.

IV. Judge Bork's Inconsistency With the Frankfurter-Harlan Tradition of Judicial Restraint

Contrary to the assertion of some of Judge Bork's prominent supporters, his judicial philosophy is contrary to, and inconsistent with, that of Justice Harlan and particularly Justice Frankfurter, who greatly shaped my own views of judicial restraint and of the proper role of the Supreme Court in a constitutional democracy.

V. Continuing the Court's Role in Achieving a Fair Society For All

Finally, even though I generally agree with President Reagan's views on a strong defense, the need to reduce the public deficit, and the importance of returning power to the states and the private sector, I disagree with his view that the Supreme Court has been creating constitutional law rather than interpreting it. I also firmly believe that, having come this far towards a free and open society, it is not in the public interest to stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discrimination against women.

Let us turn to each of these reasons:

DISCUSSION

I. The Protection of Fundamental Rights

Since at least 1923* the Supreme Court has recognized that the "liberty" protected by the Due Process clauses of the Fifth and Fourteenth Amendments is not limited to "freedom from bodily restraint" but has substantive content and thus embraces certain basic individual liberties. *Meyer*, 262 U.S. at 399. *See also Pierce*, 268 U.S. at 510 (1925). As the Court in *Meyer* recognized, those liberties include "the right of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer, 252 U.S. at 399. These substantive liberty rights were assumed by me to be part of every American's heritage even before I attended law school. Everything I have learned since as a lawyer in trying to understand the yearnings of Americans, including what I have learned from reading Supreme Court decisions, has only reinforced that belief. It has become an established part of our legal tradition to view the Constitution as forbidding government abuses which, in the words of Justice Frankfurter, "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." Adamson v. California, 332 U.S. 46, 59, 66-67 (1947) (Frankfurter, J., concurring). See also Poe v. Ullman, 367 U.S. 497, 522, 543 (1961) (Harlan, J., dissenting).

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* As stated earlier, *supra* p. 5, the proper date may in fact be at least 1891.

The conclusion that the liberty in the Fifth and Fourteenth Amendments and the preamble to the Constitution has substantive content in the realm of personal rights has been accepted by every Justice with the possible exception of Justice Hugo Black,* whose somewhat distinctive jurisprudence resulted from his premise that the first eight amendments in their entirety are incorporated in, and represent both the floor and the ceiling of, the Fourteenth Amendment. Justice Harlan's concurring opinion in *Griswold v. Connecticut*, 381 U.S. at 499-501 (1965), clearly demonstrates the error in Justice Black's view.* *See also* Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1959). Encompassed within the long-established view of the meaning of liberty in the Constitution is the fundamental right to privacy, which has been held by the Court in a long line of cases to encompass personal decisions relating to marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*; procreation, *Skinner v. Oklahoma*; 316 U.S. 535 (1942); contraception, *Griswold v. Connecticut*; *Eisenstadt v. Baird*; 405 U.S. 438 (1972); family relationships, *Prince v. Massachusetts*; 321 U.S. 158 (1944); abortion, *Roe v. Wade*; and child rearing and education, *Pierce*; *Meyer*.

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* As Senator Specter pointed out at these hearings on Friday, September 18, 1987, Justice Black accepted this conclusion when he voted with the Court in Bolling v. Sharpe, 347 U.S. 497 (1954), the District of Columbia school desegregation case.

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* Of course, even Justice Black's view gives substantive content to the word "liberty" in the Fourteenth Amendment, as that is necessarily implied by the incorporation of the first eight amendments into the Fourteenth Amendment through the word "liberty." Justice Douglas agreed to a point, although in his view the first eight amendments did not exhaust the substantive content of the word "liberty" in the Constitution.

Justice Powell, for instance, wrote in Moore v. East Cleveland, 431 U.S. 494 (1977), in a decision striking down a housing ordinance restricting dwellings to traditional single family living arrangements,

> [a] host of cases tracing their lineage to [Meyer and Pierce] have consistently acknowledged a 'private realm of family life which the state cannot enter'" (citation omitted).

Moore, 431 U.S. at 499. And just this past Term Justice O'Connor, in a portion of the opinion joined by every member of the Court in Turner v. Safley, 55 U.S.L.W. 4719 (1987), held that the Constitution's protection of "liberty" prevented a state from prohibiting a man in jail from marrying, stating that there exists "a constitutionally protected marriage relationship in the prison context." Id. at 4724.

Justice Stewart also agreed that "liberty" in the Constitution has substantive content. Although he dissented in Griswold, in his concurring opinion in Roe v. Wade he indicated his acceptance of the long line of substantive due process decisions:

> Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such . . . . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty'

> protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.

Griswold, 366 U.S. at 268 (1965).

Judge Bork rejects this fundamental concept of due process and substantive personal liberty, as well as the decisions which have recognized and followed it. Both before and after he became a judge, he has harshly criticized the entire line of decisions recognizing a fundamental right to privacy.

With regard to _Griswold_, where the Court struck down a Connecticut ban on the use of contraceptives as a violation of the fundamental right to privacy protected by the Due Process Clause, Judge Bork wrote the following:

> _Griswold_, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in _Griswold_ through principle.*

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* "Neutral Principles 1971," _supra_ p. 5, at 8-9.

He continued:

> All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of 'fairness' or to what it regards as 'fundamental' interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as Griswold v. Connecticut.*

Subsequent to becoming a federal judge, Judge Bork continued his criticism of Griswold. He wrote that the result in that case could not "have been reached by interpretation of the Constitution,"** and that Griswold, along with "all the sexual freedom cases," represented the Court's "imposition of upper middle class, college education, east-west coast morality."*** In his view, "[s]ince there is no constitutional test or history to define the right, privacy becomes an unstructured source of judicial power."**** He has repeatedly referred to Griswold and its progeny as "the so-called right to privacy cases, which deal with sexual morality,"* and in an interview in 1986 restated his views first expressed 15 years earlier:

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* "Neutral Principles 1971," supra p. 5, at 11-12.

** Address by Judge Robert H. Bork, Catholic University, at 4 (Mar. 31, 1982) [hereinafter "Catholic University 1982"].

*** Address by Judge Robert H. Bork, Federalist Society, Yale University, pt. 2, at 8-9 (Apr. 24, 1982) [hereinafter "Federalist Society 1982"].

**** Address by Judge Robert H. Bork, University of San Diego Law School, at 10 (Dec. 1983).

> I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision. The majority opinion merely notes that there are a lot of . . . guarantees of aspects of privacy. . . . Of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.**

Judge Bork has also criticized the decision in Roe v. Wade. In 1981 he testified that Roe v. Wade "is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority"*** and stated in a speech that it has "no constitutional foundation."**** After becoming a judge in 1982 Judge Bork, in his non-judicial writings and speeches, continued his attacks on Roe and described the result of that case as the outgrowth of the "gentrification of the Constitution" and the Court's attempt at the "nationalization of morality through the creation of new constitutional rights."* In an interview in 1984 Judge Bork repeated his view that there was nothing in the Constitution about the right to have an abortion.**

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* Address by Judge Robert H. Bork, Brookings Institute, at 6 (Sept. 12, 1985).

** An Interview with Judge Robert H. Bork, 3 Judicial Notice 9 (June 1986).

*** Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 97th Cong., 1st Sess. 310, 315 (1982) [hereinafter "Human Life Hearings 1982"].

**** Address by Judge Robert H. Bork, Seventh Circuit, at 7 (c. 1981) [hereinafter "Seventh Circuit 1981"].

Both Meyer v. Nebraska and Pierce v. Society of Sisters, which Justice Powell in Moore cited approvingly as the genesis of the substantive due process decisions, supra p. 14, have also been the subject of Judge Bork's criticism. In Meyer the Court struck down a law prohibiting the teaching of foreign languages to young children, holding that liberty "denotes not merely freedom from bodily restraint" but also the right

> to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399. In Pierce the Court held unconstitutional a state law requiring children to attend public schools on

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* "Federalist Society 1982," supra p. 16, at 8; see also Notes for Speech, NYU Law Review Banquet, at 3 (May 1, 1982). Research has revealed no judicial opinion in which Judge Bork has rejected, revised or modified these views.

** Robert Bork: In His Own Words, Washington Post, July 5, 1987.

the ground that it interfered with the liberty interests of parents and guardians to direct the upbringing and education of the children under their control. Judge Bork has stated that *Meyer* was "wrongly decided" since the Constitution fails to specify "which liberties or gratifications may be infringed by majorities and which may not."* He has also argued that *Pierce* was "wrongly decided," although conceded that "perhaps *Pierce's* results could be reached on acceptable grounds."** This qualified concession probably refers only to that part of the holding in *Pierce* relating to religious schools which implicated First Amendment interests, and not the part relating to non-religious private schools.

Judge Bork has also objected to the decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), recognizing a right to travel. Justice Stewart observed in a concurring opinion in *Shapiro*:

> 'The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized. *United States v. Guest*, 383 U.S. 745, 757 [(1966)]. This constitutional right, which, of course, includes the right of 'entering and abiding in any State

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* "Neutral Principles 1971," *supra* p. 5, at 11.

** *Id.*

> of the Union,' Truax v. Raich, 239 U.S. 33, 39 [(1915)], is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. '[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.' United States v. Guest, supra at 760, n.17. As we made clear in Guest, it is a right broadly assertable against private interference as well as governmental action. Like the right of association, NAACP v. Alabama, 357 U.S. 449 [(1958)], it is a virtually unconditional personal right, guaranteed by the Constitution to us all.

Shapiro, 394 U.S. at 642-43 (1969) (Stewart, J., concurring) (footnotes omitted). Judge Bork has included Shapiro in his list of decisions he considers "improper and intellectually empty."* Judge Bork's philosophy of almost total deference to the majoritarian will of local legislative bodies, which reflect the prevailing community mores and biases, even where substantive personal liberty and/or privacy are involved, makes the constitutional right to travel an imperative for minorities and the poor who seek out communities which provide them a meaningful opportunity for individual fulfillment.

Some have supported Judge Bork on the ground that his expressions of "judicial restraint" put him in the tradition of Justice Frankfurter and Harlan. In light of his views on substantive liberty and privacy, it is clear that this characterization is 100% wrong. Attached as Appendices A and B are discussions of opinions written by Justices Frankfurter and Harlan stating their views regarding the constitutional rights of liberty and privacy, views which are wholly at odds with the positions that Judge Bork has advanced.

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* "Neutral Principles 1971," supra p. 5, at 11-12.

There can be no question that privacy and substantive individual liberty interests are clearly within the Constitution as written. Moreover, for more than half a century, the Supreme Court, by recognizing the constitutional basis for the protection of such fundamental liberties, has been able to respond in a principled fashion to the unforseen problems and abuses which the framers could not have foreseen and thus cannot plausibly be said to have intended to immunize from constitutional protection. In another major branch of constitutional law, namely the Commerce Clause, Judge Bork has recognized the necessity of a pragmatic and sensitive constitutional interpretation in order to meet the changing "needs of the nation."* Yet where private individuals and families are involved, Judge Bork exhibits none of this pragmatism; he simply refuses to use the specific text "liberty" and over sixty years of Supreme Court jurisprudence or, if necessary (which it is not), the open textured language of the Due Process Clause, to afford them constitutional protection from any intrusion in addition to mere physical restraint.

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* Transcript, September 15, 1987, at 180.

To approve someone at this stage of our legal history who rejects the Supreme Court's decisions recognizing the constitutional right of privacy and liberty, whatever the scholar's background or standing at the bar, would be like approving for appointment a scholar who believed that the Fourteenth Amendment was improperly adopted and thus is not part of today's Constitution.*

II. The Anti-Discrimination Principle

That the Equal Protection Clause prohibits certain forms of invidious discrimination is manifest from the text and history of the Fourteenth Amendment. For decades the Supreme Court, in a sensitive and perceptive manner, has recognized that the bigotry long directed at blacks has been directed at other groups as well, including women, aliens, and illegitimate children. This salutary application of the grand principle of anti-discrimination to the complex realities of American life is dismissed by Judge Bork as merely the result of "fads in sentimentality."*

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* As previously indicated, supra at 8, there exists a body of literature advancing the view that the Fourteenth Amendment is invalid.

Judge Bork's views, as a scholar and lecturer, on discrimination against women are especially disturbing. In his 1971 article he stated that "cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or equal protection clause."** He has reiterated this view in more recent statements. In a speech he gave in 1982 he stated that "[w]e know that, historically, the Fourteenth Amendment was meant to protect former slaves."*** In August 1985 at Aspen, Colorado he said during a question and answer session following his speech:

> In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity (pause) is pretty much what the 14th Amendment is about; because if it's about more than that, it's about a

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* "Catholic University 1982," supra p. 16, at 19.

** "Neutral Principles 1971," supra p. 5, at 17.

*** "Catholic University 1982," supra p. 16, at 18.

> judge making up what more it's about. And I don't think he should.*

In 1987 he renewed his conclusion that "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."** If Judge Bork holds to these views he would reject cases such as Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980), which holds that the Equal Protection Clause forbids discrimination on the basis of sex, absent some significant governmental need to make such distinction. The strict or heightened scrutiny test is needed; mere reasonableness or rationality is not sufficient in gender discrimination cases.

Judge Bork has been similarly critical of Supreme Court decisions holding that discrimination against other groups should be carefully scrutinized. In a line of decisions beginning with Levy v. Louisiana, 391 U.S. 68 (1968), for instance, the Court has reviewed and struck down a variety of laws which discriminated against illegitimate children. The Court has justified heightened scrutiny because, as Justice Powell wrote, illegitimate children have "been a frequent target of discrimination." Trimble v. Gordon, 430 U.S. 762, 775 n.16 (1977). The Court has also applied heightened scrutiny to laws that discriminate against aliens. Graham v. Richardson, 403 U.S. 365 (1971); Ambach v. Norwick, 441 U.S. 68 (1979). Judge Bork has included Levy in his catalogue of decisions which he views as "improper and intellectually empty" and as explainable only as the result of "the Court's preference for particular values."* And in a speech in 1982 Judge Bork made the more general criticism that groups other than racial and ethnic minorities cannot complain if their cause does not prevail in the "democratic process."** Judge Bork has been equally critical of the decision in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), which struck down a Virginia poll tax as impermissibly discriminating "on the basis of wealth." Id. at 668. He has stated that the case was "wrongly decided" and could not be defended on equal protection grounds.***

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* Transcription from tape-recording of comments by Judge Bork at the Justice and Society Seminar, Aspen Institute for Humanistic Studies, Aspen, Colorado, August 1985.

** Bork, Bicentennial of the U.S. Constitution, Worldnet Interview, June 10, 1987, p. 12 [hereinafter "Worldnet 1987"].

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* "Neutral Principles," supra p. 5, at 11-12.

** "Catholic University," supra p. 16, at 17-19.

*** Nomination of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 5 (1973) (testimony of Robert H. Bork) [hereinafter "Confirmation Hearings 1973"].

Few, if any, of the members of this Committee, or of the rest of the Senate, or of the individuals in this room, would maintain that the aliens, the illegitimate children, or, indeed, the poor if not able to register to vote because of the poll tax, could achieve the legislative majorities necessary to end the discrimination and the unfairness against such "discrete and insular groups" that Judge Bork would deny the courts power to invalidate as violations of equal protection or due process of law.

Having stated that the application of the Equal Protection Clause should be limited to matters of race and ethnicity,* Judge Bork then goes on to reject many of the landmark victories won by black Americans before the Court: the restrictive covenant cases,** the first affirmative action case,*** the poll tax case,**** and the literacy voting cases.***** At almost every critical turning point in the civil rights movement as exemplified in these cases, Judge Bork has, as a public speaker and scholar, turned the wrong way.

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* See, supra at 23-25.

** Shelley v. Kraemer, 334 U.S. 1 (1948); see also Barrows v. Jackson, 346 U.S. 249 (1953).

*** Regents of University of California v. Bakke, 438 U.S. 265 (1978).

**** Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

***** Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

Judge Bork's treatment of restrictive covenants is particularly significant. Racial segregation in residential housing, apartments and hotels was the way of life in this country at least through 1945. The Supreme Court in 1917 in Buchanan v. Warley, 245 U.S. 60 (1917), had held that a city could not create racial ghettoes by city ordinance. The same result was accomplished, however, by private, racial restrictive covenants and by the refusal of private hotel and apartment houses to rent to blacks. Thus, in most cities, North and South, the dominant residential pattern was racial segregation. This obviously had an effect on the makeup of the public schools, and on the ability of people to get to know each other and work together, even where racial segregation by law had been abolished by state statutory or constitutional provisions.

In 1948, in Shelley v. Kraemer, the Supreme Court, by a six to zero* majority, held, in an opinion by Chief Justice Vinson and which Justices Black and Frankfurter, inter alia, joined, that the Fourteenth Amendment prevented a state court from enjoining the sale of real estate by a white to a black person because the deed contained a racially restrictive covenant. The case was based in part on Section 1 of the Civil Rights Act of 1866, which provides:

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* Justices Reed, Jackson and Rutledge did not participate in the case.

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (R.S. § 1978). The Court, following earlier decisions, also held that a judicial injunction based on the racially discriminatory language of a private contract violated the Fourteenth Amendment. The Court said:

> The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions . . . . The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitution commands.

Shelley, 334 U.S. at 19-20 (footnotes omitted).

Five years later in Barrows v. Jackson, 346 U.S. 249 (1953), the Court, relying on Shelley, held by a 6 to 1 majority* (with Justices Reed and Jackson again not participating) that it would violate the Fourteenth Amendment for a state court to award damages against a white seller who sold property to a black buyer in breach of a restrictive covenant. The Court stated:

> If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley. . . .

Barrows, 346 U.S. at 254.

In 1971, 23 years after Shelley, 18 years after Barrows, and 3 years after Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding Thirteenth Amendment bars racial discrimination even in the absence of any state action), and despite numerous cases supporting the principle in Shelley, Judge Bork took the position that the restrictive covenant cases were wrongly decided. Lest there be any doubt, this is what Judge Bork has written:

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* Chief Justice Vinson dissented. He fully accepted Shelley, but argued that since the lawsuit in Barrows was between two whites who had signed the restrictive covenant, the house had already been conveyed to the black buyer, and no claims were being brought against the black buyer, there was no one before the Court whose constitutional rights would be violated by an award of damages by the state court against the white seller.

> Shelley v. Kraemer . . . was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish . . . [Shelley] converts an amendment whose text and history clearly show it to be aimed at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion.*

In short, Judge Bork believes that judicial enforcement of private agreements, even where it involves an injunction against the voluntary actions of two people to enter into a contract to sell a house to a black person, does not involve discriminatory state action.

Judge Bork's conclusion fails to come to grips with the fact that, prior to Shelley and in the decades since then, the Supreme Court has recognized in a wide variety of contexts that "the action of state courts and judicial officers in their official capacities" is state action subject to the commands of the Constitution. Shelley, 334 U.S. at 14. Chief

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* "Neutral Principles 1971," supra p. 5, at 15-16 (emphasis added).

Justice Vinson's list of those cases which in his view supported the holding in Shelley included the following:

-- Ex parte Virginia, 100 U.S. 313 (1880), holding unconstitutional the actions of a judge restricting jury service to whites;

-- American Federation of Labor v. Swing, 312 U.S. 321 (1941), holding enforcement by state courts of common law to restrain peaceful picketing constituted state action prohibited by the Constitution;

-- Cantwell v. Connecticut, 310 U.S. 296 (1940), holding state conviction for common law crime of breach of peace to violate due process guarantee of freedom of religion;

-- Bridges v. California, 314 U.S. 252 (1941), holding enforcement of common law rule relating to contempts by publications constituted unconstitutional state action.

Chief Justice Vinson also included cases overturning convictions obtained by coerced confessions, through the use of perjured testimony, or without the effective assistance of counsel. See Shelley, 334 U.S. at 16-17. And as Justice Douglas stated in his concurring opinion in Lombard v. Louisiana, 373 U.S. 267 (1963), "[m]ost state convictions in violation of the First, Fourth, or Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, have indeed implicated not the state legislature but the state judiciary, or the state judiciary and the state prosecutor and the state police." Id. at 279.

The line of cases beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), decided seven years before

Judge Bork's 1971 article, provides further support for the continuing vitality of the Shelley principle. In those cases the Court has consistently subjected common law defamation and privacy rules in controversies strictly between two private parties to First Amendment scrutiny, thereby necessarily finding the requisite state action present. In Sullivan the Supreme Court of Alabama had rejected the constitutional claims of The New York Times Company with the "brief statements that 'The First Amendment of the U.S. Constitution does not protect libelous publications' and 'The Fourteenth Amendment is directed against State action and not private action.'" Id. at 264 (citations omitted). The Supreme Court of the United States reversed, stating:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citation omitted). See also Near v. Minnesota, 283 U.S. 697 (1931) (holding state statute authorizing prior restraint on press in violation of Fourteenth Amendment); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957) (holding Fourteenth Amendment violated when Pennsylvania courts applied a "white only" clause in a will to exclude black orphans from Girard College).

Only three years ago in Palmore v. Sidoti, 466 U.S. 429 (1984), Chief Justice Burger, writing for a unanimous Court, cited Shelley and Ex parte Virginia for the proposition that "[t]he actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. [Shelley, 334 U.S. at 14; Ex parte Virginia, 100 U.S. at 346-47.]" Palmore, 466 U.S. at 432 n.1. Judge Bork's views would call into question many of these decisions.

Judge Bork's views are especially puzzling and disturbing given that, three years before his 1971 law review article criticizing Shelley, the Court had held (by a 7-2 majority) that the 1866 Civil Rights Act, which was relied on in Shelley, did not require any state action at all. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).* The

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* Runyon v. McCrary, 427 U.S. 160 (1976), merely applied this principle to private schools. Private black parties won the case below. The United States Government filed a brief in the Supreme Court as amicus curiae urging affirmance. Solicitor General Bork, along with Deputy Solicitor General Lawrence Wallace and Assistant Attorney General for Civil Rights signed the brief. The Official Report of the Supreme Court shows no indication that Solicitor General Bork made an oral argument.

Jones decision was strongly reaffirmed and in fact extended just last Term when the Court held 9 to 0 that private discrimination violates the 1866 Act even when the victims are discriminated against because they are Arabs or Jews, rather than because of the color of their skin. Saint Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987); Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987).

In rejecting major civil rights decisions, Judge Bork often asserts that the aggrieved and often unpopular minority should seek redress through the legislative process. But where such legislative redress has been won, Judge Bork sometimes has challenged the legitimacy of the legislative action. For example, when Congress was finally stirred to action by such catastrophic events as the death of Martin Luther King, Jr., the physical attacks on thousands of sit-in students and the death of President John F. Kennedy, and by the ascension of a southerner to the Presidency -- Lyndon Johnson -- who understood firsthand the blacks' yearning for equal justice, Judge Bork objected to the legislative action on the ground that it invaded the "liberty" of whites,* or was beyond the power of Congress.**

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* Bork, Civil Rights -- A Challenge, The New Republic, at 22 (August 31, 1983) (emphasis added) [hereinafter "New Republic 1983"]:

(footnotes cont'd on next page)

Judge Bork's published constitutional beliefs, again written as a scholar, would impose severe, unfair and unwarranted restrictions on the power of Congress under section 5 of the Fourteenth Amendment, restrictions that the Court has already rejected. Section 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. There were two possible positions regarding the scope of section 5. The narrow view adhered to by Judge Bork in his public speeches and writings is that Congress cannot enact any statute that would make illegal any action which would not violate the Amendment itself in the absence

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(footnotes cont'd from previous page)

> Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss . . . the cost in freedom which must accompany it . . . There seems to be a strong disposition on the part of the proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does so is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . . Of the ugliness of racial discrimination there need be no argument . . . . [But] [t]he principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

** See Bork's comments on Katzenbach v. Morgan, infra at 35-37.

of the statute. Under this cramped view Congress can only add penalties or remedies to what is already a constitutional violation.* The Court unanimously rejected this view in Oregon v. Mitchell, 400 U.S. 112 (1970). In this case the Court advanced the appropriate and constitutionally-based view that where Congress had determined that the literary tests were used to disqualify blacks from voting, it could under section 5 prohibit the use of literacy requirements in state elections even though, prior to the statute's enactment, the Court had specifically held that such requirements were not per se unconstitutional. See Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). The view set forth in Oregon and Katzenbach v. Morgan, 384 U.S. 641 (1966), has been relied on to uphold Congressional action in Rome v. United States, 446 U.S. 156 (1980) (rejecting challenge to the "discriminatory effects" test applied under the Voting Rights Act), and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding Title VII as exercise of Congress's power under the Fourteenth Amendment). See also United States v. Guest, 383

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* Bork, Constitutionality of the President's Busing Proposals, American Enterprise Institute, at 10 (1972) ("The [Katzenbach v.] Morgan [, 384 U.S. 641 (1966),] decision embodies revolutionary constitutional doctrine . . . ."); "Confirmation Hearings 1973," at 16 (Katzenbach "incorrect"); "Human Life Hearings 1982" supra p. 17 at 310. ("I agree entirely with the dissent . . . in Katzenbach v. Morgan"); "Seventh Circuit 1981", supra p. 17, at 5 ("Katzenbach v. Morgan is terrible law.").

U.S. 745, 782, 784 (1966) (Brennan, J., concurring in part and dissenting in part) (§ 5 of the Fourteenth Amendment empowers Congress to punish private conspiracies to violate constitutional rights); id. at 761 (Clark J., concurring, joined by Harlan, J.).

Not only does Judge Bork believe that under section 5 Congress cannot establish rights not found in section 1 of the Fourteenth Amendment, he also believes that Congress can cut down on the remedy that courts could otherwise impose under the Fourteenth Amendment. For example, in Swann v. Charlotte Mecklenburg, 402 U.S. 1 (1971), the Court, in an opinion written by Chief Justice Burger, held 9 to 0 that once a district court had found that the School Board had discriminated on the basis of race, the court could order school busing to desegregate the school system in the same area in which the Board exercised its power to segregate. The Court said: "As with any equity case, the nature of the violation determines the scope of the remedy." Id. at 16. Judge Bork, however, maintains that Congress, by statute, could reduce the Court's power to desegregate.*

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* Equal Educational Opportunities Act, 1972: Hearings on S. 3395 Before the Subcomm. on Education of the Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 1312 (1972) (statement of Prof. Robert Bork, Yale University Law School).

Nothing in Judge Bork's actions as Solicitor General dispels the honestly-held fears generated by his erroneous views of the meaning and effect of the Fourteenth Amendment. The reasons why are clear. First, he expressed many of these views after he left the Office of the Solicitor General.* Second, briefs which he filed in that capacity seldom if ever had any direct bearing on the Equal Protection Clause, since the cases generally involved statutory rather than constitutional issues.** Third, it would be inappropriate to attempt to draw from Judge Bork's work as Solicitor General any conclusions about his personal views on the constitutional issues discussed above. The Solicitor General in the Ford Administration, as in previous and subsequent administrations, was the government's lawyer in Supreme Court cases, charged with presenting in that Court policies and legal views which other officials were primarily responsible for formulating.*

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* See supra p. 23-24.

** If it were claimed that Judge Bork's constitutional views derived from some animus towards minorities or women, the filing of briefs in statutory civil rights cases might be of some relevance. The objection set forth in this testimony, however, turns on the substantive injustices that Judge Bork's views of the Constitution would permit, so any claim of malice on his part is not reached. There is no need to reach the issue whether his personal views would lead him, when reviewing a clearly drafted Congressional enactment prohibiting sex or race discrimination, not to apply the literal words of the statute. The concern, rather, centers on his judicial review of a statute prohibiting a state practice, which the Supreme Court prior to the enactment of the statute had held did not violate the 14th or 15th Amendments, see Northhampton County Board of Elections, 360 U.S. 45 (1959), and which practice Congress subsequently prohibited by statute, after legislative findings that the practice adversely affected persons because of their race or sex.

If Judge Bork adhered to his previously expressed criticisms of Katzenbach v. Morgan, 384 U.S. 641 (1966), or Oregon v. Mitchell, 400 U.S. 112 (1970), he would either invalidate such a statute as exceeding Congress' powers under section 5 of the 14th amendment or section 2 of the 15th amendment, or he would construe such a statute so narrowly (to avoid his perceived constitutional defects) as to eviscerate their effect and undermine congressional intent.

The most reliable evidence of Judge Bork's views consist, of course, of his writings and speeches that predate his nomination to the Supreme Court of the United States. Although, as indicated above, research has revealed no judicial opinion authored by Judge Bork on these issues, many of his writings and speeches referred to herein postdate his becoming a judge. This Committee and the Senate should give great weight in forming their judgment on the views reflected in those earlier statements. Such a judgment cannot be based on any commitments, to the extent such commitments can ever be meaningful, from a nominee as to what he or she would do in a hypothetical future case. A nominee's future treatment of precedents which he has publicly criticized as wrongly decided, without constitutional basis, and indeed, in some instances, as "unconstitutional," is unpredictable at best, despite any commitments that might be made. In addition, Judge Bork has, in his public writings and statements, as recently as 1986, suggested using the appointment power as one way of overturning wrongly decided cases.* I would thus urge this Committee and the Senate, in assessing the views expressed by Judge Bork prior to and during these hearings, to bear in mind what he has said prior to these hearings about overruling constitutional precedents with which a Justice disagrees:

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* Antitrust policy was made in the FTC and the Antitrust Division, and Judge Bork properly defended it without regard to his personal views; primary responsibility for formulating Administration civil rights policy was, as under other administrations, in the Civil Rights Division. Where the United States is a party to a case which goes to the Supreme Court, it is the established and proper policy of any Solicitor General to adhere, absent very unusual circumstances, to the government's position in the lower courts. At his confirmation hearings for the Office of the Solicitor's General in 1973, Judge Bork acknowledged that as Solicitor General he would be prepared to "put aside [his] personal philosophy" and represent the Government "on the basis of the policy as enunciated by the agencies and the Attorney General and on the basis of the law as it presently stands." "Confirmation Hearings 1973," supra p. 25, at 24. Ordinarily the framing of amicus brief is similarly constrained by a practice of advocating a position similar to that taken in the same or other cases in the lower courts by the responsible division of the Department of Justice.

> Since the legislature can do nothing about the interpretation of the Constitution given by a court, the Court ought to be always open to rethink Constitutional

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* Bork, Judicial Review and Democracy, 3 Encyclopedia of the American Constitution 1062 (1986); see also Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1, 13 (1982) [hereinafter "Confirmation Hearings 1982"].

> problems. . . . [A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.*
>
> Supreme Court justice[s] always can say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before.**
>
> [I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court.***
>
> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.****

III. Effect of ABA Judical Committee Rating In 1981

As stated previously, I was a member of the ABA Standing Committee on Federal Judiciary in 1981 when it evaluated Judge Bork as being "Exceptionally Well Qualified" for appointment as a judge to the U.S. Court of Appeals for the District of Columbia Circuit. Some have suggested that this 1981 ABA rating should be conclusive, or at least almost so, as to whether this Committee should give its consent to the President's nominee for the Supreme Court of the United States. There are at least three reasons why such an approach is in error:

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* A Talk With Robert H. Bork, 9 District Lawyer 32 (May/June 1985).

** Justice Robert H. Bork: Judicial Restraint Personified, California Lawyer, (May 1985).

*** "Confirmation Hearings 1982," supra p. 40, at 13.

**** "Federalist Society 1987, at 126. The same argument is handwritten in the prepared text of the speech, p. 4. ("no problem w/ originalist judge overruling non-originalist decision").

1. The ABA Judiciary "Committee's evaluation of prospective nominees to . . . [the Court of Appeals] is directed primarily to professional qualifications, competence, integrity and judicial temperament."* The Committee does not "investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity."** Instead, "the Committee restricts its review primarily to issues bearing on professional qualifications." The Committee specifically points out and recognizes that "the Senate may consider other aspects of the prospective nominee's qualifications."***

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* ABA Standing Committee on Federal Judiciary: What It Is And How It Works, (1983) at 3.

** Id. at 4.

*** Id. at 1.

In an inquiry so limited, a review of Judge Bork's performance in law school, as a partner in a leading law firm, as a professor at a leading law school, and as Solicitor General of the United States revealed no evidence of a lack of judicial temperament as that term is understood by the legal profession. Based on that standard, he thus was entitled to a rating of "Exceptionally Well Qualified" for the Court of Appeals for the District of Columbia Circuit. But the investigation was limited in scope and for the circuit court only.* In any event, as the Bar understands it, it is neither the purpose nor the function of the ABA Judiciary Report to urge confirmation.

2. The ABA's procedure and rating for Supreme Court nominees "differ,"** and "are dealt with separately"*** in the ABA's investigation and rating system. The standard guiding that evaluation of nominees is completely different. It is still "limited to their professional qualifications -- their professional competence, judicial temperament and integrity,"**** but there are other factors considered which

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* Id. at 4.

** Id. at 1.

*** Id.

**** Id. at 7.

are not relevant to a Court of Appeals nominee. The instructions provide: "The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice, it is not enough that one be a fine person or a good lawyer."* These factors were never considered when Judge Bork's qualifications for the Court of Appeals were passed upon.

3. There are other reasons why the ABA Judiciary Committee's findings relative to Judge Bork's qualifications for the D.C. Circuit are not conclusive here:

> (a) Few cases in the Court of Appeals for the District of Columbia Circuit involve the constitutional civil rights and liberty issues discussed in this testimony that are so much of the staple diet of the Supreme Court. In fact, in Judge Bork's five years on the D.C. Circuit he has written only one opinion for the court in a case in that category, namely, *Dronenburg v.*

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* *Id.* at 8 (emphasis added).

Zech, 741 F.2d 1388 (D.C. Cir. 1984) (rehearing en banc denied, Nov. 15, 1984) (Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection).*

(b) As a lower court judge his opinions are subject to review by the Supreme Court and as Judge Bork has recognized, a lower court judge has a great responsibility to follow the precedents of the Supreme Court.

4. In any event, the ABA Judiciary Committee clearly recognizes that the Senate Judiciary Committee should, and does, have a wider range of inquiry and this responsibility may on occasion lead to its failure to consent to the President's nomination; in the same way a President, for other public policy reasons, may decide not to make a nomination for a Justice, even though the person is one whom the ABA Judicial Committee would find "well qualified." As Senator Thurmond stated to his colleagues in the Senate in connection with the nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court, "[t]o contend that we must merely satisfy

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* This testimony does not discuss Judge Bork's views on free speech or free press except to the extent that state action must be involved before there is constitutional protection.

ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the constitution itself nor history and precedent has prescribed."*

CONCLUSION

Should this Committee ignore Judge Bork's long-held public views because there is a possibility that his opinions on the Supreme Court would not be based on those views? So far in his role as a judge, Judge Bork has found few, if any, occasions in a judicial decision, to reject positions which he expressed prior to becoming a judge; his speeches since his becoming a judge, on the other hand, expressly adhere to his earlier views.** Judge Bork's supporters will argue that it is possible that oral argument, briefs, or his respect for precedent might cause him to change his mind with respect to views he has held throughout his academic and judicial life so far. But we have been reminded constantly that when constitutional issues are involved, Justices do not feel the same restraint not to overrule prior decisions of the Supreme Court that they do when only a question of statutory interpretation is involved.

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* 114 Congressional Record 28771 (1968).

** See, e.g., "Catholic University 1982" supra p. 16, at 3 (criticizing Griswold); "Federalist Society 1982," supra p. 16, pt. 2 at 8-9 (criticizing Griswold); id. at 10 (objecting to protecting women under the Equal Protection Clause); "Worldnet 1987," supra p. 24, at 12-13 (objecting to protecting women under the Equal Protection Clause); "Seventh Circuit 1981," supra p. 17, at 4 (criticizing Katzenbach v. Morgan); Address by Judge Robert H. Bork, First Annual Lawyer's Convention of the Federalist Society, at 126 (Jan. 31, 1987) [hereinafter "Federalist Society 1987"]. The same argument is handwritten in the prepared text of the speech, p.4 ("no problem w/ originalist judge overruling non-originalist decisions.").

For example, then Justice Rehnquist, in *Wengler v. Druggists Mutual Insurance Co*. 446 U.S. 142, 153-4 (1980), said in his dissenting opinion that he continued "to believe that *California v. Goldfarb*, 430 U.S. 199 [(1977)], was wrongly decided, and that constitutional issues should be more readily reexamined under the doctrine of *stare decisis* than other issues." Attached as Appendix C is a discussion of other cases in which individual Justices have expressed similar views regarding *stare decisis*, as well as Judge Bork's public statements regarding constitutional precedents of the Supreme Court. One of these cases I know all too well, because I was the unfortunate lawyer who argued it. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Justice Blackmun rejected his own previous concurring opinion, and instead wrote the opinion that overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Judge Bork, in his writings, has made clear his views on the limited constraint of precedent and stare decisis in approaching issues of constitutional dimension:

> Certainly, at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his philosophy, has no legitimacy.*
>
> Supreme Court justice[s] always can say. . . [their] first obligation is to the Constitution, not to what their colleagues said ten years before.**

Judge Bork has criticized many of the Supreme Court decisions discussed above as wrongly decided, as being without a constitutional basis, and in some instances as themselves "unconstitutional." In light of these criticisms and Judge Bork's views regarding the role of a Justice regarding constitutional precedents, it is difficult to believe that as a Justice he would feel bound to follow those prior decisions.

So, in the final analysis, it comes down to a simple proposition. If it turns out that Judge Bork as a

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* "Federalist Society 1987" supra, p. 46, at 126 (emphasis added).

** Justice Robert H. Bork: Judicial Restraint Personified, California Lawyer (May, 1985).

Justice would reject his writings and accept the valued Supreme Court precedents described above, then to have rejected him because of his writings could perhaps be argued as unfair to him. On the other hand, if the Senate elevates him to the Supreme Court and he performs as a Justice as he has as a scholar and as he has said a Justice ought to perform, then the Senate will have done a great disservice to women (51% of the population), to black Americans (12% of the population), and indeed to all persons in light of Judge Bork's rejection of the substantive rights of liberty and privacy, today so much a part of our constitutional fabric.

Judge Bork said in the New Republic in 1963: "Heretical though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle."* Putting aside constitutional sages, it certainly comes as no surprise to this Committee that for black Americans and the majority of American women, the Constitution and the Court are today matters of "first principle." In fact, it is first principle to all Americans.

Much has been written about whether certain rights can be found in the words of the Constitution or are mere creations of judges. Black Americans, women, indeed, most Americans, have seldom suffered because there were not enough words already in the Constitution. Most damage has come because former Justices did not read correctly what is in the Constitution. Thus most Americans merely want as Justices men and women who will carry out what is already written. Please reread the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Its result was reached only because Chief Justice Taney said that a black, however free, and wherever he lived, and even though no longer in slavery or never a slave, could not be a person or a citizen as those simple words were written in the Constitution. The Fourteenth Amendment as written did not require the Justices to set up the phoney scale of separate but equal in Plessy v. Ferguson, 163 U.S. 537 (1896), or interpret the Fourteenth Amendment to permit a state to prohibit women from practicing law. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873). And no literal reading of the Thirteenth and Fourteenth Amendments required the results reached by the Court on the meaning of the Civil Rights Act of 1866 in the Civil Rights Cases 109 U.S. 3 (1883), as has been so clearly demonstrated by the Court's decisions in Jones v. Alfred H. Mayer Company; Runyon v. McCrary, 427 U.S. 160 (1976); St. Francis College v. Al-Khazraji, and Shaare Tefila Congregation v. Cobb. In addition, no literal reading of the Constitution required the Court to hold initially that blacks could be excluded from the party primaries because primaries were construed as private clubs. Compare Grovey v. Townsend, 295 U.S. 45 (1935) with United States v. Classic, 313 U.S. 299 (1941), and Terry v. Adams, 345 U.S. 461 (1953).

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* "New Republic," supra p. 34, at 22.

More fundamentally, if anyone can appreciate the full impact of an all-pervasive and intrusive government or media on individual privacy and substantive liberty, it is our elected representatives. No principle is more fundamental to the preservation of a free society composed of diverse and sometimes fractious cultures, philosophies, and individualists. We are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society. In this day and age, can we really take the risk of nominating to the Supreme Court a man who fails to recognize the fundamental rights of privacy and "substantive liberty" (more than mere freedom from physical restraint) embedded in the very fiber of our Constitution or Congress's power to enlarge protection for blacks, women and others under § 5 of the Fourteenth Amendment or § 2 of the Fifteenth Amendment?

Having come this far towards a free and open society, we should not stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discrimination against women.*

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* In 1920 the Nineteenth Amendment was adopted which gave women the right to vote. The first case which held that discrimination based upon gender violated the Fourteenth Amendment was Reed v. Reed, 404 U.S. 71 (1971).

Appendix A

JUSTICE FRANKFURTER'S APPROACH
TO THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT

In numerous opinions spanning his tenure on the Supreme Court, Justice Frankfurter articulated a strongly-held set of views regarding the proper interpretation of the due process clause of the Fourteenth Amendment. These opinions relate primarily to the substantive and procedural rights of criminal defendants, but a number express Justice Frankfurter's views regarding certain political and privacy rights protected by the due process clause. A recurrent theme is his vigorous debate with Justice Black over whether, and the extent to which, the due process clause incorporated the Bill of Rights, thereby making them applicable to the states. In opposing wholesale incorporation, Justice Frankfurter argued for a flexible yet principled interpretation of "liberty" and "due process" that would both reflect our historical traditions and respond to the evolving demands of a progressive society, and cautioned repeatedly against a rigid conception of the due process clause that would freeze it in time and place.

Justice Frankfurter believed that in determining which "liberties" were protected by the due process clause of the Fourteenth Amendment the Court could not rely on a simple transplanting of the Bill of Rights. Instead, it had to determine on a case by case basis whether specific liberties were encompassed by the Fourteenth Amendment's prescriptions: no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. He stated that:

> These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," _Snyder_ _v_. _Massachusetts_, 291 U.S. 97, 105 [(1934)], or are "implicit in the concept of ordered liberty." _Palko_ _v_. _Connecticut_, 302 U.S. 319, 325 [(1937)].

Rochin _v_. _California_, 342 U.S. 165, 169 (1952). Justice Frankfurter believed that the due process clause "expresses a demand for civilized standards . . . [which] neither contain the peculiarities of the first eight amendments nor are they confined to them." _Louisiana_ _ex_ _rel_. _Francis_ _v_. _Resweber_, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring). Rather than simply mirroring the Bill of Rights, the clause possessed "independent potency," _Adamson_ _v_. _California_, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring), reflecting a "different but deeper and more pervasive conception," _Wolf_ _v_. _Colorado_, 338 U.S. 25, 27 (1949), _rev'd_, 367 U.S. 643 (1961), and "what may be found within or without [it] . . . must inevitably be left to 'the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,'" Resweber, 329 U.S. at 471 (quoting Davidson v. Board of Administrators of New Orleans, 96 U.S. 97, 104 (1878)).

In the context of the rights of the accused, this process of "inclusion and exclusion" did not result in a consistently expansive or restrictive interpretation of the due process clause. In Rochin Justice Frankfurter authored the majority opinion holding that the brutal stomach-pumping procedures used to extract incriminating evidence from a defendant's body "shock[ed] the conscience" and violated due process. 342 U.S. at 172. And in Leland v. Oregon, 343 U.S. 790 (1952), Justice Frankfurter dissented from the decision of the Court upholding a state statute placing on defendants who plead insanity the burden of proving their insanity beyond a reasonable doubt, arguing that the statute violated one of the basic notions of a free society. Id. at 802-03. On the other hand, in Wolf v. Colorado, supra, 338 U.S. 25 (1949), he authored the Court's opinion holding that although the Fourth Amendment's prohibition of unreasonable searches and seizures applied to the states, the exclusion of illegally seized evidence is not required by "the minimal standards assured by the Due Process Clause." 338 U.S. at 31. And in Bartkus v. Illinois, 359 U.S. 121 (1959), he wrote the Court's opinion concluding that permitting successive state and federal prosecutions for different crimes arising from the same acts is not "repugnant to those standards of outlawry which offend the conception of due process outlined in Palko." Id. at 131.

In a number of opinions in cases involving state laws impinging on the exercise of political activities, Justice Frankfurter elaborated his view that "liberty" encompassed what he termed the fundamental right to political privacy and autonomy. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), the Court held that a defendant was denied due process of law when he was adjudged guilty of contempt for declining to answer certain questions put to him in a legislative inquiry regarding his academic activities and knowledge of the Progressive Party. Justice Frankfurter, in a separate opinion concurring in the result which Justice Harlan joined, stated that "the right of a citizen to political privacy," id. at 266-67 (Frankfurter J., concurring), is guaranteed by the due process clause, and "[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling." Id. at 265. In Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951), the Court upheld requirements that public employees state whether they had been members of the Communist Party and take an oath denying past or present membership in, or affiliation with, any organization that advocated, advised or taught the violent overthrow of the government. Justice Frankfurter concurred in part and dissented in part. He stated that because the oath did not exclude unknown or inadvertent proscribed affiliations, its sheer breadth could "operate as a real deterrent to people contemplating even innocent associations." Id. at 728 (Frankfurter, J., concurring in part and dissenting in part). He concluded that the oath could not survive constitutional scrutiny since it was not "consonant with the Due Process Clause for men to be asked, on pain of giving up public employment, to swear to something they cannot be expected to know. Such a demand is at war with individual integrity." Id. at 728. One year later, in Wieman v. Updegraff, 344 U.S. 183 (1952), the Court struck down a loyalty oath imposed by Oklahoma as a condition to public employment. Justice Frankfurter, in a concurring opinion, wrote that "the Oklahoma law violates those fundmental principles of liberty 'which lie at the base of all our civil and political institutions' and as such are embedded in the due process of law which no State may offend. Hebert v. Louisiana, 272 U.S. 312, 316 [(1926)]." Wieman, 344 U.S. at 196 (Frankfurter, J., concurring).

In these opinions Justice Frankfurter interpreted "liberty" to include certain rights closely related to rights guaranteed by the First Amendment. Yet he based those rights directly and firmly on the due process clause. As he stated in Sweezy, the need to balance "the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection . . . is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause." 354 U.S. at 266-67 (Frankfurter, J., concurring). He held a similar view regarding the Court's decisions which applied to the states the guarantees of the First Amendment. Those decisions, in his view, were based not on any theory of "incorporation," but rather on the

> reasoning that the Fourteenth [Amendment] prevents state intrusion upon 'fundamental personal rights and liberties,' that among those rights and liberties are free speech, press, etc., which the First Amendment explicitly protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth [Amendment].

F. Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746, 749 (1965).

Justice Frankfurter's approach concededly left indeterminate the precise contours of the liberty interest protected by the due process clause. As he stated in Adamson, "[t]hese standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." Adamson, 332 U.S. at 68. But in his view this was as it should be, for he believed that due process "is, perhaps, the least frozen concept of our law -- the least confined to history and the most absorptive of powerful social standards of a progressive society." Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring). As he set forth at greater length in Rochin:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.
>
> When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.
>
> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

342 U.S. at 169-171.

This flexible approach to liberty and due process was repeatedly criticized, especially by Justice Black, for ceding to the Court wide and unfettered discretion. Justice Black objected that the resort to "nebulous standards" such as whether a challenged law or practice "'shocks the conscience', offends 'a sense of justice'" and "runs counter to the 'decencies of civilized conduct'" produced an "accordion-like [approach that] . . . must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." Rochin, 342 U.S. at 175, 177 (Black, J., concurring) (footnote omitted). He protested that such an ad hoc approach arrogated to the Court a license "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." Adamson, 332 U.S. at 90 (Black, J., dissenting).

Justice Frankfurter was not untroubled by the open-ended nature of his approach. Indeed, on more than one occasion he acknowledged the possibility that the "broad terms" of the due process clause "may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. Resweber, 329 U.S. at 468 (Frankfurter, J., concurring). See also Leland, 343 U.S. at 807 (Frankfurter, J., dissenting). Yet, he responded, "[t]hat is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court." Resweber, 329 U.S. at 468. See also Sweezy, 354 U.S. at 267 (1957) (Frankfurter, J., concurring). The exercise of judicial judgement is unavoidable, he stated, and:

> [t]o believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim.

Rochin, 342 U.S. at 171. That judgment must be exercised did not mean, however, that "judges are wholly at large." Adamson, 332 U.S. at 68. What is required in each case is

> an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Rochin, 342 U.S. at 172. He recognized that "[t]o practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared." Id. at 171. "But," he stressed, "these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power. Id. at 171-72.

Appendix B

JUSTICE HARLAN
AND THE DUE PROCESS CLAUSE
OF THE FOURTEENTH AMENDMENT

Justice John Harlan shared many of Justice Frankfurter's views regarding the interpretation of the liberty interest encompassed within the due process clause of the Fourteenth Amendment. Like Justice Frankfurter, he believed that Justice Cardozo's opinion in Palko v. Connecticut,* 302 U.S. 319 (1937), set forth the proper approach. And like Justice Frankfurter, he argued for a conception of the due process clause that was flexible, independent of but drawing support from the Bill of Rights, open to reexamination and evolution, and that called for the exercise of considered judgments by courts and depended on the exercise of disciplined judicial self-restraint.

The majority of Justice Harlan's opinions interpreting the due process clause concerned the rights of criminal defendants and thus carried on the Frankfurter-Black incorporation debate. But the clearest and most expansive expositions of Justice Harlan's views on liberty and due process are found in Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting), and Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring in the judgment), which extended the substantive due process analysis into the realm of personal privacy.

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* The holding in Palko, that federal double jeopardy standards were not applicable against the states, was overruled in Benton v. Maryland, 395 U.S. 784 (1969).

In Poe the Court declined to reach the merits of a constitutional challenge to Connecticut's ban on the use of contraceptives. In his dissenting opinion Justice Harlan disagreed with the dismissal of the challenge on procedural grounds, and stated that on the merits the Connecticut law should be struck down as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." 367 U.S. at 539. Acknowledging that the challenges to the Connecticut law drew "their basis from no explicit language of the Constitution," id., he proceeded to set forth at some length what he thought to be the appropriate constitutional framework:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the

> traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.
>
> . . .
>
> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting).

367 U.S. at 542-44 (Harlan, J., dissenting) (citations omitted). Turning to the Connecticut law banning the use of contraceptives, he stated:

> This enactment involves what, by common understanding throughout the English speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." Skinner v. Oklahoma, supra, [316 U.S. 535,] [ ] 541, 549 [(1942)]
>
> That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection of two places only. These are the Third Amendment, relating to the quartering of soldiers, and the Fourth Amendment, prohibiting unreasonable searches and seizures. . . .
>
> . . .
>
> It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy, while the Constitution refers only to methods of ferreting out substantive wrongs, and the procedure it requires presupposes that substantive offenses may be committed and sought out in the privacy of the home. But such an analysis forecloses any claim to Constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions.

367 U.S. at 548-49. (Harlan, J., dissenting) (citations and footnotes omitted).

In Griswold the Court reached the merits and struck down the Connecticut law, concluding that it impermissibly infringed on marriage, a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485. Justice Harlan wrote a separate opinion concurring in the judgment but did not agree with the majority's analysis. He rejected the majority's search for "some right assured by the letter or penumbra of the Bill of Rights," 381 U.S. at 499, and stated that the proper constitutional analysis required an examination of whether the law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325." Griswold, 381 U.S. at 500. Addressing the concern that his approach invited judges to "introduc[e] their own notions of constitutional right and wrong," id. at 501, he stated that even provisions more "specific" than the due process clause "lend themselves as readily to 'personal' interpretations." Id. Moreover, he cautioned, it was illusory to presume that judicial restraint could be assured by the "interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause," id. at 502. Instead, judicial restraint

> will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See Adamson v. California, 332 U.S. 46, 59 [(1947)(Frankfurter, J., concurring)].

Griswold, 302 U.S. at 501.

Justice Harlan also wrote at length regarding the nature of the liberty interest protected by the due process clause in cases involving the rights of criminal defendants, and his opinions echo many of the themes elaborated by Justice Frankfurter in connection with the "incorporation" debate. His view that the essence of liberty was "fundamental fairness" led him to interpret the due process clause to require states to afford defendants a right to confront the witness against him, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Harlan, J., concurring in the result), to present proof beyond a reasonable doubt in determination of juvenile delinquency based on criminal conduct, In Re Winship, 397 U.S. 358, 368 (1970) (Harlan, J., concurring), and to provide counsel to indigent defendants. Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring). At the same time, he interpreted the due process clause to permit a state to try a criminal defendant without a jury, Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting), to retry a defendant without running afoul of double jeopardy restrictions, Benton, 395 U.S. at 801 (1969) (Harlan, J., dissenting), and to imprison a person for refusing to give evidence which may incriminate him. Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

Regardless of whether he interpreted the due process clause expansively or restrictively, he consistently advanced his view of "liberty" and "due process" articulated in his dissenting opinion in Poe. Thus, in his dissenting opinion in Duncan, he stated that "the very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of 'liberty' and 'due process of law' but that the increasing experience and evolving conscience of the American people would add new 'intermediate premises.'" 391 U.S. at 175. To restrict due process to "rules fixed in the pas[t] . . . 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'" Id. at 176-77 (footnote omitted). Similarly, in Malloy, in which Harlan wrote a dissenting opinion rejecting the incorporation of the Fifth Amendment's prohibition against self-incrimination, he "accepte[d] and agree[d] with the proposition that continuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords." 378 U.S. at 15.

Like Justice Frankfurter, Justice Harlan recognized that his approach left the precise scope of liberty and due process indeterminate, and that "[s]uch an approach may not satisfy those who see in the Fourteenth Amendment a set of easily applied 'absolutes' which can afford a haven from unsettling doubt." Id. at 28. Nonetheless, he insisted, his approach is "truer to the spirit which requires this Court constantly to re-examine fundamental principles and at the same time enjoins it from reading its own preferences into the Constitution." Id. at 28-9.

Appendix C

THE ROLE OF STARE DECISIS IN SUPREME COURT CONSTITUTIONAL ADJUDICATION AND JUDGE BORK'S VIEWS WITH RESPECT TO PRECEDENTS

It has long been accepted wisdom that the Supreme Court is not meaningfully bound by precedents in constitutional cases. The doctrine of stare decisis et non quieta movere -- stand by the precedent and do not disturb the calm -- is generally viewed by the Supreme Court as a useful, but far from absolute, guiding principle, and Supreme Court pronouncements have typically asserted that in constitutional cases that doctrine should be given "less weight" than in other types of cases. In reality, "less weight" translates into "no weight" whenever a majority of the Court is inclined to overrule a prior decision, or a particular Justice finds the precedent inconsistent with his or her strongly-held views on a particular issue.

One of the earliest statements by the Court concerning the limited role of stare decisis in Supreme Court cases can be found in The Passenger Cases, 48 U.S. (7 How.) 283, 12 Law. Ed. 702 (1849). There Chief Justice Taney wrote:

> After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by decision of this court. I do not, however,

> object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Id. at 470. Chief Justice Taney did not elaborate a rationale for his views, a task that was left to Justice Brandeis in an oft-cited dissenting opinion in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1931). In his opinion Justice Brandeis drew a distinction between constitutional and other cases, subsequently invoked by the Court on numerous occasions, as the basis for relaxing the application of stare decisis in constitutional cases:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Id. at 406-08 (footnotes and citations omitted).

The frequency with which the Court has overruled its prior constitutional decisions has been well-documented. See Maltz, "Some Thoughts on the Death of Stare Decisis in

Constitutional Law," 1980 Wisc. L. Rev. 467, 494-96 (1980); Blaustein & Field, "'Overruling' Opinions in the Supreme Court," 57 Mich. L. Rev. 151, 167 (1958); Douglas, "Stare Decisis," 49 Colum. L. Rev. 735, 743 (1949); Burnet, 285 U.S. at 408 n.3, 409 n.4 (Brandeis, J., dissenting). The Court has not always felt compelled in each such case to address overtly the departure from the doctrine of stare decisis. See, e.g., National League of Cities v. Usery, 426 U.S. 833, 879 (1976) (Brennan, J., dissenting) (chastising majority for overruling Maryland v. Wirtz, 392 U.S. 183 (1968), "[w]ithout even a passing reference to the doctrine of stare decisis"), rev'd, 469 U.S. 528 (1985); Batson v. Kentucky, 106 S. Ct. 1712, 1721 (1986). In a number of recent cases in which the Justices have explicitly addressed the doctrine of stare decisis, their pronouncements evidence a willingness, in some instances eagerness, to reexamine or overrule decisions they consider to be in error.

In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), for instance, Justice O'Connor elaborated her views on stare decisis in the course of criticizing the framework underlying the Court's decision in Roe v. Wade, 410 U.S. 113 (1973):

> The Court adheres to the Roe framework because the doctrine of stare decisis "demands respect in a society governed by the rule of law." Ante, at 420. Although respect for stare decisis cannot be challenged, "this

> Court's considered practice [is] not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases." Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962)." . . . In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." Smith v. Allwright, 321 U.S. 649, 665 (1944) (footnote omitted).

462 U.S. at 458-59 (O'Connor, J., dissenting). Similarly Justice White in Richard Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986) (White, J., dissenting), wrote at length concerning his views on stare decisis in the context of urging the Court to overrule Roe v. Wade:

> The Court has therefore adhered to the rule that stare decisis is not rigidly applied in cases involving constitutional issues, see Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. Stare decisis did not stand in the way of the Justices who, in the late 1930s, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see United States v. Darby, 312 U.S. 100 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Nor did stare decisis deter a different set of Justices, some fifteen years later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. Brown v. Board of Education, 347 U.S. 483 (1954). In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of stare decisis.

Thornburgh, 106 S. Ct. at 2193.

Perhaps the most candid acknowledgement by the Justices of the limited hold that precedents have on the Court can be found in the exchange of views in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), which overruled National League of Cities. Justice Blackman, writing for the majority, justified the departure from established precedents as required:

> We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See United States v. Darby, 312 U.S. 100, 116-17 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

Garcia, 469 U.S. at 557 (footnote omitted). Justice Rehnquist, in a dissenting opinion, decried the abandonment of National League of Cities and confidently predicted that the principles underlying that decision would "in time again command the support of a majority of this Court." Id. at 580 (Rehnquist, J., dissenting). Justice O'Connor, in a separate dissenting opinion, reaffirmed her commitment to the principles enunciated in National League of Cities and stated that she "share[d] Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility . . . acknowledged by National League of Cities and its progeny." Id. at 589 (O'Connor, J., dissenting).

Stare decisis is, of course, invoked on occasion by a majority declining to overrule a prior decision or by a dissenting Justice urging adherence to prior authority. In Arizona v. Rumsey, 467 U.S. 203 (1984), for instance, Justice O'Connor, writing for the majority in rejecting the petitioner's suggestion that the Court overrule Bullington v. Missouri, 451 U.S. 430 (1981), stated that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification. See, e.g., Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Smith v. Allwright, 321 U.S. 649, 665 (1944)." Arizona, 467 U.S. at 212. Similarly, Justice Powell in Akron wrote in defense of Roe v. Wade that "stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." 462 U.S. at 420 (footnote omitted). See also Oregon v. Kennedy, 456 U.S. 667, 691-2 n.34 (1982) (Stevens, J., concurring (quoting Green v. United States, 355 U.S. 184, 215 (1957)) (Frankfurter, J., dissenting) ("We should not be so unmindful, even when constitutional questions are involved, of the principle of stare decisis. . . . [T]he conviction borne to the mind of the rightness of an overturning decision must surely be of a highly compelling quality to justify overruling a well-established precedent when we are presented with no considerations fairly deemed to have been wanting to those who preceded us.")

Notwithstanding the occasional admonition to adhere to precedents absent "special" or "compelling" reasons, the prevailing view among the Justices appears to be that precedents do not represent a serious obstacle to the overruling of prior constitutional decisions perceived as erroneous. Nearly 45 years ago Justice Reed in Smith v. Allwright, 321 U.S. 649 (1944), summarized succinctly the Court's view of the binding quality of precedent in constitutional cases when he wrote: "[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. . . . This has long been accepted practice, and this practice has continued to this day." Id. at 665 (footnotes omitted). Those words are equally applicable today.

As indicated in the testimony, Judge Bork has made a number of statements regarding how a Justice should handle constitutional decisions with which he disagrees. These are set forth below:

> Since the legislature can do nothing about the interpretation of the Constitution given by a court, the Court ought to be always open to rethink Constitutional problems. . . .
>
> . . . [A]t bottom, a judge's basic obligation or basic duty is to the Constitution, not simply to precedent.*

> Supreme Court justice[s] always can say . . . their first obligation is to the Constitution, not to what their colleagues said 10 years before.**

> [I]f a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court.***

> Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended.****

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* "A Talk with Robert H. Bork," District Lawyer, v. 9. no. 5, p. 32, May/June 1985.

** "Justice Robert H. Bork: Judicial Restraint Personified," California Lawyer, May 1985.

*** Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1, 13 (hereinafter "1982 Confirmation Hearing").

**** Transcript, Speech to the Federalist Society, January 31, 1987, p. 126. The same argument is handwritten in the prepared text of the speech, p. 4. ("no problem w/originalist judge overruling non-originalist decision").

The **Chairman**. Thank you, Mr. Secretary.

I have been requested by the minority to swear in the witnesses. It is a little after the fact.

Would you stand to be sworn at least for the questioning period?

Do you swear to tell the whole truth and nothing but the truth so help you God?

Mr. **Coleman**. I do.

The **Chairman**. Now I will yield to my colleague from South Carolina. I am sorry. The minority reminded me that I had not sworn. We are sworn at all hearings. I am not suggesting the minority is asking to be sworn this one time. I was pointing out that the minority reminded me that I did not swear.

Mr. **Coleman**. I know the leader of the minority, and I am pretty sure he would never ask me to do anything he would not ask anybody else to do.

Senator **Thurmond**. Mr. Chairman, as I understand it, it is customary to swear all witnesses.

The **Chairman**. That is correct.

Senator **Thurmond**. And it is not just a minority request. That is the policy of the committee.

The **Chairman**. That is correct, Mr. Chairman, Mr. ranking member chairman.

By the way, I yield to the Senator from South Carolina.

Senator **Thurmond**. Mr. Secretary, you made the initial investigation of Judge Bork, I believe, for the Court of Appeals for the District of Columbia. Is not that correct?

Mr. **Coleman**. Yes, sir.

Senator **Thurmond**. What finding did they make at that time?

Mr. **Coleman**. It was reported to you that they found that Judge Bork was exceptionally well-qualified to be a Judge of the United States Court of Appeals for the District of Columbia.

Senator **Thurmond**. Mr. Secretary, is not the criteria for the court of appeals the same as for the Supreme Court—professional competence, judicial temperament and integrity?

Mr. **Coleman**. The way you ask that question, sir, I would have to say no, or I could say yes, but. Now you can take it either way.

I would refer you to the ABA document, in particular the second part, and I call the attention of Senator Heflin to page 44 of my testimony, where I quote the portion which is applicable only to a person who is going to be considered for a Justice of the Supreme Court. That portion is not applicable to a person who is going to be considered for the court of appeals.

Senator **Thurmond**. In the American Bar Association's Standing Committee on Federal Judiciary, on page 3 "Evaluation Criteria" it is entitled, "The Committee's evaluation of the perspective nominees to these courts is directed primarily to professional qualifications, that is competence, integrity and judicial temperament."

And so that would be the same as the Supreme Court on page 7 reads, "The Committee's investigation of perspective nominees to the Supreme Court is limited to their professional qualifications, their professional competence, judicial temperament and integrity."

So it would be about the same criteria, would it not?

Mr. **Coleman**. No, sir. They are separate. And I would ask you to reread them, and you will find, I think, when you read "this court," you were talking about the district courts and the court of appeals.

Senator **Thurmond**. Mr. Secretary, is your testimony today as an individual or on behalf of an organization?

Mr. **Coleman**. My testimony today, sir, is as an individual. I do put in a footnote on the first page of my written testimony that I do think that I do need to disclose that I am a member of the Legal Defense Fund. I was, until I became Secretary of Transportation, its non-employee President. After I left office, I became its non-employee chairman of the board.

I indicate to you in the testimony the connection I have had with the Legal Defense Fund on this matter. I appear here as William T. Coleman, Jr., a practicing member of the bar, and as a citizen. I am not appearing here on behalf of the fund, and I so disclosed that in my testimony.

Senator **Thurmond**. But you are chairman of the board of the NAACP Legal Defense Fund?

Mr. **Coleman**. I am chairman of that board.

Senator **Thurmond**. That is all. Thank you very much, sir.

The **Chairman**. We are going to go—this is unusual, but we will continue on the same side of the aisle since we yielded time.

Senator Hatch.

Senator **Hatch**. Well, thank you. Welcome to the committee, Mr. Coleman.

Mr. **Coleman**. Thank you, Senator.

Senator **Hatch**. I have appreciated your testimony through many years and I have appreciated our personal relationship through those years as well.

Now Senator Thurmond has brought up that actually you headed the investigation of the American Bar Association back in 1981 and 1982. Is that correct?

Mr. **Coleman**. I was the member from D.C. and, since the appointment was for the D.C. Circuit, it was my initial responsibility and I did it.

Senator **Hatch**. Right. The important thing is that back in 1981 in his nomination for the Circuit Court of Appeals for the District of Columbia your investigating committee for the American Bar Association gave him the highest possible rating that a judgeship nominee could have for that position.

Mr. **Coleman**. Yes, sir.

Senator **Hatch**. And that rating was exceptionally well qualified.

Mr. **Coleman**. Qualified for the court of appeals.

Senator **Hatch**. Now let me ask you this: Has Judge Bork's record on the appellate bench done anything to diminish his professional competence, which is one of the three major criteria that you had to consider, in your opinion?

Mr. **Coleman**. As a judge on that court, his opinions are good opinions. I would say that he is darn good, because every case I argued before him I think he voted my way, so—but I am slightly disturbed by the recent rehearing controversy and I have not looked into that, but——

Senator HATCH. But my point is, you do not know anything that would diminish his professional competence as a judge?

Mr. COLEMAN. As a judge on the court of appeals.

Senator HATCH. Right. You would agree, he is professionally competent?

Mr. COLEMAN. As a judge on the court of appeals.

Senator HATCH. Okay. Now, in 1981, you also agreed that Judge Bork met the highest standards of professional integrity, is that correct?

Mr. COLEMAN. Yes.

Senator HATCH. And do you know of any event since 1981 which would cast doubt on Judge Bork's highest standards of professional integrity?

Mr. COLEMAN. I know of none, and more important, I heard the chairman of this committee, on Saturday say that he had looked through the FBI report, and there was nothing in there which would in any way cast doubt on his integrity.

Senator HATCH. That is right. Now, finally, in 1981, you and your committee unanimously found that Judge Bork, based on his record, evidenced the highest standards of judicial temperament, is that correct?

Mr. COLEMAN. Yes, and I thought that Senator Simpson defined it correctly. I could not get the page reference of the testimony because I did not hear it until Saturday afternoon, but I think my friend Senator Simpson, who has been in print a lot—and I take his definition of what is meant by "judicial temperament"—stated that a judge that acts courteously towards you, is understanding toward the counsel, and does not "chew you out" too much in front of your clients, embodies what is meant by judicial temperament.

Senator HATCH. I think all of us——

Mr. COLEMAN. Do you recall when you made that statement, sir?

Senator SIMPSON. That is good.

Senator HATCH. I think all of us trial lawyers would agree with that, I will tell you.

Senator SIMPSON. That is close enough, Bill. That is right.

Mr. COLEMAN. What, sir?

Senator SIMPSON. That is close enough, Bill. I like that.

Mr. COLEMAN. And that is all it means. It does not mean that he is well suited or qualified to handling the great issues which you are asking him to handle.

Senator HATCH. Well, and he is on the circuit court of appeals and he will be on the Supreme Court as well.

Mr. COLEMAN. No, he is not. No. That is the problem. On the great issues, namely, the fundamental liberty of every American citizen, he has not had a case in that area.

Senator HATCH. Well, I submit that he has.

Mr. COLEMAN. Other than the homosexual case.

Senator HATCH. I think he has.

Mr. COLEMAN. And that is the only case. I mean, you read that line of cases. I checked them. That is the only case he has had.

Senator HATCH. And that is the *Dronenburg* case that we are talking about——

Mr. COLEMAN. That is right.

Senator **Hatch** [continuing]. And that was sustained by the *Bowers* v. *Hardwick* case by the Supreme Court itself.

Mr. **Coleman**. Yes. But the fact is, after he has been on the bench, he has publicly stated that that line of cases, from *Near* v. *Minnesota,* through the last term, are not constitutionally based. With respect to the *Griswold* case, he says there is no basis in the Constitution, and, quote, "It's unconstitutional."

Senator **Hatch**. Now let me go a little bit further here. I was mentioning about the high standard of judicial temperament. Now do you think that Judge Bork's well-known appellate record in any way undermines your confidence in his judicial temperament?

Now let me cite, with particularity. Specifically I call your attention to the fact that he has been in the majority in 95 percent of the 416 cases in which he has participated. That he authored during that time only 20 dissenting opinions, six of which were adopted by the Supreme Court on review.

Do you have any evidence, whatsoever, that would cast doubt upon his judicial temperament, the third category? The other two you have agreed with.

Mr. **Coleman**. What I am saying is that the judicial temperament is what I think Senator Simpson said it was. I would like to call your attention, though, to page nine of the appendix relating to Justice Frankfurter's views on what it takes to be a good judge. Every time you start talking about these statistics, it concerns me, because when you judge, you have got to look at each case, and somebody can have a great record, if he is not exposed to the great cases.

Senator **Hatch**. Well, that is right.

Mr. **Coleman**. And he has not been exposed to the great cases as a judge. As a scholar, he has reached out, and he discussed them, and with respect to the whole line of liberty cases, privacy cases, his discussions are completely contrary to what the Court has said.

For a long time, my good friend, Lloyd Cutler said, "Oh, but at least he agrees with Potter Stewart." That is not so, because Potter Stewart finally, in his concurring opinion in *Roe* v. *Wade* said, I now agree that there is this line of cases, there is substantive due process, and we've applied it.

Senator **Hatch**. Well, you know, you say he has not handled the major great cases, but yet I might just give you a couple of significant civil rights issues that he voted on. The voting rights case in Sumter County, South Carolina. The equal pay for women case in *Matthew* v. *Palmer*. The title VII cases that he decided. Those are all great cases.

Mr. **Coleman**. Now wait a minute. Look, to the two litigants every case is a great case.

Senator **Hatch**. Well——

Mr. **Coleman**. But wait.

Senator **Hatch**. Anybody looking at a great case——

Mr. **Coleman**. Each one of those cases——

Senator **Kennedy**. Can he answer the question, Mr. Chairman? I am trying to follow the dialogue, and I would like to make sure that he is able to answer the question without interruption.

Mr. **Coleman**. Each one of those cases dealt with the interpretation of a statute. That great voting case that you described on television—I went back and I looked at it. All that case involved was a statute saying that certain States, in order to make a change in their voting laws, have to get preclearance from the Attorney General's office. The State did not get preclearance, it tried to review that in the court of appeals, and Judge Bork wrote an opinion applying the statute.

Now the other case you cited—and this one really surprised me at about 1:00 o'clock in the morning last night—is the *Runyon* case, which is the civil rights case.

Senator HATCH. Versus *McCrary* which he argued as Solicitor General.

Mr. COLEMAN. He did not argue, sir. With all due respect to you, when I pulled that book down and checked to see who made the oral argument—he did not make the oral argument. That was a case decided after *Jones* v. *Mayer*, and by that time you did not have to be much of a lawyer to go in and convince a court that the Act of 1866 applied.

Senator HATCH. I agree with that, too.

Mr. COLEMAN. In that case the black plaintiff won below and the other side sought review by the Supreme Court of the United States, and certiorari was granted. The United States filed a brief as amicus curiae. Stan Pottinger, who was the Assistant Attorney General for Civil Rights, recommended that the U.S. Government get into the case, as did Deputy Attorney General Larry Wallace, who you must know because he is the lawyer who had the courage to take the position he did in the *Bob Jones* case.

Judge Bork signed that brief.

Senator HATCH. Yes. He filed the brief.

Mr. COLEMAN. But he did not argue the case.

Senator HATCH. Well, the brief is the argument, and he——

Mr. COLEMAN. What?

Senator HATCH. The brief is the——

Mr. COLEMAN. Well, if you go back to the practice of law, when you just file a brief or amicus curiae, don't argue the case, and you submit a big bill the client says for what——

Senator HATCH. No, no. Wait. Bill, we understand who argued, but it was his brief filed in that case, making that point that was argued by another attorney under his direction as Solicitor General.

Mr. COLEMAN. No, no. The point was, the Government did not argue the case. The Government, along with about ten other amicuses, filed a brief.

Senator HATCH. Okay. I understand he did not personally argue the case. Let me ask you this, Mr. Coleman.

Mr. COLEMAN. And also I want you to look at my footnote——

The CHAIRMAN. Please.

Mr. COLEMAN. I want you to look at my footnote, sir——

The CHAIRMAN. Sir, Mr. Coleman. I want you to be able to answer the question fully, and just as with Judge Bork, every witness before us will have a full opportunity.

Now would you like to complete the answer to that question?

Mr. COLEMAN. Yes. I want to complete the answer, which is I have a footnote—and I will tell you what page it is on—where, during Judge Bork's confirmation hearings for his nomination to be Solicitor General of the United States, I think it was Senator Tunney who was concerned because just before Judge Bork testified the committee had heard from the Assistant Attorney General for Antitrust, whose testimony as to how he was going to enforce the antitrust laws different from positions Judge Bork had taken in his antitrust writings.

I would ask you to re-read that hearing, in which Judge Bork said if I am confirmed, I will be a lawyer for the Government, and if the Assistant Attorney General for antitrust takes a position, that is the position I will take in the United States Supreme Court for the Government, even though, intellectually, I may disagree with that position. And that is what he is supposed to do.

Senator HATCH. Okay.

The CHAIRMAN. Thank you.

Senator HATCH. You are finished. Let me understand this clearly, Mr. Coleman. You led the investigation as a representative of this district——

The CHAIRMAN. Time is up but I would like you to continue. We are not going to cut anybody off, but I just want you to go on——

Senator HATCH. Well, I will just make this——

The CHAIRMAN. No, no. Go on as long as you want. This is very important testimony, and take as much time as you want.

Senator HATCH. All right. You led the investigation resulting in then Mr. Bork receiving the highest rating of the American Bar Association back in 1981. There was not a single dissenting vote. All or most of the materials upon which you based your opinion, and your current opinion of Judge Bork, all of those materials were public then.

Mr. COLEMAN. That is not so, sir.

Senator HATCH. Well——

Mr. COLEMAN. That is not so.

Senator HATCH. Okay. Go ahead.

Mr. COLEMAN. Well, the fact is that since he has been on the bench in 1982, he has made a lot of speeches, and I have a footnote where you can see all the speeches——

Senator HATCH. All right. That is fair.

Mr. COLEMAN [continuing]. And he has reiterated and said the same thing. Secondly, when I made that investigation, I—you know—you call people up, and you try to do the work. As you know, this time, from the moment he was nominated, the White House began to send out materials, and other people also sent out materials. The materials come across your desk and you read it, and I would say that today, I can make a much better examination of Judge Bork than I was able to in 1981.

Senator HATCH. All right. But you are saying as of 1981, when you rated him exceptionally well qualified, that basically, you found no real reason, as you do today, to stand against his particular appointment at that time. In spite of all this——

The CHAIRMAN. Senator, I think, with fairness, the judge has said, or the Secretary has said a half a dozen times——

Mr. COLEMAN. I am not a judge.

The CHAIRMAN. No. But the Secretary has said a half a dozen times, that the distinction between the circuit court of appeals and the Supreme Court are, in his view, fundamentally different.

Senator HATCH. Well, my question, if you will notice, Mr. Chairman—and I would appreciate it if it is not interrupted—was not that he is—we are talking about the Supreme Court now. We were talking about the circuit court of appeals at that time, and that was what my question was limited to.

The CHAIRMAN. Then you went on to say as you——

Senator HATCH. Then I would have gone on and asked a question with regard to the Supreme Court. With that, I will just make this comment.

Most of his writings that he has been criticized for occurred before that particular investigation back in 1981.

Mr. COLEMAN. With all due respect, sir, that is not true.

Senator HATCH. Well, there have been some since, there is no question. Most of them, most of the ones——

Mr. COLEMAN. If you are examining a witness and you say most happened before such and such a date, and 30 percent happened after that date, I do not expect the witness to say yes.

Senator HATCH. Fine. But I am saying that the point I am making is, that apparently, based upon the writings up to that date, you and your committee unanimously rated him exceptionally well qualified.

Now the only thing I am going to say is that you found also those three criteria to be in order. Professional competence, professional integrity, and of course judicial temperament.

And I do not—with all due respect to you as a friend—I do not see where any of those three factors have changed between 1981 and today. In fact I see a lot of cases where he has ruled in favor of minority groups, and of course has done so many other things that are worthwhile.

In the *Dronenburg* v. *Zech* case, that was upheld by the Supreme Court. With regard to the illegitimate child case, you say that an illegitimate child will not muster legislative support to vindicate his or her inheritance rights.

Well, Judge Bork has made it clear, that he, as a Justice, would enforce an illegitimate's rights case under the equal protection clause.

Thus, if there is no reasonable distinction——

Mr. COLEMAN. Where did he make that clear?

Senator HATCH. He has made that point, I thought, in his testimony here.

Mr. COLEMAN. Oh, wait now. Oh, now wait.

Senator HATCH. Let me finish my comment.

Mr. COLEMAN. Can I take you through his writings, though?

Senator HATCH. Well, let me finish my comment, and then you can gladly correct me, if you can.

Thus, I think if there is no reasonable distinction between legitimate and illegitimate children, Judge Bork would strike down the State law that makes such a distinction in inheritance rights. I believe he made that case in the *Shelley* case.

Let me just finish it, and then I will turn it over to you.

In the *Shelley* v. *Kraemer* case, which you criticized, because he, as a law professor, criticized *Shelley* v. *Kraemer*, and, by the way, he did that before 1981. That was the case involving restrictive racial covenants.

Judge Bork did not object to the holding of that case, only the reasoning, and since that time, the Supreme Court has questioned its own reasoning, and it has confined *Shelley*, that particular case, to its facts, and I cite with particularity the *Moose Lodge* case, or, *Lugar* v. *Vinson*.

Mr. COLEMAN. Well, with all due respect, sir, you are wrong. I cite cases just 3 years ago——

Senator HATCH. Well, let me finish.

Mr. COLEMAN [continuing]. Where Chief Justice Burger says *Shelley* is good law.

Senator HATCH. I am going to give you a chance to say whatever you would like, but, as to its results, Judge Bork, as Solicitor General, it seemed to me, as Solicitor General, his group the *Runyon* v. *McCrary* case.

Mr. COLEMAN. With all due respect, that is not so. A black lawyer and a black plaintiff won that case.

Senator HATCH. Fine. That is fine, but he was Solicitor General at the time, and he said that he backed it, and that he believed it, and that he believes it to this day.

And he basically has stated here that he would never rule to overrule the *Shelley* v. *Kraemer* case, and I think that it is a misleading thing to come in and say that you think he would.

Mr. COLEMAN. Sir, I did not say he would.

Senator HATCH. But you criticized him.

Mr. COLEMAN. I must say, I would not—I do not think any judicial official should come here and tell you what he would do on a case.

Senator HATCH. I do not either.

Mr. COLEMAN. And if he tells you, I think that puts in question a problem. But you certainly have to look at what he said and wrote as a scholar, as to what he feels about this. Can I explain one thing? You asked me about his views regarding illegitimacy, and, really, look: you start off with the fact that any time you pass a statute, and you say "a" has something, "b" has something different, you have made a distinction. The 14th amendment mandates equal protection. One could argue that unless a statute treats everybody the same, the statute is unconstitutional. You do not do that. It is clear that if you are too arbitrary you violate the 14th amendment.

But when you are dealing with women, or illegitimate children, there are certain areas where you can rationalize and make a distinction, and for a long time the Court said that is all you had to do. Take, for example, that case that I called your attention to where the Supreme Court in about 1881 reviewed a State statute which prevented women from practicing law. The legislation gave reasons for that: that women should stay in their homes, or they may be more excitable, and gave a lot of other reasons for it.

The Supreme Court upheld that statute on the ground that it was reasonable. In a series of recent decisions, including decisions written by Justice O'Connor, the Court has said that when dealing with questions of sex, the Constitution requires heightened scrutiny of distinctions.

Now what does that mean? It means that the State has to say there is an important and significant reason for making this distinction. They also have to say, and be able to demonstrate to a judge, that there is a cognate relationship between what they are doing, and the means that they are trying to use to do it. In addition, the State has to go into court and say we are doing that for these reasons, and in our best judgment, we cannot find another reason to accomplish the same result.

Now that is heightened scrutiny. Now when you apply just a reasonableness standard, you lose a lot of cases under that, that you would not lose if you applied heightened scrutiny.

Now, as I understood Judge Bork's testimony, under additional questioning his position continually changed, and by the time he was finished, you might also say that he means something like heightened scrutiny under a different name.

I ask two questions. Why do you have to invent a new term when there is already substantial agreement on the current approach, and every federal district judge, every State court judge knows what the law is under the current system? And if you really apply only a reasonableness standard, which I think puts us back to where we were, is it so clear that, for instance, the original statute that said women do not have the right to practice law would be held unconstitutional?

But under the heightened scrutiny test, I know it is not constitutional.

Senator HATCH. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you. I also failed to do something else, and that was to indicate that I think it is appropriate at this point—that you were a former Secretary of Transportation.

Were you a Democrat or a Republican at that time?

Mr. COLEMAN. Sir, sir, you know what—I am not—Look. I——

The CHAIRMAN. It is important for the record. Right?

Mr. COLEMAN. No. I just do not think one shows class if one is testifying, or if I were to write an article in support of a Democrat, for instance, to make a point of one's party affiliation. I would say that I had worked in a Republican administration.

I am up here based on what I have written and said. I want you to read it, and if you disagree with it, that is your right, but I am not up here to flag-wave the fact that I am in another political party or any other reason.

The CHAIRMAN. Let me ask you a question. It has been stated by several here, and at least implied by others, that Judge Bork is at least in part of the mold of Felix Frankfurter. You clerked for Felix Frankfurter, I understand, on the Supreme Court; is that correct?

Mr. COLEMAN. Yes, sir.

The CHAIRMAN. Is Judge Bork, in your view, in his judicial philosophy similar to Felix Frankfurter's?

Mr. COLEMAN. Well, as a judge, Judge Bork has not had the opportunity to handle the great issues that Justice Frankfurter had to handle. If I measure Judge Bork only by his writings, in my judgment, whatever his views are with respect to judicial restraint, they are not the views that I think that Justice Frankfurter had and wrote about. And in the appendix dealing with Justice Frankfurter, I have quoted those views.

The CHAIRMAN. Thank you.

Mr. COLEMAN. The same with Justice Harlan. I think in Justice Harlan's writings there is some very moving language about the duty of a Justice and what judicial restraint really means. And I think you kid yourself honestly when you say you can divine original intent by reading the words. I ask any of you, what words can you find in the Constitution that are more specific than that you have to have a trial by jury? But once having said that, a judge has to determine what is meant by trial by jury. When I came to the Bar and I think, Senator Specter, when you came to the Bar, it was generally thought those words in the Constitution meant that the jury had to be 12, it had to be unanimous, it had to pass upon facts. Now, despite that language, if you read the cases today, you will find that a jury is a constitutional jury if it is, I have seen, at least down to six, and it can decide by a two-thirds vote.

Now, believe me, from everything I had learned at law school, I would have said that such juries are unconstitutional but as time has gone on, they are now determined to be constitutional.

The CHAIRMAN. I yield to the Senator from Ohio.

Senator METZENBAUM. Mr. Secretary, I want to thank you for a very scholarly, clear presentation. I have not read your entire presentation, but I have looked through it enough to know that it zeros in on some of the very points about which this committee is concerned.

I think the written presentation that you made in connection with the difference between the evaluation of Judge Bork when he was up for confirmation to the circuit court of appeals and the present evaluation is so clear, clearly stated, and because I feel my colleague from Utah may have attempted to confuse that issue, I think that I am going to just read that.

I quote—and when I use the phrase "quote" in my quote, I will be quoting from the ABA's rules themselves because that is what you have done. On Page 43 of your presentation, "The ABA's procedure and rating for Supreme Court nominees 'differ,' and 'are dealt with separately' in the ABA's investigation and rating system. The standard guiding that evaluation of nominees is completely different. It is still 'limited to their professional qualifications—their professional competence, judicial temperament and integrity,' but there are other factors considered which are not relevant to a court of appeals nominee. The instructions provide: 'The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying society problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the facts which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice'—this is all within the quote—'it is not enough that one be a fine person or a good lawyer.' "

Carrying on your language, "These factors were never considered when Judge Bork's qualifications for the court of appeals were passed upon."

You then go on to say that "there are other reasons why the ABA Judiciary Committee's findings relative to Judge Bork's qualifications for the D.C. Circuit are not conclusive here," and I will not read that further.

I read that because I thought that it was so lucidly stated, so succinctly stated that we ought not to have any further question as to the difference between confirming Judge Bork to the circuit court of appeals and confirming Judge Bork to the Supreme Court.

Mr. COLEMAN. I would like to ask Senator Hatch and Senator Thurmond: If I had gone further and determined that because someday Judge Bork could get on the Supreme Court, I should either outwardly or inwardly let that affect my judgment, do you think that would have been fair to Judge Bork at that time?

Senator HATCH. I think it would have been fair to him. I agree that was not your obligation.

Mr. COLEMAN. You said it would have been fair to him?

Senator HATCH. Sure. Sure, I do not see any problem because I think he would have come out well both ways at that time. I think there is a difference between that time and now that you are faced with the reality that he is going on the Supreme Court. I think that makes the difference.

You know, when you say the difference is "the significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying society problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability," I think you have to conclude, if you have watched Bork's record at all, that he is a person of exceptional ability who would fill every one of those qualifications.

I think the difference here is that we are faced with the fact that he may very well go on the Supreme Court. I know you are sincere and I appreciate that and I have great respect for you, but, yes, I think you could have, but not as a member of the ABA you should not have at that time.

Mr. COLEMAN. That is all I am saying.

Senator THURMOND. I want to say, since you directed it to me, too, that his opinions on the circuit court speak for themselves. That is what counts. Any writings he may have made in connection with being a professor of law, as a practitioner or something is different. But his opinions on the circuit court are what counts.

Again, I want to remind you, and I have here, as I stated, the rules of the ABA on this question, on Page 7, "Evaluation Criteria and Ratings, the Committee's investigation of prospective nominees to the Supreme Court is limited—I repeat—"is limited to their professional qualifications." Then it continues: "their professional competence"—have you any trouble with Judge Bork's professional competence?

Senator METZENBAUM. Mr. Chairman, I didn't interrupt——

Senator KENNEDY. I think the Senator——

Senator THURMOND. ". . . judicial temperament"——

Senator KENNEDY. Both the Senators have responded to the——

Senator THURMOND [continuing]. "And integrity," those three things. As I understood it, you had no question——

Senator KENNEDY. The Senator will have an opportunity to question——

Senator HATCH. Let the Senator finish. He is ranking minority member. Let him finish and then let us go from there.

Senator METZENBAUM. Mr. Chairman, I have not——

Senator **Thurmond**. We gave you all so much time. What are you quibbling about?

Senator **Metzenbaum**. I am not quibbling.

Senator **Thurmond**. You took over a half an hour.

Senator **Metzenbaum**. Who took over a half an hour?

Senator **Thurmond**. You took over a half an hour. Now you are quibbling over 2 minutes.

Senator **Metzenbaum**. I took over a half an hour?

Senator **Kennedy**. We will be in order. The Senator has not taken a half an hour.

Senator **Thurmond**. This witness——

Senator **Metzenbaum**. I took 2 minutes.

Senator **Kennedy**. We will be in order, and we will go back to the questioning from the Senator from Ohio.

Senator **Metzenbaum**. Mr. Chairman, I thought——

Mr. **Coleman**. As a matter of personal privilege, could I ask that the Senator from South Carolina ask me the question? I would like to put the answer on the record, if you do not mind, sir.

Senator **Thurmond**. I just stated that, "The committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications." That means "their professional competence, judicial temperament and integrity."

Now, do you have any question about his professional competence?

Mr. **Coleman**. I have no doubt about his professional competence.

Senator **Thurmond**. Do you have any question about his judicial temperament?

Mr. **Coleman**. I have no question about his judicial temperament.

Senator **Thurmond**. Do you have any question about his integrity?

Mr. **Coleman**. I have none, but I would ask you——

Senator **Thurmond**. Well, then, that is what—let me get through now.

Senator **Kennedy**. The witness——

Senator **Thurmond**. I do not care. Let me get through.

Senator **Kennedy**. The witness will be permitted to answer——

Senator **Thurmond**. You have been cutting me off and now you are cutting him off.

Senator **Kennedy**. I have not. Just as soon as——

Senator **Thurmond**. Well, let him get through. He started to answer, and you cut him off.

Senator **Kennedy**. The witness will be permitted——

Senator **Thurmond**. Let him get through his answer.

Senator **Kennedy**. That is exactly what I——

Senator **Thurmond**. He has got a right to finish answering.

Senator **Kennedy**. That is exactly what he wants to do.

Mr. **Coleman**. I would just urge you to read the rest of the paragraph, and you will see that there are other things in the paragraph, sir.

Senator **Thurmond**. So you have no question about any of the three of those?

Mr. Coleman. Then read the rest of the paragraph, and you will find that, like ofttimes——

Senator Thurmond. It merely elaborates on those three things.

Mr. Coleman. Well, then, if what you are saying is that the sentences that Senator Metzenbaum read go back and qualify those three things, then I do have problems. If that is what you are saying, then I do have problems.

The Chairman. I apologize for leaving. [Laughter.]

Senator Kennedy. You missed a lot, Joe.

The Chairman. Where are we?

Senator Kennedy. Senator Metzenbaum.

The Chairman. Senator Metzenbaum.

Senator Metzenbaum. May I say, Mr. Secretary, that I think the degree of response and the concern that has been expressed by some of my colleagues down the table sort of testifies to the effectiveness of your presentation.

Mr. Coleman, I have some concerns about possible inconsistencies in statements Judge Bork may have made regarding his firing of Archibald Cox. The recent letter from the American Bar Association regarding its recommendation of Judge Bork includes a statement that one member of the committee is concerned that there may have been "inconsistent and possibly misleading recollections" by the nominee on this issue. It is important to try to get the facts on this record as to what Judge Bork said to your committee when he was up for confirmation to the circuit court of appeals.

Were you responsible for preparing the report on Judge Bork in regard to his 1982 nomination to the court of appeals?

Mr. Coleman. I have trouble answering that. I will say yes only because I know some of Judge Bork's supporters have told you that, have told people on the committee that.

Senator Metzenbaum. Did you have occasion to ask him in that capacity about his role in the Saturday Night Massacre?

Mr. Coleman. Sir, at this point, I would not like to have to answer further questions. In 1981, when I was on the committee, everything done was done confidentially. When I talked to Judge Bork, it was in confidence. The only people that I would show it to would be the other people on the committee. It is my understanding that all of the proceedings are confidential. I do not wish to break that confidence.

Senator Metzenbaum. Let me say I understand that. I asked Judge Bork the following question:

> Judge Bork, there seems to be some question as to what you did tell Mr. Coleman at the ABA investigation in 1982. My staff has discussed with the ABA the question of obtaining information about your statements to the ABA regarding your role in the Watergate matter. The ABA has said it is willing to furnish that information if you will agree to waive any objection. Would you be willing to waive any objection to the ABA providing that?
>
> Judge Bork. You mean the notes from Mr. Coleman?
>
> Senator Metzenbaum. The entire matter of your inquiry with the ABA at that point concerning this matter.
>
> Judge Bork. Certainly. In fact, I thought I had. Somebody from the Department of Justice or the White House asked me if I would be willing to waive a week ago, and I said yes.

So I am not asking you to do something that Judge Bork has any opposition to. I think one issue that concerns Judge Bork's statements about the decision to appoint a new special prosecutor after Mr. Cox was fired. Last week, I asked Judge Bork the following:

> You had no guarantee from President Nixon at the time he fired Mr. Cox that there would even be another special prosecutor. Is it not a fact that the decision to appoint a new special prosecutor was not made until several days later after the President had provoked a firestorm of controversy around the country?

Judge Bork answered that question by saying,

> That is right. Initially, we intended to leave the Special Prosecution Force intact, but not to appoint a new special prosecutor, and they would go under Mr. Ruth and Mr. Lacovara as before. But we did not initially contemplate a new special prosecutor until we saw that it was necessary because the American people would not be mollified without one.

In other words, Judge Bork is saying that, at the time Mr. Cox was fired, the assumption was that there would not be a new special prosecutor. However, it has been publicly reported that Judge Bork told you in 1982 that after Mr. Cox was fired he "immediately began searching for another special prosecutor."

That statement creates the impression that when Judge Bork fired Cox the assumption was that the investigation would go forward under another special prosecutor. So it is important, Mr. Secretary, to know whether Judge Bork made any statements in 1982 to you regarding when the decision was made to appoint a new special prosecutor. It goes directly to the question of credibility.

Therefore, in view of Judge Bork's willingness to waive any confidentiality, it is important, I think, that this committee have access to those notes.

Mr. COLEMAN. Well, sir, as I indicated to you, as a member of that committee I thought that everything I did was confidential. I know that a copy of that report and the copy of the memorandum of the interviews with Judge Bork and other people are in the files of the ABA. I would hope that you would get them from that source.

The CHAIRMAN. The Chair will sustain your not having to answer that question if you choose not to. The fact of the matter is that it was whether the ABA would release it. I have spoken to Judge Tyler. He is prepared, as I understand him today, to release that.

I respect your desire to maintain the confidentiality. You have given that report, as I understand it, Mr. Secretary to the ABA Committee. They have that, and it is up to them. Judge Bork has authorized them to release it if they so choose. I expect that to happen this afternoon. I will sustain your position of not wishing to disclose that yourself.

Senator METZENBAUM. Mr. Chairman, I just want to make clear one point.

Does the ABA have the notes or do you have them, Mr. Coleman, or both?

Mr. COLEMAN. The ABA . . . well, I——

Senator METZENBAUM. Because the Chairman——

Mr. COLEMAN. Senator Specter, I wish you were here, you know—in our days of discovery—I do not know how I handle that one? If I claim I have a privilege, how much can I describe and not be waiving my privilege?

Senator SPECTER. Mr. Secretary, you do not need any help from me.

The CHAIRMAN. In other words, you are on your own. [Laughter.]

Senator METZENBAUM. What concerns me is that if you have the notes and they do not, then I think it is important that we have the notes because we have other witnesses who will be coming forward to testify later on.

Mr. COLEMAN. Well, I will put it this way: I do not think that I have anything that they do not have. Put it that way.

Senator METZENBAUM. All right. Fine.

The CHAIRMAN. I think your time is up, Senator.

Senator METZENBAUM. In view of the last answer, I have no further questions. Thank you.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman. It is good to see you this morning, Bill Coleman.

Mr. COLEMAN. Good to see you, sir.

Senator SIMPSON. And I have come to know you, and have the deepest respect for you, and that is more than passing, that is public, and I have said that many times before.

I remember your extraordinary help to me in various legislative issues I have dealt with, and your support, and I thank you for that.

Mr. COLEMAN. I have had the opportunity of knowing you, sir. You have a lot of style and a lot of class.

Senator SIMPSON. I have nothing further to say. [Laughter.]

Mr. COLEMAN. I see you have good judgment, too.

Senator SIMPSON. Bill, usually they are trying to bail me out, you know, most of them, saying, stop him.

You are an exceedingly reasonable man, and every bit of your writing, and your past public service, and your practice of law discloses that.

I been trying, desperately—honestly—to read this remarkable statement which was just given to me, and Mr. Chairman, this is not a whining complaint, but, gosh, you know, it would be so helpful to have this and be able to go over it before we are handed it as we come into this place.

It is 51 pages, it is a remarkable thing, with three appendices, and I think we are all ill-served by not having that in front of us, so that our staff could have looked at it yesterday, and I could have looked at it. I am only down to page 35 now. And it is unfortunate because it is very lucid, and the Secretary is saying some things.

Is there any way to assure that we could have these things in our hands at an earlier period so that we can review these things, so that we can fully participate?

The CHAIRMAN. I think that would be useful. Unfortunately, we do not have any of the statements, so far, of any of the witnesses for, and very few of the statements of those who are testifying against, but we will try very hard, Senator, to make them available as quickly as we can get them.

Mr. COLEMAN. Senator, I apologize. I tried my best to get it to you. I was not called, that I was going to have to testify today, until 2:00 or 3:00 o'clock on Friday. I was at the Greenbriar. I got back the first thing Sunday morning. I had left the office at a quarter of one this morning, and I think it was delivered over to the Senate shortly thereafter. I apologize.

Senator SIMPSON. No. I thank you so much, but it is pungent stuff, and I wish I could have had a chance to read it all, and I did not.

I know you have made a comment before I came in, and I know and have reviewed that. I do not put you in the category in any way—and this is a judgment on my part—but you are not even close to the people I am talking about, when I am talking about people who have raised the specter of emotion, fear, guilt, and racism, when it comes to this nominee, and that is what we have had.

We have had a pretty good load of that because we have used charged words. We have really almost dog-eared this Indiana Law Review article of 1971, which, if anyone had read the first two paragraphs, would know that it was called ranging shots, theories—in fact it ended and said it was tentative, and it was using words like "speculative," "informal," "not well-researched"—just arranging series of thoughts about a neutral system of looking at the U.S. Constitution. We have nearly worn out that document. That was written in 1971.

We have nearly worn out the document of 1963, when he wrote about affirmative action—not affirmative action, but discrimination in public places. The same things that Sparkman was talking about, and Bill Fulbright was talking about, and three Members of the present sitting United States Senate were talking about.

Those are the things that I am saying.

Mr. COLEMAN. Well, sir, the difference is that those gentlemen were running for public office, and I think the most dramatic example is Senator Thurmond.

I mean, in 1948, his political judgment was that that was the way to go. He certainly has developed and changed as much as any human being I know. In fact in his last election I went down to South Carolina and campaigned for him.

That is the American political scene. I think you weigh that person differently from a scholar who is not under that type of pressure, and I also think that Senator Strom Thurmond bears today the record of probably seeing that his President appointed the first black judge to sit in the south.

But that is the political process and that is what we really want. But when I am talking about a judge, or I am talking about a scholar at the Yale Law School, I just think that you measure his performance over the years by a different standard.

Senator SIMPSON. Mr. Chairman, there is an extraordinary statement. A politician is allowed to change and grow, but a judge apparently is not, nor a professor.

Mr. COLEMAN. Oh, no.

Senator SIMPSON. You cannot be saying that.

Mr. COLEMAN. I want him to change and grow, but I do not want him, in 1971, to do the Indiana Law Review Article, to take privacy and liberty out of the Constitution, and then, as late as 1982, 1987, say the same thing.

I would just like you to look at my footnote two on page 46, where he is saying the same thing.

Senator SIMPSON. Well, Mr. Chairman, Justice Hugo Black, who was a remarkable civil libertarian, did not agree with the *Griswold* case, and said very clearly—he said, "The Court talks about a constitutional right of privacy as though there—this is Justice Black talking, not Judge Bork as though there is some constitutional provision, or provisions, forbidding any law ever to be passed which might abridge the privacy of individuals, but there is not," is what he said. That was Judge Black.

"Nor is there anything in the history of the ninth amendment that offers any support for such a shocking doctrine."

Justice Black said there was no right of privacy in the Constitution and cited that, and that is his language in the *Griswold* case.

Mr. COLEMAN. Well, sir, I knew that you would raise that, and if you look at pages 12 and 13 of my testimony, I cover that, and I thought—you know, I know we Philadelphia lawyers think that we are going to flatter each other—but I felt that when Senator Specter got through with trying to say, if one felt that way how could one agree with *Bolling* v. *Sharpe,* that he was probably right.

And can I tell you the reason why Justice Black reached the conclusion he did, sir?

Senator SIMPSON. If I had more time, I would love it, but——

Mr. COLEMAN. Well, I think it is important because you raised the issue.

The CHAIRMAN. You can have more time.

Senator SIMPSON. Thank you. Go ahead. I would like to hear that, Bill, please.

Mr. COLEMAN. The Justice felt that he wanted to try to place a little more restriction on what a Justice could do. But when he incorporated in the 14th amendment the first eight amendments through the word "liberty," he had given away two-thirds of the ball game by conceding that liberty means more than mere freedom from restraint, because the first eight amendments contain many other substantive rights. In order to restrict giving additional substantive content to the word liberty, he then insisted that that word means *only* the first eight amendments.

At that time there were two other Justices who said, well, yes, it means all that, plus it means more. The Justices that we most often think of as advocates of judicial restraint—Justice Frankfurter and Justice Harlan—said, wait a minute, the meaning of liberty is not limited to the first eight amendments as incorporated by reference. In their view, we need to understand the real fundamental feelings in the Constitution for people, and therefore, the incorporation doctrine does not solve the problem.

That Justice Black's problem is—and he had difficulty with some of the cases—that if you say that the Bill of Rights represents both the floor and the ceiling, then you are in real trouble because by doing that Justice Black cannot say that the State statute, which prohibits the use of contraceptives is unconstitutional. Whereas Justice Harlan, Justice Frankfurter, and those that really understood this had or would have had no problem in holding such a statute unconstitutional.

Senator SIMPSON. Yes. You might have been interested, and maybe you heard some of the testimony about how that case came about.

No charge had ever been brought under it. It had been on the books for 80 years, a totally absurd piece of legislation. In fact it was referred to, by Judge Bork, as being "nutty." Others referred to it with greater clarity.

And that was the way that case came up, and finally, the law professors——

Mr. COLEMAN. I beg you if you go back and——

Senator SIMPSON. May I——

Mr. COLEMAN. If you go back and figure out how the *Ships Money* case came up, which only involved sixpence, I bet you you will find that there—you know—it did not have to happen. I mean, that is how great law is often made. Take Shuffling Sam, for example, in *Thompson* v. *Louisville.*

You know, there are some great cases that came up in a way where you say, indeed, lawyers ought to have something more important to do, but that is the way the law grows.

Senator SIMPSON. Well, law professors will never be busy again after these hearings, I can tell you that. Any law professor that is going to take off and fly, and flap his wings, after this hearing, is really going to figure out that that ain't the way to go. That is what is going to be a chilling effect on the profession of professors. That is just my own personal——

Mr. COLEMAN. I heard you make that point. That does give me some concern, sir.

Senator SIMPSON. Well, it should give every American concern.

Mr. COLEMAN. I would love to walk over some time and have lunch with you. I think I can talk that one out with you. I do not think you are right.

Senator SIMPSON. Good. I will be ready. I will buy.

But we have been here now 5 days going through Judge Bork's background, and it has been very fair, and much better, in many ways, than previous hearings, because we have not really delved into personal things, and so on, as we did in some.

But we have spent an inordinate amount of time on writings, and things done before he assumed the federal circuit court, at which time—and you have—I believe I do not paraphrase—I believe you said he had done "a good job" as a Federal District Judge of the United States of America.

Mr. COLEMAN. Court of appeals.

Senator SIMPSON. Court of appeals. He had been "good," and that many of the things—if I say this correctly—have been in line with your views as to his time on the circuit court of appeals.

I believe that is what you said moments ago.

Mr. COLEMAN. I do not think I said that, sir. I said that he was dealing with interpreting statutes written by this Congress and he applied the statutes as they were written, and that he had not had the opportunity to deal with the great public cases, but he had written about them even after he was on the bench, and the views expressed in those writings seemed to be very similar to the views expressed before he went on the bench.

Senator SIMPSON. But what I was saying—and will come to a conclusion and submit a good deal of my questions in writing—that here we have been presented with a great many charged words in connection with this man, and this is the troublesome part to me. Not from you.

Mr. **Coleman**. Oh.

Senator **Simpson**. We have talked about him being one who favors sterilization of his fellow man, and woman, which is absolutely absurd.

We have equated the word "poll tax" with him as a totally racist thing, and the United States Supreme Court never used the term in any way in that poll tax case. There was nothing in it, from top to bottom, end to end, that had a thing to do with racism. Not one thing in that case.

Mr. **Coleman**. As I read the case, it turns on poverty. But I also think it is very important in this country to say that a State statute which adversely affects somebody merely because he is poor, should be subject to heightened scrutiny to see whether you ought to have that type of statute.

Senator **Simpson**. The United States Supreme Court stuck with him on the issue of it not being a racist case. And then we have heard a great deal——

Mr. **Coleman**. But they decided the case against his views.

Senator **Simpson**. What is that?

Mr. **Coleman**. The case was decided 7 to 2 against his position on the grounds of poverty.

Senator **Simpson**. The case had nothing to do with racism, that is what I said, and that is what I would insist that I have said, and leave it at that. I do not know what other things it had to do with——

Mr. **Coleman**. That is the problem, that is what Judge——

Senator **Simpson** [continuing]. But it did not have anything to do with racism.

Mr. **Coleman**. That is what Judge Bork did. He——

Senator **Simpson**. But that is what it has been portrayed, Bill. It is portrayed as a racist case, and it is not.

Now may I go forward, please?

Mr. **Coleman**. But sir, I—you certainly may, because you have the power.

Senator **Simpson**. Well, I do not want to use power. I just want to, you know, get a response that I——

Mr. **Coleman**. See, people have criticized those that come up and oppose Judge Bork as being irresponsible. All I really want to do is demonstrate to the country that even in this democracy you can come up with a poll tax.

The great thing about the poll tax case is that the Court said, leaving aside the race issue—and actually, if you go back and look at the legislative history, you will find in the debates in Virginia, evidence that legislators said let's draw a statute in such a way that the court will not say it is unconstitutional, but let's make sure we get it so that very few blacks can vote—but the Court went on a different standard, namely, that poverty ought not to be a basis for denying the right to vote, and that makes it a great case.

Now, if you read Judge Bork's statement, that the 14th amendment is limited to race, he takes that issue out of the ball game. I think that as Mr. Lincoln said, that you have to love the poor people, there are so many of them, and I think that is a very important part of American life.

Senator **Simpson**. Mr. Chairman, I guess I will just conclude, that in any event, we have heard a lot about these charged words. The firing of Archibald Cox. Archibald Cox could be here to testify, if he wished.

I do not know the reasons he did not choose to do so. He was a professor of mine in labor law in my earlier life, a very steady and thoughtful man. He is not here.

We have heard a lot about women's rights, and this man being prejudiced against women's rights. These are things that I have been listening to for 5 days, that he was a person who was discriminatory and engaged in——

Mr. **Coleman**. No, you have not heard that from——

Senator **Simpson**. I know but——

Mr. **Coleman**. Sir, see, the worst thing in the world for a lawyer to say is: judge, you missed the point. That is not the point we are making.

What we are saying is that everybody has to recognize that there is still discrimination against women. Some of it will be taken care of by the political process. Some of it will be taken care of because private people will feel more responsible. But in this country, we know that the only way some of it is resolved is in constitutional cases, and that when a man—not being prejudiced—does not recognize that the 14th amendment gives the court the power to do that, then you have adversely affected the rights of women, not because you are prejudiced but just because you do not quite understand the Constitution.

Senator **Simpson**. Well, I guess when I have heard five days of testimony from the man himself, a most thoughtful and articulate person, with all of the things that go to leading to the type of person you would want on the Supreme Court, I personally—and this is my own view—see no difference between a person that we are going to put on the highest court, appellate court of the land, and the lower courts, the Federal Court of Appeals of the District of Columbia or the United States Supreme Court. That does not make a whit of difference to this person, and I say that as my own personal opinion.

I will leave it at that. In fact I will just stay so close to my own personal opinions, that there is no way they can leap on my head.

I am just saying that I have watched and listened, and I have heard these charged words, and about illegitimate children and antitrust, and anti-consumers, and paying more for your groceries and your toys, and all of that business. I have heard all that.

And use of the *Dred Scott* decision which, in my mind, is offensive, when we are told—and it was told here several days ago—someone read from that and said, "Judge Bork, that sounds like you."

Now how would you like to try that one on? That is the kind of stuff I have been here listening to for 5 days. That is very ponderous and tedious.

The issue, to me, and what I am going to just share with you—I know you are aware because I know you, and I know what a lawyer you are—that as Solicitor General of the United States, this man filed 19 amicus briefs addressing substantive aspects of federal civil rights law, and seventeen of those briefs urged the Supreme Court to boldly construe the relevant law and rule in favor of the minority, or female plaintiffs.

That is what happened with this man, and, on more than several occasions, Justice Powell voted against him. In fact it was extraordinary, as we talk about Powell being the centrist and the swing vote, to see how many times that Bork was sometimes leading the way.

And this is no reflection on Justice Powell. He is a superb man. But these are the realities. And I want to submit into the record this entire case law, where this man was involved, either as Solicitor General, or the judge of the court, where he shows not one shred of discriminatory activity, or not one single intent, or attempt to denigrate or deny, or press down minorities, or lesser people in the United States. I want that in the record, and I have no further questions.

The CHAIRMAN. Without objection, it will be placed in the record.

[Information follows:]

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK SUPPORTED THE RIGHTS OF MINORITIES

1. Runyon v. McCrary, 427 U.S. 160 (1976), which affirmed that Section 1981 applied to racially discriminatory private contracts. (Amicus)

2. Lau v. Nichols, 414 U.S. 563 (1974), which ruled that Title VI and possibly the 14th Amendment reached actions discriminatory in effect, even where the actions were not intentionally discriminatory. (Amicus)

3. Fitzpatrick v. Bitzer, 427 U.S. 445 (1975). The United States, as amicus, successfully argued that the 14th Amendment effected a basic change in the constitutional relationship between state and national governments and that Section 5 of that Amendment gives Congress complete power to remedy violations of that Amendment, including the power to abrogate sovereign immunity. (Amicus)

4. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which held that an employee may sue in court under Title VII employment discrimination statute even though the Union had lost on the issue of discrimination in arbitration. (Amicus)

5. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), which made it significantly easier for plaintiffs to prove employment discrimination claims on the basis of a discriminatory "effects" test. (*Amicus*)

6. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). As in *Albemarle*, Bork's *amicus* brief successfully urged the Supreme Court to make it significantly easier for plaintiffs to prove employment discrimination and receive full relief for such violations.

(*Amicus*)

7. *Beer* v. *United States*, 425 U.S. 130 (1976), Solicitor General Bork argued that although a new reapportionment plan increased minority voting strength, the plan nonetheless had a discriminatory "effect" because other proposed plans would have done more to increase the influence of minority voters. The Supreme Court (per Justice Stewart) (5-3) rejected Bork's expansive interpretation of the Voting Rights Act. Instead, the Court held that the Act was satisfied so long as the new electoral scheme did not further dilute the minority vote.

8. Washington v. Davis, 426 U.S. 229 (1976), Bork unsuccessfully argued that employment tests having a discriminatory "effect" violated Title VII.

9. Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court rejected Bork's argument that wholly race-neutral seniority systems violated Title VII if they perpetuated the effects of prior discrimination.

10. Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976), Bork argued that a school district which had already faithfully implemented a wide-spread busing plan could be required by a court to achieve a more perfect racial balance. The court disagreed, holding that the lower court's action directly contradicted Supreme Court precedent foreclosing the use of busing to achieve perfect racial balance.

11. United Jewish Organizations v. Carey, 430 U.S. 144 (1977), which held permissible under the 14th and 15th Amendment race-conscious electoral redistricting to enhance minority voting strength.

12. Virginia v. United States, 420 U.S. 901 (1975). In this case Bork successfully urged the Court to hold that the State of Virginia was not entitled to be relieved of the special burdens imposed by Section 5 of the Voting Rights Act.

SUPREME COURT BRIEFS WHERE SOLICITOR GENERAL BORK
SUPPORTED THE RIGHTS OF WOMEN

1. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Bork's amicus brief argued that employment discrimination based on pregnancy violated Title VII of the Civil Rights Act of 1964. Six Justices rejected this argument. In 1978, Congress adopted Bork's position when it amended Title VII to prohibit discrimination on the basis of pregnancy.
(Amicus)

2. Vorchheimer v. Philadelphia, 430 U.S. 703 (1977), where the United States as amicus argued that single-sex schools are unconstitutional and illegal if not equivalent in the educational offerings, and said the Court should not reach the question whether such schools are unconstitutional even if educational offerings were equivalent. The Court was equally divided and issued no opinion.
(Amicus)

3. Corning Glass v. Brennan, 417 U.S. 188 (1974), a landmark "Equal Pay Act" case which ruled that men could not be paid more than women for similar jobs on different shifts.

Senator Simpson 9/21/87

Questions Submitted to the Record

Civil Rights Questions

1. Are you aware that Judge Bork, as Solicitor General, filed 19 amicus briefs addressing substantive aspects of federal civil rights law and that 17 of these briefs urged the Supreme Court to broadly construe the relevant law and rule in favor of the minority or female plaintiffs?

2. Are you aware that Solicitor General Bork argued for more extensive interpretation of civil rights laws than ultimately adopted by the Court in several landmark civil rights decisions? For example, are you aware that the Supreme Court rejected Bork's arguments in the following cases:

A. The Supreme Court rejected Bork's argument that discrimination on the basis of pregnancy violated Title VII. (General Electric Company v. Gilbert 1976 -- Powell voting against Bork.)

B. The Court rejected Bork's argument that a New Orleans reapportionment plan violated the Voting Rights Act because it diluted black voting strength. (1976 Powell voting against Bork.)

C. The Court voted against Bork's position that all employment tests with discriminatory "effect" violated Title VII. (Washington V. Davis 1976 -- Powell with the majority against Bork.)

D. The Court voted against Bork's position that wholly race neutral seniority systems perpetuating the effects of prior discrimination violate Title VII. (Teamsters v. U.S. 1977 -- Powell siding with the majority, against Bork.)

E. The Court ruled against Bork's position that school districts that have faithfully implemented a wide-spread bussing plan can still be ordered to achieve a more perfect racial balance. (Pasadena Board of Education v. Spangler 1976 -- Powell siding with majority against Bork.)

3. Are you aware that as an Appellate judge, Judge Bork has never rendered or joined a decision less sympathetic to a minority or females than that made by either the Supreme Court or Justice Powell? Indeed, in all but three of his appellate opinions which addresses substantive aspects of the civil rights law, Bork broadly construed the relevant law and ruled in favor of the minority or female plaintiffs.

4. Are you aware that as an Appellate judge, Judge Bork authored or joined several opinion broadly interpreting Titles VII of the equal Pay Act including, the cases of Laffey v. The Northwest Airlines and Palmer v. Shultz? Are you aware of Judge Bork's record as Solicitor General in gender discrimination cases?

Bork represented the United States in several landmark gender discrimination cases, including the General Electric Company v. Gilbert case and Corning Glass v. Brennan, arguing in that case that men could not be paid more than women for similar jobs on different shifts. And then there is Vorchheimer v. Philadelphia where Solicitor General Bork argued that single sex schools are unconstitutional and illegal if not equivalent in educational offerings.

5. Are you familiar with the case of Pasadena Board of Education v. Spangler 427 U.S. 424 (1976)?

6. Are you aware of the case of Milliken v. Bradley 428 U.S. 717 (1974)?

7. Are you familiar with Judge Bork's vote, joining the panel decision, in Palmer v. Shultz, a District of Columbia Circuit Court decision of 1987?

8. I would like to describe for you several cases which Solicitor General Bork argued which called for an expansive interpretation of Title VII. These cases include Washington v. Davis (unsuccessfully arguing that employment tests have a discriminatory "effect" which violated Title VII), Teamsters v. United States, (unsuccessfully arguing that wholly race-neutral seniority systems perpetuating effects of a prior discrimination violated Title VII). Abermarle Paper Company v. Moody (successfully arguing for use of statistical evidence and discriminatory "effects" tests to prove Title VII violations) and Alexander v. Gardner-Denver Co. (successfully arguing that employees may bring Title VII suits even if the union loses its discrimination claim in arbitration).

SIGNIFICANT PRO-MINORITY AND PRO-WOMEN APPELLATE COURT DECISIONS

✓ 1. Ososky v. Wick, 704 F.2d 1264 (1983) (Foreign Service subject to Equal Pay Act) (Pro-Female).

✓ 2. Palmer v. Schultz, 815 F.2d 84 (1987) (inferences of intentional discrimination can be made solely on statistical evidence) (Pro-Female).

✓ 3. Laffey v. Northwest Airlines, 469 F.2d 1181 (1985) (female stewardesses may not be paid less than male pursers for nominally different jobs; Equal Pay Act back pay awards determined by calculating total job experience) (Pro-Female).

Kept → 4. Nordell v. Heckler, 749 F.2d 1264 (1984) (Title VII's statutory limitations should be liberally construed).

ct. [illegible] [illegible]

Broad construction of stat. of lim.

✓ 5. Emory v. Sec'y of the Navy, 819 F.2d 291 (1987) (military branches subject to review of civil rights claims involving selection of senior officers).

6. Jarrell v. U.S. Postal Service, 753 F.2d 1088 (1985) (allows recognition of "equitable considerations" to excuse plaintiff's noncompliance with statutory requirement that EEOC complaint must be raised within 30 days of alleged discriminatory event).

Aff. ✓ 7. County Council of Sumpter County, South Carolina v. United States, 555 F. Supp. 694 (1983) (switch to "at-large" election system required preclearance).

The **Chairman**. Judge—Senator Heflin, a former judge, but Senator Heflin from Alabama.

Senator **Heflin**. Mr. Chairman, thank you.

You mentioned *New York* v. *Sullivan* in the Alabama Supreme Court, and just to get the dates straight, I believe the United States Supreme Court case of *New York* v. *Sullivan* was decided in 1964.

Mr. **Coleman**. Yes.

Senator **Heflin**. You mentioned I was on the supreme court. I did not go on until——

Mr. **Coleman**. No, I did not say you—No, I checked that. I would not have cited the case if you got reversed. No, I checked that. I know you were not on the court. [Laughter.]

The **Chairman**. Will Senator Heflin please pull his microphone a little bit closer, if he does not mind. Thank you.

Senator **Heflin**. Well, I am finally glad that you admitted you were a Republican, about that campaigning down in South Carolina.

You know, it has been an interesting thing to me, you know, today, to see the Republicans versus Republicans. They tell me the most acceptable form of cannibalism is Republican eating Republican.

The **Chairman**. Mr. Secretary, you are free to respond in any way you would like. [Laughter.]

Senator **Heflin**. Just a little levity now and then. [Laughter.]

You served as the Chairman of the American Bar Association's Committee on the Federal Judiciary. Were you on that committee and were you Chairman with Sandra Day O'Connor's——

Mr. **Coleman**. I was not Chairman. I was a member, sir. But I was a member when——

Senator **Heflin**. What was your service on that committee?

Mr. **Coleman**. Each circuit has a member. I was the member for 3 years for the District of Columbia. Among those passed upon at that time was Justice O'Connor for the Supreme Court of the United States and also, incidentally, Judge Scalia for the D.C. Circuit.

Senator **Heflin**. All right. Now, as I understand it, the American Bar has various standards or criteria that they look at, but they say they do not get into ideology. Was that true when you served? Has that been true relative to the Supreme Court?

Mr. **Coleman**. To the best of our ability, we did not get into ideology.

Senator **Heflin**. Well, in some of the questioning, it would appear that some of your distinctions between your role reviewing Judge Bork and your opinions now may deal with ideology. I am a little bit confused, particularly by the section of the ABA instructions that are on Page 44 of your testimony, which Senator Metzenbaum read.

"The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change," and then they go on to other things, such as "extraordinarily heavy docket." But the words "The significance . . . of issues, the importance of the underlying societal problems and the need to mediate between tradition and change," they come pretty close to saying ideology.

Mr. COLEMAN. No, maybe I can give you such a situation.

If a scholar says that in the 14th amendment there is no protection of liberty or privacy, he is reading out a lot, and I would almost treat him the way I would treat the same scholar who is awfully good but writes scholarly pieces that the 14th amendment has never been properly adopted. And on Page 8 of my testimony, I give you the citations of scholars that say that.

In the same way I do not think it is ideological to consider as relevant a nominee's view that a whole line of cases which every great Justice has pretty much accepted should be written out of the 14th amendment. By the same token, when you have Section 5 of the 14th amendment and Section 2 of the 15th amendment, and a nominee looks at those provisions in such a way that he or she does not give the Congress the power that I think they have to have, then I think that goes to the constitutional structure. And if under those circumstances I say that I cannot take the risk, I do not think you would accuse me of being simply ideological.

I just think that there are certain fundamental things that you expect in anybody who sits on that Court.

Senator HEFLIN. You mentioned his opinions since he has been on the court of appeals. You indicated no real civil rights opinion dealing with the constitutional issue.

Mr. COLEMAN. Yes, sir.

Senator HEFLIN. Yet you indicate that he has spoken otherwise and has written otherwise in various articles and forums.

I do not know whether it is in here since we have not had an opportunity to read it, but I wonder if you could prepare a list of writings and speeches to direct us or our staff where we could look.

Mr. COLEMAN. Yes, sir. If you look at page 46, footnote 2, I collect those in that footnote.

Senator HEFLIN. These are the collection of those writings?

Mr. COLEMAN. Yes. I give every date after he was sworn in to be on the court.

Senator HEFLIN. All right. Well, that might be, I think, of some significance. It should be reviewed.

I may have some questions that I might submit in writing, but that is all I have right now.

Senator KENNEDY. Senator Grassley.

Senator GRASSLEY. Thank you, Senator Kennedy.

Mr. Secretary, thank you very much for your testimony. I have some questions that I would like to ask and ask you to comment in regard to what difference these points make in your mind. If they do not mean anything, then say so.

The bottom line that I am interested in is whether or not your viewing and reviewing Judge Bork's appearance before us last week and the extent to which you have changed your views as a result of his being here. So I am going to start out with this point: the NAACP Legal Defense Fund or its lawyers filed briefs in ten cases during Mr. Bork's tenure as Solicitor General in which the court made a substantive interpretation of Federal statutory or constitutional law. Are you aware that in nine of these ten cases the Legal Defense Fund sided with the Solicitor General?

Mr. COLEMAN. I am aware of that from the testimony, but I would urge you to look at those cases. Once again, all you are demonstrating is the Legal Defense Fund is responsible and they come to the Court when they are usually right.

Secondly, my understanding is that in those cases they basically dealt with statutes. They were not constitutional cases.

Senator GRASSLEY. Well, I start with the presumption that we are dealing with an intellectually honest person, and if in his public duties he could not in clear conscience take these positions, that he would not; that he would resign. In fact, he made statements to that effect last week.

Mr. COLEMAN. Sir, I have a footnote here where I cite his testimony when he was being questioned during his conformation hearings to be Solicitor General of the United States, and I would urge you to reread that.

Senator GRASSLEY. What do you want me to look at? I will do that after I am done questioning.

Mr. COLEMAN. It is the footnotes on page 39. He stated in connection with antitrust policy that he would put aside his personal views. As a lawyer, you know, if you go and pull my record—and I argued many cases—I hope you do not get my client and me both in the same room and say, "Bill, did you really agree 100 percent with your client's view?" You know, when you function as a lawyer, that is different from functioning as a judge.

Senator GRASSLEY. Again, let me state as fact, maybe there is no point in asking for a response. But in seven of these cases where the Solicitor General filed as friend-of-the-court, are you aware of the fact—and I think maybe Senator Simpson touched on this and is committing a whole series of these citations for the record—That Justice Powell opted for a narrower civil rights interpretation than that urged by Solicitor General Bork.

But we have had stated for the last 2 months that because Judge Bork would be replacing Justice Powell—Justice Powell has been a swing vote in several important cases before the Court—that this is tipping the balance on many issues; and from the standpoint of the people making the charge, that that is a wrong course of action to take. And from the standpoint of the civil rights community, I think it should be noted that in several of the cases as Solicitor General that Judge Bork presented his case and the government's case before the courts, that he urged upon the court a broader interpretation of civil rights laws than either Justice Powell or the Supreme Court were willing to accept.

Are you aware of that? Or if you are aware of it and disagree with it, tell us.

Mr. COLEMAN. I have heard that testimony, sir.

Senator GRASSLEY. Well, your response? Obviously, that has got to detract from the criticism of Judge Bork over the last two months.

Mr. COLEMAN. My response, before I could make a judgment, sir, with all due respect, would be to go to get the cases and the brief to see what the cases are about. Then I could respond to you.

As I said, after hearing so much said about the *Runyon* case, at about 1:00 a.m. o'clock this morning I had somebody bring me that volume. I was surprised to find out that Solicitor General Bork did not argue that case; that the Government did not open its mouth in that case. All they did was file an amicus brief.

Senator GRASSLEY. I want to read three sentences—one would be on page 8, one would be on page 9, and the other one would be on page 11—of your testimony. Then I am going to lead back to the original statement I made to you as I started my 10 minutes.

"And, since becoming a judge, he has not written any opinion disavowing any of his publicly stated views."

At the bottom of page 9, "The committee should compare his comments on *Shelley* with his comments on *Katzenbach* v. *Morgan*." It is legitimate that you bring that up.

Also on page 11, "I also firmly believe that, having come this far towards a free and open society, it is not in the public interest to stop or turn back the constitutional development that slowly and steadily is removing the vestiges of slavery, of 350 years of legally enforced racial discrimination, and of centuries of irrational discrimination against women."

Now, I am not here to find fault with any of those things you have said, but we had Judge Bork before this committee for 30 hours last week. And it seems to me like he responded, on both sides of the aisle, to much of the criticism that had been presented over the last 2 months. And I have to ask you as a person who obviously has strong feelings about this or you would not come before this committee: If you observed Judge Bork for 30 hours or even for a portion of that 30 hours, is there not anything in his testimony of last week—hopefully there is a lot in his testimony of last week—that explains more adequately some of the positions that he took as a professor, some of the statements he made that were very provocative, that would indicate to you that those views expressed 25 years ago, 14 years ago, may not be ruling with him and would not be ruling with him when he is going to be sitting on the Supreme Court?

Mr. COLEMAN. Sir, with all respect, I think you are missing the point. The reason why I took you through the 14th amendment cases is just to say that there were five or six instances, in each one of which black Americans had won a tremendous victory. I think everybody else here agrees with them. And each one of those, Judge Bork saw fit to criticize the decision.

I do not stop there. When he was writing the criticism in 1971, ridiculing or saying that there is no basis for *Shelley* v. *Kraemer*, there were available at least three other cases decided after 1948 and before 1971 that I think a scholar should have discussed and should have said, even if the Court were wrong on the State action part, the decision was supported by the Act of 1866. The Supreme Court in *Jones* v. *Mayer*, 3 years before his article, said you do not need the 14th amendment, that the Act of 1866 is valid under the 13th amendment because all the Act of 1866 does is remove vestiges of slavery. It seems to me that a scholar who in writing condemns one of the cases that black lawyers of that time thought of as a great and important decision at least should have said: You guys went on the wrong theory. Next time argue the Act of 1866.

Senator GRASSLEY. We were questioning him last week, Mr. Secretary, on those very points that how, as a Supreme Court Justice, they influence his thinking. And so I have to ask you if you reviewed that, if you viewed that last week, did that cause you to change any of the views that you had about Judge Bork prior to his appearance here last week?

Mr. COLEMAN. My views about Judge Bork are not personal. They are based upon his writings, and there are two simple propositions.

Senator GRASSLEY. You have got to compare what he said last week with what he has written; otherwise, you are taking the position——

Mr. COLEMAN. There are two simple propositions, and this is not me speaking as a black person. This is me speaking as an American. The first is that one of the greatest heritage of an American is the liberty and the privacy prescribed in our Constitution. Those cases have nothing to do with blacks per se. They concern every man and woman. This Judge reads them out of the Constitution. He has done it in his speeches before. He has done it since on the bench. He has not had opportunity to say, well, even though wisdom seldom ever comes, there is no reason to reject it merely because it comes late, and say in a decision: "I was wrong."

The other proposition—and this really should affect you—concerns Section 5 of the 14th amendment and Section 2 of the 15th amendment, which give you the power to correct things that the Court does not correct. I think that when someone's writings puts that in jeopardy, you should look at that person carefully.

He may believe in every one of these positions, and I do not focus on his personal views—that is not the problem. If you feel that, then I have really failed you.

Senator GRASSLEY. I still would like to hear you say, Mr. Secretary, whether or not anything Mr. Bork said last week in any way causes you to change your views about him, what he said last week compared to the writings that you are criticizing. Because this is the record——

Mr. COLEMAN. The only thing I could say——

Senator GRASSLEY. It is the record of this hearing that I have got to base my judgment on.

Mr. COLEMAN. I am under oath. What he said last week somewhat surprised me, because he kept on changing his positions and that really bothered me.

Senator GRASSLEY. Well, now, he is not qualified to be on the Court because he has changed his view?

Mr. COLEMAN. What?

Senator GRASSLEY. Because he changed his view.

Mr. COLEMAN. No. No, I thought that on certain of these issues, I——

Senator GRASSLEY. You look positively, then, at the fact that he expressed some contrary views last week?

Mr. COLEMAN. Well, all I am saying is in all his writings he said that those cases dealing with the right of privacy and liberty are not in the Constitution, and he said that as late as 1985. There were certain points in his testimony where he said, well, maybe those rights can be found some place else. But to the best of my knowledge, he never said where it was. With respect to the rights protected under the *Meyer* decision. I believe he said that a State statute that prohibited parents from sending their children to a religious school would be a violation of the first amendment or the 14th amendment, and therefore, the Catholic schools would not be under a threat. But that apparent concession does not take care of that military academy and those other schools that were also in *Meyer* v. *Nebraska*, or the other privacy rights that have been given protection in the line of cases following that decision.

The CHAIRMAN. Mr. Secretary, as you can see, there is great interest in your testimony, and we are going to keep you longer because others want to question you, with your permission. But would you like to take a 5-minute break?

We have two more questioners. That is supposedly 20 more minutes.

Mr. COLEMAN. I can go on.

The CHAIRMAN. I just want to make sure.

All right. I yield to your fellow former Philadelphia lawyer. I guess he is still a Philadelphia lawyer and good lawyer, Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Secretary Coleman, I join in welcoming you here. The committee, I know, thanks to you for the tremendous effort that you have put into the very scholarly presentation which you have made both in writing and orally today.

I think it should be put on the record the tremendous public service you have given in the past as Secretary of Transportation, Assistant Counsel to the Warren Commission, where you and I worked for many years together, and your work on the *Bob Jones* case and many, many other matters. And, of course, when you talk about the *Girard College* case or Judge Raymond Pace Alexander, and the matters which have occurred in Philadelphia, Pennsylvania, they have special meaning for me.

I would like to discuss with you two issues in the few minutes which have been allotted to me today—the first amendment issue on clear and present danger and issue on equal protection of the law, which I think are central to this matter.

On the issue of clear and present danger test, Judge Bork said—and I think this is really a critical aspect—that although he disagrees philosophically with the case, that he would apply the settled law if confirmed as a Supreme Court Justice. I think there is a generalized agreement as to his integrity, and he has promised to uphold the settled law of *Brandenburg* and, considering the various factual situations which come before the court—and this is really an ultimate question which I have to decide as a Senator, this panel has to decide—but I would be interested in your views on the central question as to whether it is realistic for a Justice of the Supreme Court to apply settled law, which he may disagree with philosophically?

Mr. COLEMAN. Well, I think that sometimes the justices do and sometimes they do not. And what I have attempted to do was to collect in Appendix C some of the cases on that, and at the end of the Appendix I have collected statements made by Judge Bork. The latest one was made on January 31, 1987, in which he said "Certainly, at least I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent because that precedent by the very basis of his judicial philosophy has no legitimacy. It comes from nothing that the framers intended."

Senator SPECTER. Mr. Secretary, there is no question that he has said that, and we questioned him on that closely. But there is distinction three ways on three issues.

One is as to clear and present danger test, he flatly made a commitment to accept settled law. On the privacy cases he has not made that commitment. He has talked about various considerations of reliance and stare decisis, but he has made no commitment on privacy and that leads to the abortion issue.

On equal protection he has made a commitment, but it has been a different standard.

Mr. COLEMAN. Sure.

Senator SPECTER. But you testified, and I think accurately so, that as Solicitor General he took positions that he disagreed with intellectually. You and I know that as practicing lawyers we do not have to agree intellectually with the position to defend someone.

When I was a Public Defender for a time, I defended people that I did not agree with their position, but that is a lawyer's job. As District Attorney I had greater opportunity to dismiss the case if I disagreed with that.

But the central issue as to whether a man of goodwill and integrity, whether he can apply a principle of law that he philosophically disagrees with is one which I am pondering. And that is why I asked you the question, as to whether you had any special——

Mr. COLEMAN. I do not. All I can ask you is to read Appendix C, and I do not think that something other——

Senator SPECTER. I have already read Appendix C. It is a very erudite appendix. I have read your paper, and it is really quite excellent.

Mr. COLEMAN. I am the unfortunate lawyer who argued the *Garcia* case, and I was up there twice. And I finally told the Justices, "The only way you can rule against my clients in this case, sir, is you have got to reverse yourself", and they did.

So, you know, you cannot say that I can rely on people who say they will or will not adhere to precedents, because in *Garcia* Mr. Justice Blackmun, who is a wonderful gentleman, reversed himself. And in that case Justice O'Connor and Chief Justice Rehnquist each stated in dissent that that decision is just a temporary ruling, and that the right time will come, and the issue will come back before the court. I have two kids who are lawyers, and both of them are saying "I hope I get back there; I can reargue that case again and win one you could not".

Senator SPECTER. Mr. Secretary, your last point illustrates a number of principles. One of them is the complexity of cases before the Supreme Court. Let me discuss with you for a few moments the issue of equal protection of the law because you dealt with this in your statement.

Judge Bork has said that he would apply equal protection of the law more broadly than he had in his writings, and I have said that I accept that.

And then the question is: When you apply equal protection to women and to illegitimates and to the poor and to aliens, what the standard is?

And you have raised a question about heightened scrutiny versus a reasonable standard. And what Judge Bork did in his testimony here was to adopt the standard of Justice Stevens. Justice Stevens has written two cases on equal protection of the law. He has written a concurring opinion in *Craig* v. *Boren*. He has written a concurring opinion in *City of Cleborne* v. *Cleborne Living Center*.

The issue which is raised for me is whether Judge Bork's standard of equal protection is sufficient. Now when Justice Stevens wrote *City of Cleborne* and articulated the reasonable basis standard, he did not have any motivation to get confirmed. He said flat out that he disagreed with the three tiers of strict scrutiny, at one extreme, and rational basis, at the other.

And then he articulates a standard of rationality, which Judge Bork has adopted. And the purpose of my question here today to you is to get some help on my own thinking on whether Judge Bork's standard is sufficient.

In the *Craig* v. *Boren* case, when this same question came up, there were seven opinions of the court on what equal protection meant. Justice Brennan filed the opinion of the court. Justice Powell filed a concurring opinion. Justice Stevens filed a concurring opinion. Justice Stewart filed an opinion concurring in the judgment. Justice Blackmun filed an opinion concurring in part. Chief Justice Burger dissented and filed an opinion, and Justice Rehnquist dissented and filed an opinion.

Now people are very anxious to know where some of us on this Judiciary Committee stand on the questions involved in this case. And equal protection is a big one. There are two big issues—and that is under speech—and liberty, and it is equal protection. And it does not exactly lend itself to a thirty-second sound bite as to how a Senator is going to decide the question of Judge Bork's competency or adequacy for the Supreme Court when he talks about a different standard and nine Justices and you have seven opinions.

Now my question for you is: Are you sure that Judge Bork's acceptance of the Stevens' standard on reasonable basis is inadequate to do justice under the equal protection clause?

Mr. COLEMAN. Sir, that I do not know. But if I had the problem, I would first start with Judge Bork's speech in August 1985, in which he said and I quote: "In the 14th amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity is pretty much what the 14th amendment is about; because if it is about more than that, it is about a judge making up more that it is about. And I do not think he should." I am reading from pages 23 and 24 of my written testimony.

Therefore, I start with the fact that, if Thy would be true to Thine own self, that whenever Judge Bork approached these issues he certainly would not have the flexibility in his own mind that Mr. Justice Powell, Mr. Justice Brennan or Justice O'Connor would. I would urge you to reread her opinion in the case that came up from Mississippi involving the school for male and female nurses, I think, and you will see how she feels about it.

And I just think that to tell the Bar that the standard is reasonableness leaves us I think with a major problem. I feel from my own experience that it is essential that a judge, when he is passing upon a discriminatory law involving women, apply a heightened scrutiny standard.

Now if what Judge Bork is saying is that he just wants to say the same thing but in a different way, so that when he says reasonableness, what he means by that is precisely what is currently meant by "heightened scrutiny", then what he is doing is confusing the Bar, although we lawyers tend to make a lot of money when the court confuses us. If that is what he is saying, than it seems to me perhaps you could do it.

But I think that is something that is a judgment that you have to make and I have every confidence that you will make the right one.

Senator HEFLIN. Mr. Chairman, could I interrupt? Would you tell us what page you were quoting from from your testimony?

Mr. COLEMAN. The page I was quoting from was on page 23, sir. If you go to pages 23–25, I indicate the statements that he has made. As I also indicate in page 23, "This salutary application" of "—this is me referring to the equal protection cases involving women, aliens and legitimate children—"of the grand principle of anti-discrimination to the complex realities of American life is dismissed by Judge Bork as merely as a result of fads in sentimentality".

I just do not think it is conceivable for me to read cases involving women as being merely "fads in sentimentality." We have come a long way, and particularly when I read a case from the Supreme Court in 1881 where a woman cannot even practice law. I just think that you have got to recognize that these statements and positions have to be taken into consideration.

Senator SPECTER. Mr. Secretary, when you refer to Judge Bork's speech about equal protection applying only to race and ethnic issues, I read in the section of an earlier writing where he said that equal protection applied only to race——

Mr. COLEMAN. Yes.

Senator SPECTER [continuing]. And asked him about the broad interpretation as to women and as to illegitimates and as to poor and as to aliens, and he said that he accepted the broader interpretation, and said that what he had written as a professor, that that was one view, but he is prepared to accept the interpretation of the court on the broadened standards, not only to blacks but to women and to the poor, et cetera.

Now I may be wrong, but I accept that. I accept that as a representation he has made here. Now that takes me to the next step, and the next step is when he disagrees with the heightened scrutiny standard, which I think is the proper standard, then he goes over to what Justice Stevens has said, then I start to pick up what Judge Stevens has said because I want to understand where Judge Bork is and what we may rely upon him.

And he, if confirmed, is going to be held to the standard not to be disgraced in history, to fulfill his commitments. He might have called them campaign promises, but to fulfill his commitments if he is confirmed to this committee.

Now when you come down with the Stevens' standard, I would have been more satisfied with heightened scrutiny because I know a lot more about what that is. But then I come to the Stevens' standards, and Justice Stevens articulated this standard obviously in good faith and not looking for confirmation, but he says that he does not like the three tiers because he does not understand it. And he comes to the rational basis standard, and he takes up a lot of considerations which are very important, considering the arm to the members of the disadvantaged class, considering the tradition of disfavor which is a critical factor, and then articulates this standard.

So one of the issues that I am wrestling with is whether this standard is about the same thing, which is what Judge Bork said it was, the heightened scrutiny, and/or whether it is adequate.

My time is up, Mr. Secretary.

Mr. COLEMAN. Senator, I wish you would reread the first sentence in Mr. Justice Stevens' concurring opinion, and frankly I hope that if I ever get a chance to see him either in court or privately, I hope he will rethink that.

Senator SPECTER. In the *Cleborne* case?

Mr. COLEMAN. This is in *Craig* v. *Boren*.

Senator SPECTER. *Craig* v. *Boren*.

Mr. COLEMAN. When he says there is one equal protection clause. It requires every State—it does not direct the courts to apply one standard in some cases and another standard in the other.

I have written—and my feeling is—that when you read that 14th amendment, it is clear if there is anybody protected by that amendment, it is blacks. And I do not mind opening it up to the women and other persons, but as a result of doing that, I do not want the court to say that because there is only one standard under that amendment, and the standard that applies to illegitimate children or women or anybody else is less than the standard that would govern the court applied the amendment only to blacks, that therefore I am going to apply that lesser standard also to blacks.

So I think if the first sentence in that opinion leads to that result, with all due respect I think Justice Stevens is starting at the wrong place.

The CHAIRMAN. If the Senator will yield, that is the point I attempted to ask Judge Bork the second to the last day, I believe. If there was one standard, has he merged all the standards?

And if the Senator would not mind my pursuing this just for a moment with Secretary Coleman——

Senator SPECTER. By all means.

The CHAIRMAN [continuing]. I do not recall. His answer was unclear to me. Then I suggested that if you are going to keep the strict scrutiny standard on race and a reasonable standards merge in the other two existing standards, is that not an extremely subjective judgment? And does he not argue throughout his writings that subjectivity is the one thing he seeks to avoid?

Mr. COLEMAN. I would agree with you, Senator. Frankly, I think the first sentence in the concurring opinion is the wrong approach and you will find a lot of people who say that that cannot be the way you go.

The CHAIRMAN. Thank you for letting me interrupt.

Senator SPECTER. Well, if I may just raise another point or two and conclude.

I think Judge Bork has moved a considerable distance—whether you accept it or not is another point—to a reasonable standard test and judicial interpretation which does not come from original intent. Whether you accept it, that is the judgment call that the Senate is going to have to make.

Mr. Secretary, when you point to the first sentence where Justice Stevens says there is only one equal protection clause that requires every state to govern impartially, it does not direct the courts to apply one standard of review in some cases and a different standard in other cases. We want one standard for everyone in this country. That is what we are looking for.

Whatever criticism may be leveled at a judicial opinion, implying that there are at least three such standards, applies with the same force to a double standard.

But, as you started off in your analysis about what happened to the right to jury trial in a very clear-cut case, the court takes the equal protection clause. It has trouble deciding whom it is going to apply to. In 1886 it comes to aliens, and gradually it comes to indigents, and then it comes to illegitimates, and then it comes to women.

Then it adds an equal protection clause that has three tiers on it. And then Justice Stevens calls it a double standard. He could have called it a triple standard. We do not like double standards in this country; we like triple standards less. Then he comes to a reasonable-basis test and it is extraordinarily complicated.

Mr. COLEMAN. Can I give you a hypothetical? Take the law that you voted on—the draft law—in which you exempted women. Certain males asked: is that unconstitutional? It was analyzed under the heightened-scrutiny test and the Court said no, it was not. But suppose you had been foolish enough to add, "and Blacks and whites would be separate." You would get a different result. But if you were to use the same test, you may not get a different result. And that is the reason why I think it is a little bit too easy to say because we want one standard we analyse all classifications the same way.

The reason why I pulled back was that a lot of times in our litigation we were always confronted with the argument that, well, if you let blacks in, then you have to let women in. You know, there are different standards. As it turned out, Girard College, which I referred to earlier, also has women. But my point simply is that different analytical standards are appropriate. And I just think that for a judge to insist on one standard is not the way you can handle the cases. Just think through the draft case again and I think you will reach that conclusion.

Senator SPECTER. Thank you very much, Mr. Secretary. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from New Hampshire, Senator Humphrey.

Senator HUMPHREY. I like the way the Chairman says New Hampshire. There seems to be a special ring to it.

The CHAIRMAN. It is growing in my affection every day.

Senator HUMPHREY. Mr. Secretary, being the most junior, or the second-most junior of a committee is not the most advantageous position, as Congresswoman Jordan will recollect, because most of the really interesting questions are used up by the time your turn comes.

On the other hand, you have an opportunity to size up the witness and I had decided before the questioning traveled more than half way down the panel that I was going to approach you very differentially because you are a man who knows very much what he is talking about, I would say, although I think many would disagree with your conclusions in some respects; particularly with respect to confirmation.

Do I read you correctly and hear you correctly that, to try to get the essence of this now, your bottom line concern about Robert Bork is how broadly or how narrowly he would read the intent of the framers? Is that about right? I mean, you do not question his professional competence, his integrity, any of that stuff?

Mr. COLEMAN. There is a wonderful opinion by Justice Harlan which is set forth in the appendix about this idea. It is not a single-minded focus on original intent. You must read the Constitution with a lot of background of history and you make judgments.

Senator HUMPHREY. Yes.

Mr. COLEMAN. There are very few provisions in the Constitution which are simple and anybody can read and always know what the framers meant.

Senator HUMPHREY. Right. It does not always jump right out at you.

Mr. COLEMAN. No. What I am trying to say is that despite Judge Bork's scholarship, his law school record, successful practice, service as Solicitor General, there are several fundamental areas of the law where he in his scholarship has a view of the Constitution completely different from the type of Constitution which I think this nation lives under today. And in the liberty and privacy cases, I would ask any of you, the next time you campaign, just to take Justice Harlan's dissent in *Poe* v. *Ullman,* read it, and say, I am against what he says there. And I think you will have a hard time coming back to this place.

Senator HUMPHREY. Yes.

Mr. COLEMAN. The other thing is that in the crucial area of the 14th amendment he has a very restrictive notion of how you apply that great amendment, and therefore, I hope that the Senate will consider that as well. And you really come down to the fact that he says: although I wrote all of this as a scholar, when I get on the Court, precedent will sway me. I just ask you to re-read Appendix C and see whether that is an adequate answer.

Senator HUMPHREY. That was a rather—the answer does not quite—I like to try to reduce things to their essence. Was I correct in what I asserted, that your concern is how broadly or narrowly Robert Bork would read the intent of the framers?

Mr. COLEMAN. No.

Senator HUMPHREY. Is that an unfair question?

Mr. COLEMAN. That is completely misleading.

Senator HUMPHREY. I misread you.

Mr. COLEMAN. Well, yes.

Senator HUMPHREY. Then what is the essence of your concern?

Mr. COLEMAN. Once again, there are basic fundamental cases, starting with *Meyer* v. *Nebraska,* which every Justice pretty much has accepted, and Judge Bork says those cases are not constitutionally based, they are not in the Constitution. And secondly, that his idea of your power under Section 5 of the 14th amendment and Section 2 of the 15th amendment are completely different from what the Court has said in nine to nothing decisions, and from what I think each one of you up there think.

Therefore, you then come down to the fact that he expressed his views as a scholar, he has not confronted those issues on the court of appeals, and he says that certainly these hearings have educated him—which I hope they have—but you do not know what is going to happen when he gets on the Court.

Senator HUMPHREY. You make the point that in many of his cardinal positions, or his position on cardinal points of the law, that he stands apart from many whom you respect. But is it not also true that—I am sure this is true—that many whom you do respect agree with Judge Bork on some of these cardinal points of law.

Let me talk about *Shelley* v. *Kraemer* just briefly. Or let not me talk about it, but let me cite some of the statements of persons whom you probably respect—I would think so—who agree—you see, it is not the result——

Mr. COLEMAN. I am begging you to mention one of them. If you do not, I will tell you who it is.

Senator HUMPHREY. All right. What does it start with?

Mr. COLEMAN. Why do you not start with Herb Wechsler?

Senator HUMPHREY. I will skip that one.

Mr. COLEMAN. Because he was the one who argued *Times* v. *Sullivan* 7 years later and won the case on the very legal theory that he criticizes in the Columbia Law Review as not being solid good law.

Senator HUMPHREY. Wechsler is one that I want to cite, as a matter of fact.

Mr. COLEMAN. That would be fine.

Senator HUMPHREY. But the point I want to make before I do that is that surely you do not think that Robert Bork opposes the means? His question, his trouble with some of these landmark decisions involves the method at arriving at the means; am I correct in that assertion? You do not question his commitment to the end, to equality before the law for all persons? You do question that?

Mr. COLEMAN. Well, you know, I do not question it if you mean by that that he sits home at night and says, oh, gee, I do not believe in equality of the law. But when I took you through those landmark civil rights cases, every one of which was won, and usually by a big vote, we saw that in his writings criticizing them, all he did was criticize them and he did not then go on and say, this is the way the court should have reached its result.

I think when you re-read the 1971 article and read the cases that were decided since 1948 and up to the date he wrote in 1971 you have to ask yourself why as a scholar he did not say, after pointing out that the Court made a mistake, that this is the way the Court should have done it.

Senator HUMPHREY. In any event, *Shelley* v. *Kraemer*——

Mr. COLEMAN. On that I would ask you to read Lou Henkin's article on how he would have rewritten *Shelley* v. *Kraemer* in the Columbia Law Review, and you will see the difference of the types of scholars you have.

Senator HUMPHREY. Okay. *Shelley* v. *Kraemer*. Am I right—I am not a lawyer, by the way—but am I right that the effect of this decision was to broaden the application of the 14th amendment? How would you describe the effect of *Shelley* v. *Kraemer?*

Mr. COLEMAN. I would describe the effect of *Shelley* v. *Kraemer* as saying that after fighting the war between the States and having a debate on three great amendments and having this Congress pass them, that what was decided in *Shelley* v. *Kraemer* was well within what the 14th amendment meant. But the only tragedy was, it was not decided a 100 years before it was.

Senator HUMPHREY. Yes. In any event—for example, Professor Laurence Tribe of Harvard Law School stated that *Shelley's* reasoning, quote, "consistently applied would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement."

So Professor Tribe there seems——

Mr. COLEMAN. He will be here. You can work him over on that.

Senator HUMPHREY. Okay. But I just wanted——

Mr. COLEMAN. All I want to tell you, I would love to take him through it. I would love to take any law school professor through it. And I assure you—do me a favor. Just pull the cases that Chief Justice Vinson cited—and he was never known as a great liberal justice—just read those cases.

Senator HUMPHREY. Okay.

Mr. COLEMAN. And after you read those cases, you say, if you can, that that does not mean that when a State judge acts and by his action deprives somebody of a constitutional right, that merely because he got in this because a private person brought the lawsuit, that that does not violate the 14th amendment.

Senator HUMPHREY. Okay, but look, I am not trying to rehear the case. The point I am trying to make is that a number of imminent scholars and jurists agreed with Robert Bork that while the result is salutory, the means was something else. The danger is, of course, the means was something else, and the danger is, of course, that the ends do not always justify the means and that we do not want autocratic judiciary inventing all kinds of means because the result is salutory, do we?

Mr. COLEMAN. If you put yourself back in 1948, sir, and try to be black for a moment——

Senator HUMPHREY. Yes.

Mr. COLEMAN [continuing]. Having been well educated, having contributed a lot, seeing the long way you had to go to get where I am here today——

Senator HUMPHREY. Yes.

Mr. COLEMAN [continuing]. And see how you would react that in every case decided, a scholar says that that case was wrongly decided. That is all I ask you. You live that experience and see how you would react.

Senator HUMPHREY. I cannot even imagine it, but I can begin to imagine it, and I would be pretty upset about it even to this day. So I do not blame you for holding that concern, but the point I want to make—and I wish you would either confirm it or deny it, because it is an important point and out of fairness we ought to establish this one way or the other—are there not many imminent scholars like Professor Laurence Tribe, are there not many members of the Supreme Court, past and present, who have cited, not explicitly, but who have shared, shall I say—shared the same point of view about some cardinal decisions that Robert Bork holds; is that not true? Or are you saying he stands out there all by himself completely isolated and that there is not one respected jurist or scholar who has ever agreed with him on these important points?

Mr. COLEMAN. If you say you are not a lawyer, you should be one because you have now asked the question that anybody would have to say, well, obviously, I am pretty sure on every issue you might find one person who would not disagree with him. But I do not think, if you take the whole package, you will find any scholar that would agree with that whole package.

Senator HUMPHREY. Well, of course not. I did not suggest that, nor should we expect to. But the point I think is valid. In the case of *Shelley* v. *Kraemer,* I have read the quote from Professor Laurence Tribe and no one questioned—my goodness, he is, as I understand it, one of the most liberal law professors in the country, to use the vernacular expression.

Mr. COLEMAN. I do not know what that word means, sir. I do not know what liberal means. We confuse ourselves when we say liberal.

Senator HUMPHREY. That is right, but you know what I am talking about. He is hardly a conservative professor of law. And he agreed with Robert Bork on this extraordinarily important point over which you have made such a fuss. And I understand where you are coming from.

In the matter of privacy, again, very, very important. And again, I want to emphasize that Judge Bork acknowledges that there are explicit and very important privacy rights in the Constitution: The right to be free of unreasonable searches and seizures; the right to free speech, and so on.

What he is saying is not that there is not a right to privacy in the Constitution, but what he is saying is that there is not a vast, broad, unlimited general right to privacy in the Constitution, and on that point—that there is not a vast, broad, unlimited right to privacy in the Constitution—many prominent jurists have agreed with him.

Mr. COLEMAN. I think anybody in the room would agree to that. I think Congresswoman Barbara Jordan will say that you certainly hate to have kept her here all this time and not have her put on—have to make those judgments. But I do not think you can go home and find anybody who will tell you that the right to marry is something that the State should be able to interfere with. I do not think you can go home and get anybody to agree with you that if you want to send your kid to a private school, you cannot do that.

Senator HUMPHREY. Quite so.

Mr. COLEMAN. It is a very narrow limit, and the whole debate is over whether in addition to those things that are in the first eight amendments, there are some other fundamental rights that every

American had from the day he or she was born with which the State can not interfere.

Senator HUMPHREY. Quite so. By virtue of being a child of God. I agree with you in the concept, but the problem is that when you had judges who claim that there is a very broad right to privacy, then they make decisions about which explicit rights must be honored and which not. Is there a right to use drugs in private?

Mr. COLEMAN. No.

Senator HUMPHREY. Is there a right to homosexual conduct or sodomy? Where do you draw the line? The problem is that if you do not have a nice consistent system, if instead you have judges deciding which rights are included in privacy and which not, then you have the rule of judges and not rule of law.

Now, I know these things are not——

Mr. COLEMAN. Sir, will you do me a favor?

Senator HUMPHREY. Yes.

Mr. COLEMAN. When you go home, will you re-read the piece that I did on Justice Harlan, pages 5 and 6—well, start with pages 2 through 6 and then read the piece on Justice Frankfurter—they describe for you how a federal judge in a democratic society is supposed to work.

I do not think that anybody that knew Justice Frankfurter would say that he would enact in his decisions his personal feelings. But there are certain fundamental rights that people hold. There is a way you pick them out and they are very limited.

Senator HUMPHREY. Quite right.

Mr. COLEMAN. But you do not say that they are not in the Constitution.

Senator HUMPHREY. That is not the final word on that argument but it must be—nor will it be, probably, for centuries, but it must be in this case because my time is very nearly running out. I had so much more. I hope I can get invited to this luncheon with Senator Simpson that you guys were talking about.

Let me just ask you this, finally, before I get cut off by the Chairman.

The CHAIRMAN. I am not going to cut you off. Your time is up, but we all have exceeded our time, so you will be right in the mainstream.

Senator HUMPHREY. By the way, I hope Congresswoman Jordan does not have a class to teach this afternoon.

The CHAIRMAN. I think I have already ruined her schedule.

Senator HUMPHREY. Senator Specter made the very important point that this is one of the most important classes that has been conducted in a very long time, and I surely agree with that. There have been a lot of really interesting and exciting celebrations of the bicentennial of the Constitution, but I would not have missed this for the world, because of all of the hundreds and thousands that have taken place across our country, this has been the most important, this unintended observance or celebration of the—that is to say, it was not meant to be a celebration of the bicentennial, but it has turned out to be.

Let me just ask this in closing. Nobody, as far as I know, challenges the devotion to the equality before the law for all persons, irrespective of any classification, of former President Gerald Ford.

How in the world do we in this panel reconcile, how do the American people, reconcile the appearance of President Gerald Ford in behalf of confirmation of Robert Bork and the appearance 2 days later of a man who served so well in the Ford administration who is urging the rejection of this nominee? How do we reconcile that?

Mr. COLEMAN. Very simply. We live in a democratic country. The most important thing is to have differences of opinion, to argue, to discuss, but in the end to shake hands and unite jointly to defend this country, to defend this Constitution, and also to make sure that we leave both the country and the Constitution for our children in as good shape as when we enjoyed them.

Senator HUMPHREY. Or better.

Mr. COLEMAN. Or better.

Senator HUMPHREY. I wish I had more time.

The CHAIRMAN. Thank you. I will yield 5 minutes to the Senator from Massachusetts and then we will conclude.

Senator KENNEDY. Thank you, Mr. Chairman.

I, too, want to acknowledge the remarkable career of Secretary Coleman; not only his academic career at college, at the University of Pennsylvania, at Harvard Law School and the Law Review and then coming down and serving as law secretary for Felix Frankfurter, then serving in President Ford's Cabinet with great distinction. In practice, he appeared before the Supreme Court on 18 different occasions over three decades, and he has really reached the pinnacle of success both in the public and private sectors. I think all of us who have listened to him this morning, our knowledge has been advanced and enhanced, both by his understanding of the Constitution and by his review of the many cases that have made this a better society and a better country.

I just wanted to touch on one or two points. One, I think, is really quite obvious, although there has been at least some attempt, intentional or unintentional, to confuse the issue. That is the distinction between the court of appeals and the Supreme Court. It is very real.

The Supreme Court makes precedent. The courts of appeal interpret it. I think it is a reasonable question to set a standard to understand what kind of new precedents are going to be established in the interpretation of the Constitution and what kind of precedents are going to be overruled. As I understand it, that is basically at the core of the distinction between the Secretary's decision at one time to endorse the nominee for the circuit court and to express reservations and opposition to him for appointment as an Associate Justice to the Supreme Court.

Mr. COLEMAN. That is a fair statement; although I hope when you press the American Bar Association, they will tell you when they come up here that when they say they found him qualified, that that does not mean that they are also endorsing him or asking you to endorse him.

That is the difficulty. Lawyers do what they are told to do; and if you would reread what my assignment was, I think that you begin to see the distinction I am trying to make.

Senator KENNEDY. I was also interested in an earlier response to a question where you indicated that the summary of this Judge's opinions, going over a long period of time—the summary of both his statements, speeches, writings—draw you to the conclusion that it would be extremely difficult to find anyone in the scholarly area of constitutional opinion that would agree with all of his conclusions.

The history is that many of those who had sided with some of the positions that have been taken by Judge Bork at different times altered and changed their positions and found ways in the future, by their own actions both in public and private, to vary the decisions that they had made earlier. I think Secretary Coleman has illustrated it.

So what we are basically talking about is just not one particular area of decision, but we are talking about a culmination. I think you made the case, which I think is an important one, that when you review that total culmination, you are talking about someone that is out of the mainstream.

Let me just go into two final areas, Mr. Secretary. When Judge Bork was before us and he was being asked about his past writings and about his statements and about his positions, in response to one of the questions he said, "Well, I would think that any woman or any man who reviewed my position as Solicitor General, and also my positions as a circuit court judge, would feel completely relieved of any anxiety"—I can get his exact quote—"would feel effectively"—"if I were a black man and knew my record as Solicitor General and Judge, I would not be concerned because my civil rights record is a good one." This was in response to both women and men.

I am just asking you, because we are going to hear over the course of the debate, well, let us forget about what was done beforehand; let us take the position of Judge Bork both as Solicitor General and on the court.

Now, how do you answer that? Do you share that assessment? That is the question.

Mr. COLEMAN. Well, sir, I wish you would look at page 38 of my testimony, footnote 2. To the best of my ability, I have tried to answer that question.

Senator KENNEDY. I will do that and ask the Chair to——

The CHAIRMAN. Why do you not just read it, if you do not mind.

Mr. COLEMAN.

> If it were claimed that Judge Bork's constitutional views derived from some animus towards minorities or women, the filing of briefs in statutory civil rights cases might be of some relevance. The objection set forth in this testimony, however, turns on the substantive injustices that Judge Bork's views of the Constitution would permit, so any claim of malice on his part is not reached. There is no need to reach the issue whether his personal views would lead him, when reviewing a clearly drafted congressional enactment prohibiting sex or race discrimination, not to apply the literal words of the statute. The concern, rather, centers on his judicial review of a statute prohibiting a state practice, which the Supreme Court prior to the enactment of the statute had held did not violate the 14th or 15th amendments, see *Northampton County Board of Elections* case, and which practice Congress subsequently prohibited by statute, after legislative findings that the practice adversely affected persons because of their race or sex.
>
> If Judge Bork adhered to his previously expressed criticisms of *Katzenbach* v. *Morgan*, or *Oregon* v. *Mitchell*, he would either invalidate such a statute as exceeding Congress' powers under Section 5 of the 14th amendment or Section 2 of the 15th amendment, or he would construe such a statute so narrowly (to avoid his perceived constitutional defects) as to eviscerate their effect and undermine congressional intent.

And that is what my problem is.

Senator KENNEDY. A final question. As I mentioned, you have appeared before the Supreme Court 18 times; you have known many of the distinguished Justices. Perhaps the one you knew the best was Felix Frankfurter. You have an insight, obviously, into the writings of Harlan and many other conservative jurists and those that have believed in the judicial restraint.

I am wondering what your opinion is of those that have tried to put Judge Bork in the same mold as Felix Frankfurter in terms of the issues of judicial self-restraint. How does that hold up, given both your understanding of Justice Frankfurter and your review of the readings and statements of Judge Bork?

Mr. COLEMAN. In Appendix A and B, I deal with that issue.

Senator KENNEDY. I saw those two, A and B.

Mr. COLEMAN. It seems to me, as I read Judge Bork's writings, that he is completely inconsistent with the manner in which Mr. Justice Frankfurter or Mr. Justice Harlan would handle comparable issues.

There is a wonderful passage here, which I will not read, as to just what judicial restraint means. I do not think that a person who comes on the public scene as late as Judge Bork did and who goes out of his way to reject a whole line of cases starting in 1923—incidentally, it really did not start in 1923, it started in 1891, and the first case was a case where the United States Government subpoenaed Governor Harriman's father to bring all his records down here, and he successfully resisted that on the grounds that it implicated the right of privacy and that therefore the State should not get a person's own private record; so this is something that has really been in the law since 1891—can plausibly justify his views as based on a philosophy of judicial restraint. You cannot under the guise of judicial restraint go out and just roam around and adversely affect a lot of people. But, by the same token, you are not exercising judicial restraint if you want to eliminate the constitutional gains that already have been made. To me, that is not judicial restraint.

Senator KENNEDY. Thank you very much, Secretary Coleman. It has been a pleasure to hear your testimony.

Mr. COLEMAN. Thank you.

The CHAIRMAN. Mr. Secretary, if it is the quote I think you are referring to, it really warrants being read; at least this one in my view. They all do. But it says, "The exercise of judicial judgment is unavoidable, he stated, and '[t]o believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior.' "

That is what you are referring to?

Mr. COLEMAN. Yes, sir.

The CHAIRMAN. Powerful.

Mr. Secretary, I must tell you, I have not been here as long as my colleagues on my left and my right, but I have sat here for 15 years. I thought I knew you before you came up because I was here when you were Secretary of Transportation. On mass transit issues, I was often petitioning you with regard to Amtrak and other things. I thought I knew you, and I was impressed then.

I must tell you—and I am not being solicitous, presumptuous, for me a younger man to say this about you—but I have been more impressed by you as a witness today than any witness I have ever sat and listened to in any hearing. I knew you were a man of great integrity and passion and feeling, but I am amazed and impressed by the depth of your knowledge of the law, your reverence for the Constitution, and your facility to discuss it.

Whether or not Judge Bork should or should not be on the Court will be decided by the whole body, but I want to tell you, there is not a President now or in the future who would have made a mistake by putting you on the Supreme Court of the United States of America. You are truly an impressive man, and your testimony here today is one I will not forget, nor do I think the proponents or opponents of Judge Bork will soon forget.

You are a man of high honor. It was truly a pleasure to have you here. Thank you very much.

Mr. COLEMAN. You are very kind to say that, sir, but I would tell you that if this country was as great 50 years ago as it is today, and if Charles Houston had ever appeared before you, you would have found him a much superior person, and similarly if Judge William Hastie had ever appeared before you. There are some awfully bright, able people. They did not get the opportunity. This country since 1945 has been doing much better with respect to race and gender issues. You have had an opportunity to see me function; wait until you see some of those young women lawyers I have in my law firm.

The CHAIRMAN. I saw two behind you. Obviously, they were looking with great pride at you.

Mr. COLEMAN. Really, I mean that is what this country is about. I really love every moment of it. I appreciate your giving me the opportunity to come here. Thank you.

The CHAIRMAN. Thank you very much for being here.

Now, we will proceed immediately to Professor Jordan, Congresswoman Jordan has been waiting patiently.

Let me tell my colleagues what my desire is, and I hope they will accede to it. I would like very much to have Professor Jordan give her testimony and respond to questions. And although Mr. Marshall and Mayor Young are here, if they would be willing to come back after lunch, then in the meantime we will decide exactly the order. But our last witness prior to adjourning for lunch—whenever we adjourn for lunch—we will do it, I believe with the ranking member's permission—for an hour and 15 minutes when we adjourn.

Without any further ado, let me say that Congresswoman Jordan currently holds that LBJ Centennial Chair at the LBJ School of Public Affairs, University of Texas. She teaches policy development and ethics. She is a former Congresswoman, as we all know. She attended the celebration last week at the Archives for the Constitution day on the celebration of the bicentennial.

There is much more to say, but there is one thing for certain: As we all know from when you were in the Congress and spoke to the national television audience in the late 1970s and every time you spoke here, you are a woman of great passion, conviction and clarity. It is an honor to have you here, and I would ask you to raise your right hand if I may, Congresswoman, and be sworn.

Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. JORDAN. I do.

TESTIMONY OF BARBARA JORDAN

Ms. JORDAN. Thank you very much, Mr. Chairman.

I am delighted that you gave me the chance to come and give my thoughts on your task. I am opposed to the confirmation of Robert Bork to the Supreme Court of the United States. My opposition is not a knee-jerk reaction of followership to the people or organizations whose views I respect. My opposition is a result of thinking about this matter with some care, of reading the White House position paper in support of Robert Bork, of reading the Judiciary Committee, your committee's point by point response to that position paper, discussing the matter with friends and people I respect, reading some of Judge Bork's writings. But more than any of that, my opposition to this nomination is really a result of living 51 years as a black American born in the South and determined to be heard by the majority community. That really is the primary basis for my opposition to this nomination.

I concede Judge Bork's scholarship and intellect and its quality, and there is no need for us to debate that. But more is required. When you experience the frustrations of being in a minority position and watching the foreclosure of your last appeal and then suddenly you are rescued by the Supreme Court of the United States, Mr. Chairman, that is tantamount to being born again.

I had that experience. The year was 1962. I had graduated from Boston University Law School in 1959. I went back to Houston, Texas, with my law degree in hand, and the Democrats around there said, in 1962, "Your work with us since you have been here makes us think you ought to run for the Texas House of Representatives." I said, "But I have no money to run." They said, "We will loan you the money." And so on a borrowed $500, I filed for the election to the Texas House of Representatives. I ran. I lost. But I got 46,000 votes.

I was undaunted. I said I will try that again because I think my qualifications are what this community needs. So in 1964, I ran again for membership in the House of Representatives of the State of Texas. I lost. But I got 64,000 votes.

Why could I not win? I will tell you why. The Texas legislature was so malapportioned that just a handful of people were electing a majority of the legislature. I was dispirited. I was trying to play by the rules, and the rules were not fair. But something happened. A decision was handed down: *Baker* v. *Carr*. That decision said this: The complainant's allegations of a denial of equal protection present a justiciable constitutional cause of action. The right asserted is within the judicial protection of the 14th amendment.

Following *Baker* v. *Carr*, a series of cases were decided. The Texas legislature was required, mandated by the Supreme Court to reapportion itself. It reapportioned. So in 1966, I ran again. The third time. This time in one of those newly created State senatorial districts I won.

My political career got started. Do you know what Judge Bork says about those cases on reapportionment? He has disagreed with the principle of one person, one vote, many times.

In his confirmation hearings in 1973, this is what he said: "I think one man, one vote, was too much of a strait-jacket." And then he continued: "I do not think there is a theoretical basis for it."

My word. "I do not think there is a theoretical basis for it." Maybe not, gentlemen. Maybe there is no theoretical basis for one person, one vote, but I will tell you this much. There is a common sense, natural, rational basis for all votes counting equally.

We once had a poll tax in Texas. That poll tax was used to keep people from voting. The Supreme Court said it was wrong, outlawed it. Outlawed it.

Robert Bork said the case was wrongfully decided. You have talked much about the right of privacy—*Griswold* to *Roe,* and others. Judge Bork has his theory—if you cannot find that right within the letter of the Constitution, explicitly, it is not there. It does not exist.

I believe that the presence of that point of view on the Supreme Court of the United States places at risk individual rights. It is a risk we should not afford. We do not have to.

I like the idea that the Supreme Court of the United States is the last bulwark of protection for our freedoms. Would the membership of Judge Bork alter that altogether? I do not know whether that is the case, but that is not the question.

I do not want to see the argument made, that there is no right to privacy on the Court. I do not want that argument made, and the only way to prevent its being made is to deny Judge Bork membership on the Court.

I do not know whether you have read in your papers Mr. Justice Brandeis' dissenting opinion in the *Olmstead* case. If you did, you would read that Justice Brandeis made it very clear, that there is indeed a right of privacy, that it is really explicit, and that it is bottomed in the fourth and fifth amendments. Justice Brandeis makes that clear.

The presence of a Judge Bork on the Supreme Court places that in jeopardy. I was listening and watching these hearings, and I heard Judge Bork say he was not sure what the ninth amendment meant. That there was a lot of confusion surrounding the ninth amendment.

I certainly do not pretend to be able to say what the ninth amendment means, but I can say that if you hold the view which is espoused by Robert Bork, there is a built-in inconsistency in the Constitution, and we know that every word of the Constitution is to be given some effect.

We understand that right. The Declaration of Independence preceded the Constitution, and the Declaration of Independence speaks of inalienable rights endowed by our Creator with inalienable rights, among them life, liberty, pursuit of happiness.

So they are not the only ones—life, liberty, pursuit. There are others, and those others should be given effect.

Now you know what Judge Bork would say. "Listen. I approve of the results of the reapportionment cases. I approve of the outcome in many of those cases, but my problem with the whole matter is that I don't like the reasoning which was used."

Well, let's look at that for a moment. A Borkian view. "Don't like the reasoning that was used. Approve of the outcome. What you really ought to do is let the democratically elected bodies make these decisions. That is the proper way to proceed."

Gentlemen, when I hear that, my eyes glaze over. If that were the case, I would right now be running my 11th unsuccessful race for the Texas House of Representatives. I cannot abide that.

I know you have talked about the Saturday Night Massacre, and I know that there has been much discussion about whether what Judge Bork did in firing Archibald Cox was legal or illegal.

There is a court decision that says it was illegal, and then Senator Hatch would say, "Oh, but that decision has been set aside and it is a nullity."

All I can say to you is that on the day, and at the time that Robert Bork fired Archibald Cox, there were rules and regulations in place, viable, alive, with the force and effect of law. They were violated, and, to me, that means the Solicitor General acted illegally. To me, that is not very difficult to understand.

The Office of Special Prosecutor and Independent Counsel is under attack right now. For you to confirm Robert Bork to the Supreme Court I think sends the wrong message. I believe that such a confirmation would indicate that it is all right with you for a person to sit on the Supreme Court who has utter disdain for the Office of Special Prosecutor.

I do not think that is the message you want to send. Constitutionalism is a part of the cultural glue of this country. The Supreme Court should be the ballast to keep the ship of state from making wide, unanticipated swings. A new Justice should help us stay the course, not abort the course.

I want to conclude by reading a quote from a professor at the Yale Law School, at the time this was written, Charles Black. It is a note which he wrote in the Yale Law Journal, 1970. I think it is important.

> If a President should desire, and if chance should give him the opportunity to change entirely the Supreme Court of the United States, he may do that, and nothing would stop him except the United States Senate. The question is, for the Senate, whether the nominee holds such views, that when transposed into judicial decisions, they are bad for the country.

You have every right to look into the judicial philosophy of Robert Bork, because Mr. Black said at the conclusion of that article: "In a world that knows that a man, a nominee's fitness for office, in this kind of a world, his social philosophy shapes his judicial behavior." You must inquire into whether that philosophy affects his fitness for office.

You have a satisfactory basis for voting against this nominee, and I urge you to do that.

[Material follows:]

A Note on Senatorial Consideration of Supreme Court Nominees

Charles L. Black, Jr.†

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded far enough to enable me to make that pretense.[1] I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

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† Henry R. Luce Professor of Jurisprudence, Yale University. B.A. 1935, M.A. 1938, University of Texas; LL.B. 1943, Yale.

[1] I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten; for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Irwin; I have also had the benefit of talking to him about the piece after it was written.

HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953) came to my attention and hands after the present piece had gone to the printer. This excellent and full account of the entire function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why"? I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . . ."?[2] Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

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[2] U.S. CONST. art. II, § 2, cl. 2.

Senatorial Consideration of Supreme Court Nominees

Procedurally, the stage of "advice" has been short-circuited.[3] Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textual reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not; I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than that a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

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[3] Even this short-circuiting is not complete. First the President's "appointment," *after* the Senate's action, is still voluntary (Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his worldview will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the lifeview and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved on July 21, 1787,[4] and was carried through into the draft of the Committee of Detail.[5] The change to the present mode came on September 4th, in the report of the Committee of Eleven[6] and was agreed to *nem. con.* on September 7th.[7] This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

> But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.
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> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.
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> It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an

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[4] 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (M. Farrand ed. 1911).

[5] *Id.* at 132, 146, 155, 169, 183.

[6] *Id.* at 498.

[7] *Id.* at 539.

> entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.[8]
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> If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If by influencing the President be meant restraining him, this is precisely what must have been intended* [emphasis supplied]. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils.[9]

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterized, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

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[8] THE FEDERALIST No. 76, at 494-95 (Modern Library 1937) (Alexander Hamilton).
[9] *Id.* No. 77, at 495 (Alexander Hamilton).

When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than these. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.[10] John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.[11] Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.[12] There is the celebrated Parker case of this century.[13] The perusal of Warren[14] will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, except arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. [In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the

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10. 2 C. Warren, The Supreme Court in United States History [illegible] (rev. ed. 1926).

11. 1 *id.* at [illegible].

12. *Id.* at 41[illegible].

13. L. Pfeffer, This Honorable Court, A History of the United States Supreme Court 288 (1965).

14. C. Warren, The Supreme Court in United States History (rev. ed. 19[illegible]).

Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

You have a satisfactory basis for a negative vote

Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the Government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F. (2d) 842 and 850. The petition in No. 493 was filed August 30, 1927; in Nos. 532 and 533, September 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully. It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month sales amounted to $176,000; the aggregate for a year must have exceeded two millions of dollars.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; eleven others contributed $1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven. Of the several offices in Seattle the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the "stuff," to places along Puget Sound near Seattle and from there the liquor was removed and deposited in the caches already referred to. One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room—the "bull pen." The call numbers of the telephones were given to those known to be likely customers. At times the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides—"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." And the Fifth: "No person . . . shall be compelled, in any criminal case, to be a witness against himself."

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

Boyd v. *United States,* 116 U. S. 616, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against thirty-five cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in twenty-nine cases previously imported. The fifth section of the Act of June 22, 1874, provided that in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice, belonging to the defendant, would tend to prove any allegation made by the United States, might by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This Act had succeeded the Act of 1867, which provided that in such cases the District Judge, on affidavit of any person interested, might issue a warrant to the marshal to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the Act of 1863 of a similar tenor, except that it directed the warrant to the collector instead of the marshal. The United States Attorney followed the Act of 1874 and compelled the production of the invoice.

The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621):

"But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that by refusal he should be conclusively held to admit the incriminating character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is *Weeks* v. *United States,* 232 U. S. 383,—a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and on introduction of the papers contended that the search without warrant was a violation of the Fourth and Fifth Amendments and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and upon making seasonable application he was entitled to have them restored, and that by permitting their use upon the trial, the trial court erred.

The opinion cited with approval language of Mr. Justice Field in *Ex parte Jackson*, 96 U. S. 727, 733, saying that the Fourth Amendment as a principle of protection was applicable to sealed letters and packages in the mail and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, the defendants were arrested at their homes and detained in custody. While so detained, representatives of the Government without authority went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the District Attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

"Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance."

And it held that the illegal character of the original seizure characterized the entire proceeding and under the *Weeks* case the seized papers must be restored.

In *Amos* v. *United States*, 255 U. S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and store "within his curtilage," without warrant should be returned. This was denied. A woman, who claimed to be his wife, was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered and found whiskey. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whiskey and to exclude the testimony was error.

In *Gouled* v. *The United States*, 255 U. S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direction of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the U. S. Army, pretending to make a friendly call on him, gained admission to his office and in his absence, without warrant of any character, seized and carried away several documents. One of these belonging to Gouled, was delivered to the United States Attorney and by him introduced in evidence. When produced, it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

Agnello v. *United States*, 269 U. S. 20, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest, and seized there without a warrant. Under such circumstances the seizure could not be justified as incidental to the arrest.

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. This was held by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Dana*, 2 Metcalf, 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in *Entick* v. *Carrington*, 19 Howell State Trials, 1029. Mr. Justice Bradley made effective use of this case in *Boyd* v. *United States*. But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the *Boyd* case. This appears too in the *Weeks* case, in the *Silverthorne* case and in the *Amos* case.

Gouled v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

It is urged that the language of Mr. Justice Field in *Ex parte Jackson*, already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wire tapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Postoffice Department and the relations between the Government and those who pay to secure protection of their sealed letters. See Revised Statutes, §§ 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and § 3929 which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

This Court in *Carroll* v. *United States,* 267 U. S. 132, 149, declared:

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Justice Bradley in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Hester v. *United States,* 265 U. S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. *United States* v. *Lee,* 274 U. S. 559, 563; *Eversole* v. *State,* 106 Tex. Cr. 567.

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection we shall deal with it in both of its phases.

While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid,* 12 How. 361, 363, 366; *Logan* v. *United States,* 144 U. S. 263, 301; *Rosen* v. *United States,* 245 U. S. 467; *Withaup* v. *United States,* 127 Fed. 530, 534; *Robinson* v. *United States,* 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Professor Greenleaf in his work on evidence, vol. 1, 12th ed., by Redfield, § 254(a) says:

"It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question."

Mr. Jones in his work on the same subject refers to Mr. Greenleaf's statement, and says:

"Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute." Vol. 5, § 2075, note 3.

The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York,* 192 U. S. 585. The *Weeks* case, announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. *People* v. *Defore,* 242 N. Y. 13. But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. *Hughes* v. *State,* 145 Tenn. 544, 551, 566; *State* v. *Wills,* 91 W. Va. 659, 677; *State* v. *Slamon,* 73 Vt. 212, 214, 215; *Gindrat* v. *People,* 138 Ill. 103, 111; *People* v. *Castree,* 311 Ill. 392, 396, 397; *State* v.

Gardner, 77 Mont. 8, 21; *State* v. *Fahn,* 53 N. Dak. 203, 210. The common law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 2656–18) that: "Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor."

This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N. Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union can not affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in *United States* v. *Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States*, 127 Fed. 530, 534.

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

Affirmed.

MR. JUSTICE HOLMES:

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 24. But I think, as MR. JUSTICE BRANDEIS says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* v. *United States,* 232 U. S. 383 and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

MR. JUSTICE BRANDEIS, dissenting.

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire-tapping was employed, on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The type-written record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire-tapping, on the ground that the Government's wire-tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment; and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that if wire-tapping can be deemed a search and seizure within the Fourth Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. See *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, 9; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Brooks* v. *United States,* 267 U. S. 432. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 387; *Buck* v. *Bell,* 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said in *Weems* v. *United States,* 217 U. S. 349, 373: "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. *Boyd* v. *United States,* 116 U. S. 616, 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these.[1] To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society."[2] Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in *Boyd* v. *United States*, 116 U. S. 616, 627–630, a case that will be remembered as long as civil liberty lives in the United States. This Court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in *Entick* v. *Carrington*, 19 Howell's State Trials, 1030: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employés of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."[3]

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[1] Otis' Argument against Writs of Assistance. See Tudor, James Otis, p. 66; John Adams, Works, Vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, Vol. II, p. 95.

[2] *Entick* v. *Carrington*, 19 Howell's State Trials, 1030, 1066.

In *Ex parte Jackson*, 96 U. S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below: "True the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference." The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

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[3] In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, the statement made in the *Boyd* case was repeated; and the Court quoted the statement of Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 250: "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." The *Boyd* case has been recently reaffirmed in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, in *Gouled* v. *United States*, 255 U. S. 298, and in *Byars* v. *United States*, 273 U. S. 28.

Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in *Gouled* v. *United States,* 255 U. S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment rather than at its underlying purpose would hold, as this Court did in *Ex parte Jackson,* 96 U. S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: "No person . . . shall be compelled in any criminal case to be a witness against himself." Yet we have held, not only that the protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman* v. *Hitchcock*, 142 U. S. 547, 562, 586. but that: "It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." *McCarthy* v. *Arndstein*, 266 U. S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object, "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock*, *supra*, p. 562.

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper;[4] whether the paper when taken by the federal officers was in the home,[5] in an office[6] or elsewhere;[7] whether the taking was effected by force,[8] by fraud,[9] or in the orderly process of a court's procedure.[10] From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere[11]—any such use constitutes a violation of the Fifth Amendment.

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[4] *Gouled* v. *United States*, 255 U. S. 298.

[5] *Weeks* v. *United States*, 232 U. S. 383; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20; *Byars* v. *United States*, 273 U. S. 28.

[6] *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43, 70; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Marron* v. *United States*, 275 U. S. 192.

[7] *Ex parte Jackson*, 96 U. S. 727, 733; *Carroll* v. *United States*, 267 U. S. 132, 156; *Gambino* v. *United States*, 275 U. S. 310.

[8] *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Amos* v. *United States*, 255 U. S. 313; *Carroll* v. *United States*, 267 U. S. 132, 156; *Agnello* v. *United States*, 269 U. S. 20; *Gambino* v. *United States*, 275 U. S. 310.

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

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[9] *Gouled* v. *United States*, 255 U. S. 298.

[10] *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43, 70. See *Gouled* v. *United States*, 255 U. S. 298; *Byars* v. *United States*, 273 U. S. 28; *Marron* v. *United States*, 275 U. S. 192.

[11] *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. Compare *Gouled* v. *United States*, 255 U. S. 298, 307. In *Stroud* v. *United States*, 251 U. S. 15, and *Hester* v. *United States*, 265 U. S. 57, the letter and articles admitted were not obtained by unlawful search and seizure. They were voluntary disclosures by the defendant. Compare *Smith* v. *United States*, 2 F. (2d) 715; *United States* v. *Lee*, 274 U. S. 559.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[12]

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime.[13] Pierce's

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[12] The point is thus stated by counsel for the telephone companies, who have filed a brief as *amici curiae*: "Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful."

[13] In the following states it is a criminal offense to intercept a message sent by telegraph and or telephone: Alabama, Code, 1923, § 5256; Arizona, Revised Statutes, 1913, Penal Code, § 692; Arkansas, Crawford & Moses Digest, 1921, § 10246; California, Deering's Penal Code, 1927, § 640; Colorado, Compiled Laws, 1921, § 6969; Connecticut, General Statutes, 1918, § 6292; Idaho, Compiled Statutes, 1919, §§ 8574, 8586; Illinois, Revised Statutes, 1927, c. 134, § 21; Iowa, Code, 1927, § 13121; Kansas, Revised Statutes, 1923, c. 17, § 1908; Michigan, Compiled Laws, 1915, § 15403; Montana, Penal

Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin* v. *Brundage,* 276 U. S. 36, *id.* 604.

Code, 1921, § 11518; Nebraska, Compiled Statutes, 1922, § 7115; Nevada, Revised Laws, 1912, §§ 4608, 6572(18); New York, Consolidated Laws, c. 40, § 1423(6); North Dakota, Compiled Laws, 1913, § 10231; Ohio, Page's General Code, 1926, § 13402; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, § 2265; South Dakota, Revised Code, 1919, § 4312; Tennessee, Shannon's Code, 1919, §§ 1839, 1840; Utah, Compiled Laws, 1917, § 8433; Virginia, Code, 1924, § 4477(2), (3); Washington, Pierce's Code, 1921, § 8976(18); Wisconsin, Statutes, 1927, § 348.37; Wyoming, Compiled Statutes, 1920, § 7148. Compare *State* v. *Behringer,* 19 Ariz. 502; *State* v. *Nordskog,* 76 Wash. 472.

In the following states it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: Alabama, Code, 1923, §§ 5543, 5545; Arizona, Revised Statutes, 1913, Penal Code, §§ 621, 623, 691; Arkansas, Crawford & Moses Digest, 1921, § 10250; California, Deering's Penal Code, 1927, §§ 619, 621, 639, 641; Colorado, Compiled Laws, 1921, §§ 6966, 6968, 6970; Connecticut, General Statutes, 1918, § 6292; Florida, Revised General Statutes, 1920, §§ 5754, 5755; Idaho, Compiled Statutes, 1919, §§ 8568, 8570; Illinois, Revised Statutes, 1927, c. 134, §§ 7, 7a; Indiana, Burns' Revised Statutes, 1926, § 2862; Iowa, Code, 1924, § 8305; Louisiana, Acts, 1918, c. 134, p. 228; Maine, Revised Statutes, 1916, c. 60, § 24; Maryland, Bagby's Code, 1926, § 489; Michigan, Compiled Statutes, 1915, § 15104; Minnesota, General Statutes, 1923, §§ 10423, 10424; Mississippi, Hemingway's Code, 1927, § 1174; Missouri, Revised Statutes, 1919, § 3605; Montana, Penal Code, 1921, § 11494; Nebraska, Compiled Statutes, 1922, § 7088; Nevada, Revised Laws, 1912, §§ 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes, 1910, p. 5319; New York, Consolidated Laws, c. 40, §§ 552, 553; North Carolina, Consolidated Statutes, 1919, §§ 4497, 4498, 4499; North Dakota, Compiled Laws, 1913, § 10078; Ohio, Page's General Code, 1926, §§ 13388, 13419; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, §§ 2260, 2262, 2266; Pennsylvania, Statutes, 1920, §§ 6306,

The situation in the case at bar differs widely from that presented in *Burdeau* v. *McDowell,* 256 U. S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a

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6308, 6309; Rhode Island, General Laws, 1923, § 6104; South Dakota, Revised Code, 1919, §§ 4346, 9801; Tennessee, Shannon's Code, 1919, §§ 1837, 1838; Utah, Compiled Laws, 1917, §§ 8403, 8405, 8434; Washington, Pierce's Code, 1921, §§ 8982, 8983, Wisconsin, Statutes, 1927, § 348.36.

The Alaskan Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that "if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall wilfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, . . . the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court."

The Act of October 29, 1918, c. 197, 40 Stat. 1017, provided: "That whoever during the period of governmental operation of the telephone and telegraph systems of the United States . . . shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both."

The Radio Act, February 23, 1927, c. 169, § 27, 44 Stat. 1162, 1172, provides that "no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."

federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping and of facts ascertained thereby.[14] There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

As Judge Rudkin said below: "Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States." The Eighteenth Amendment has not in terms empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. Compare *Maryland* v. *Soper*, 270 U. S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction.[15]

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[14] The above figures relate to Case No. 493. In Nos. 532–533, the Government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wire-tapping.

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare *The Paquete Habana*, 189 U. S. 453, 465; *O'Reilly deCamara* v. *Brooke*, 209 U. S. 45, 52; *Dodge* v. *United States*, 272 U. S. 530, 532; *Gambino* v. *United States*, 275 U. S. 310. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Will this Court by sustaining the judgment below sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands.[16] The maxim of unclean hands comes from courts of equity.[17] But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.[18]

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[15] According to the Government's brief, p. 41, "The Prohibition Unit of the Treasury disclaims it [wire-tapping] and the Department of Justice has frowned on it." See also "Prohibition Enforcement," 69th Congress, 2d Session, Senate Doc. No. 198, pp. iv, v, 13, 15, referred to Committee, January 25, 1927; also Same, Part 2.

[16] See *Hannay* v. *Eve*, 3 Cranch, 242, 247; *Bank of the United States* v. *Owens*, 2 Pet. 527, 538; *Bartle* v. *Coleman*, 4 Pet. 184, 188; *Kennett* v. *Chambers*, 14 How. 38, 52; *Marshall* v. *Baltimore & Ohio R. R. Co.*, 16 How. 314, 334; *Tool Co.* v. *Norris*, 2 Wall 45, 54; *The Ouachita Cotton*, 6 Wall. 521, 532; *Coppell* v. *Hall*, 7 Wall. 542; *Forsyth* v. *Woods*, 11 Wall. 484, 486; *Hanauer* v. *Doane*, 12 Wall. 342, 349; *Trist* v. *Child*, 21 Wall. 441, 448; *Meguire* v. *Corwine*, 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Irwin* v. *Williar*, 110

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress.[19] Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes

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U. S. 499, 510; *Woodstock Iron Co.* v. *Richmond & Danville Extension Co.*, 129 U. S. 643; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 411; *Embrey* v. *Jemison*, 131 U. S. 336, 348; *West* v. *Camden*, 135 U. S. 507, 521; *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *Hazelton* v. *Sheckels*, 202 U. S. 71; *Crocker* v. *United States*, 240 U. S. 74, 78. Compare *Holman* v. *Johnson*, 1 Cowp. 341.

[17] See *Creath's Administrator* v. *Sims*, 5 How. 192, 204; *Kennett* v. *Chambers*, 14 How. 38, 49; *Randall* v. *Howard*, 2 Black 585, 586; *Wheeler* v. *Sage*, 1 Wall. 518, 530; *Dent* v. *Ferguson*, 132 U. S. 50, 64; *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, 236; *Miller* v. *Ammon*, 145 U. S. 421, 425; *Hazelton* v. *Sheckels*, 202 U. S. 71, 79. Compare *International News Service* v. *Associated Press*, 248 U. S. 215, 245.

[18] Compare *State* v. *Simmons*, 39 Kan. 262, 264–265; *State* v. *Miller*, 44 Mo. App. 159, 163–164; *In re Robinson*, 29 Neb. 135; *Harris* v. *State*, 15 Tex. App. 629, 634–635, 639.

[19] See *Armstrong* v. *Toler*, 11 Wheat. 258; *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 499–500; *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 99; *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274.

spoken of as a rule of substantive law. But it extends to matters of procedure as well.[20] A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself.[21] It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

MR. JUSTICE BUTLER, dissenting.

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases.

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[20] See *Lutton* v. *Benin*, 11 Mod. 50; *Barlow* v. *Hall*, 2 Anst. 461; *Wells* v. *Gurney*, 8 Barn. & Cress. 769; *Ilsley* v. *Nichols*, 12 Pick. 270; *Carpenter* v. *Spooner*, 2 Sandf. 717; *Metcalf* v. *Clark*, 41 Barb. 45; *Williams* ads. *Reed*, 29 N. J. L. 385; *Hill* v. *Goodrich*, 32 Conn. 588; *Townsend* v. *Smith*, 47 Wis. 623; *Blandin* v. *Ostrander*, 239 Fed. 700; *Harkin* v. *Brundage*, 276 U. S. 36, *id.*, 604.

[21] *Coppell* v. *Hall*, 7 Wall. 542, 558; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 267; *Higgins* v. *McCrea*, 116 U. S. 671, 685. Compare *Evans* v. *Richardson*, 3 Mer. 469; *Norman* v. *Cole*, 3 Esp. 253; *Northwestern Salt Co.* v. *Electrolytic Alkali Co.*, [1913] 3 K. B. 422.

The **Chairman**. Thank you very much, Congresswoman. I will yield to questioning, and, Senator Grassley.

Senator **Grassley**. I have no questions at this time. I reserve my time.

The **Chairman**. The Senator from Massachusetts. Senator Kennedy.

Senator **Kennedy**. Just briefly, Barbara Jordan, Congresswoman Jordan. I think all of us are moved by your eloquence and your past history as an individual who has dealt with important and distinguished matters in the Congress. You have also been a very, very eloquent and compelling voice for equality in our society and for the securing of the blessing of liberty in our society.

And I am just wondering, as someone who now has been out of the political swim, and has been working with young people, and also continues to take a great interest in the issues of equality and justice in our society, do you feel that if Judge Bork is approved, that there will be members of our society whose confidence in the institution of justice will be undermined or threatened? Will there be many Americans who will feel that the cause of justice, or equality, is perhaps somewhat lessened in our society?

Ms. **Jordan**. Senator, I can only respond to that question with an unequivocal yes, and I state that because I am talking to these young people that you are talking about. I am talking to them, and they are meeting in their clubs, their sororities, their various organizations, and they are not having little cocktail parties. They are having letter-writing campaigns to their Members of the United States Senate.

And what are they writing about? They are writing about the nomination of Robert Bork. They sense that there is something different about this nomination, and do not want to risk a diminution of the kind of life they have enjoyed so long, and so well, with the Supreme Court as guardian.

They do not want to risk losing that, and so, the answer to your question is yes.

Senator **Kennedy**. Thank you, Mr. Chairman.

The **Chairman**. Senator Specter.

Senator **Specter**. Thank you very much, Mr. Chairman.

Congresswoman Jordan, Professor Jordan, that was powerful testimony and eloquently stated.

Do you have any views to offer with respect to the definition on equal protection of the law as it applies to women? That subject has been a subject of considerably analysis here, and you were present, of course, during Secretary Coleman's testimony where we were discussing the issue of heightened scrutiny, Justice Stevens' standard of reasonable basis, and there is a concern I think felt generally, that there be a strong standard for equal protection so that women are reached, and I would be interested to know if you had any view on that subject.

Ms. **Jordan**. My view comports pretty much with a highest scrutiny requirement for equal protection. I think that that was a part of the intent of the framers of the 14th amendment and equal protection clause, that such acts of discrimination were entitled to the highest, most careful of scrutiny available and allowable. Yes, sir.

Senator SPECTER. Congresswoman Jordan, there has been very extensive discussion about professorial theorizing, and as a professor yourself, you have a unique opportunity to provide some comment on that.

And the subject matter really boils down to the issue as to whether there ought to be some considerable latitude for professorial theorizing, because there is no question about the fact that Judge Bork, as a professor, did so.

And I would like to separate off, for purposes of your response to this question, the considerable speechmaking which he did after he was on the bench, because that is in a different category.

But if you take the 1971 Indiana Law Review, there are views expressed there which are at sharp variance from what Judge Bork testified he would do on the Supreme Court in terms of the clear-and-present-danger test, or, equal protection being applicable only to race, not even to ethnics in that article.

But I would be interested in your thought as to the latitude that ought to be accorded to professorial theorizing, and whether you think that professors may be somewhat chilled by the kind of reception we gave to that professorial theorizing in this committee.

Ms. JORDAN. Senator Specter, professors, in my opinion, will not be chilled by the examination you gave professorial theorizing. The reason why I feel that it is disingenuous to try to separate Robert Bork's professorial theorizing to what he may do on the bench is this.

Those theories he espoused were not lightly held theories, but deeply felt, and a part of a consistent ideology and philosophy which he was developing.

When you have deeply held theories which become incorporated into a philosophy which you are developing with the view to advancing, you do not reject those theories cavalierly, and decide, now that I am a judge, I cannot believe that any more.

Am I saying, then, that I find some of Judge Bork's recantation incredulous? The answer is yes.

Senator SPECTER. Well, I have not asked that question yet. [Laughter.]

But I will now, but in a slightly different form.

Would you give any weight at all—and I phrase that carefully—to Judge Bork's statement that he would apply the settled law on speech, clear-and-present-danger test, and that he would apply the settled law on a more expansive interpretation of equal protection under Justice Stevens' standard.

Would you give him any credence at all on those statements?

Ms. JORDAN. Any credence at all is your question.

Senator SPECTER. Right.

Ms. JORDAN. At all. I would say, Senator, that because of the statements which are being lately made by Robert Bork, I would feel called upon to consider them carefully and give them little weight.

Senator SPECTER. Well, that is an even more careful answer than the question, Congresswoman Jordan.

The nomination comes to this committee with many complications surrounding it, and when you point out that Judge Bork has expressed his philosophy very forcefully, that is really the nature of the man.

He has criticized the Court in very strong language. I think Judge Bork does not do anything other than with strength. He has said that the court lacks legitimacy or judges are civilly disobedient or articulated matters in very strong terms. Part of the explanation that has been given for what Judge Bork has been doing is the very unique relationship he had with his fellow professor at the Yale Law School, Alexander Bickel, who allegedly said to him, "Wreak yourself upon the world," an expression I had not heard of until I started to study Judge Bork's background.

I suppose what that means, or we can conclude what that means at this stage is: Go out and make your views known and make them known very strongly. I was interested to find later that Professor Bickel had gotten the expression, "Wreak yourself upon the world" from Justice Frankfurter for whom Professor Bickel clerked; and that, in turn, Justice Frankfurter had gotten that expression from Justice Holmes.

In trying to figure out where Judge Bork comes down in terms of being a Supreme Court nominee, there is something to be said for the proposition articulated by some that he has campaigned for the Supreme Court from podium to podium. I have already said that I do not object to that. I do not know that any of the Senators would object to that since that is all we do is campaign from podium to podium.

The CHAIRMAN. I do not even object to Alexander Bickel using someone else's quote. [Laughter.]

Senator SPECTER. The New York Times this morning has two articles, Senator Biden, Mr. Chairman, saying that that has been very fashionable historically. It is done consistently. You may be exonerated this week.

The CHAIRMAN. Or I may be in deep trouble before it is over.

Senator SPECTER. But you cannot go back and unprint all those prior articles.

The question that I have for you, Congresswoman Jordan, is really speculative, but you have been a Congresswoman. You are a professor; you have been in the public arena considerably. This is a question which I am considering as deeply as I can. Senator Heflin said earlier that perhaps we ought to be psychiatrists to try to figure out what is going on. I think this has been a very unique proceeding in many, many ways.

It is an unusual occurrence where the Senate has the nominee before it for two-and-a-half months before the process starts, where we are not occupied day and night on the Senate floor so we have a chance to really study this matter. But one analysis of Judge Bork is that he has campaigned and he has been interested in the Supreme Court, and I give him a lot of credit for that. He has been very prolific; he has been very studious, and he has been strong in his language; and he has moved from one position to another. He had a good response for the socialism issue in terms of Winston Churchill's differing positions on it.

But the ultimate question which I would appreciate your musing on—and this will be my final question—is whether and to what extent we ought to give him credit for having gotten to be a Supreme Court nominee, and then look closely at his representations in this room where he is under oath, and his very forceful statement that he does not plan to be disgraced in history and his own sense of rectitude and what we might expect of him as a Supreme Court Justice, which might differ from every place he has been so far, as Justice Black did, and that so many in the history of the Court have done.

Ms. JORDAN. Senator, you cannot afford, in my opinion, to take lightly anything Judge Bork has said to you or anything that he has represented to you in terms of his ideas and interests now. I certainly can commend your not holding it against him that he campaigned to be a Supreme Court Justice. That is the way we get to be what we want to be, let people know we want to be it.

Therefore, I believe that you have every right to search him as thoroughly as you are, and I think you have done that and are continuing to do that. And you have got some days to go.

Senator, of course, I am not going to lecture you on advise and consent, but that is a very powerful task that you have. When you think about it, half of the task, advice, you really do not get a chance to do that when it would do the most good. The President does not seek your advice. He sends the nomination up, and then you examine the nominee because you need to be able to determine whether you are going to consent.

So your very thorough searching review of the nominee is in order. There is just no reason that you should not do exactly what you are doing.

Senator SPECTER. Well, we are pursuing the advice and consent function in detail, but it is plain, of course, that if we reject Judge Bork that our advice may not be sought on his successor nominee; and it is doubtful if anybody who comes into this room following a rejection of Judge Bork will undergo the kind of scrutiny we have here. So it is a weighty consideration.

Ms. JORDAN. It is but I hope you do not look past Judge Bork to what may happen in the event of. I think that is not the way to proceed.

Senator SPECTER. Well, we will take them one at a time.

Ms. JORDAN. One at a time.

Senator SPECTER. There is no doubt about that, Congresswoman Jordan.

Thank you very much for your testimony. As you can tell, you have many admirers in this room, on this Hill and throughout the country. Thank you.

The CHAIRMAN. Thank you.

Senator Metzenbaum, please.

Senator METZENBAUM. I just want to point out to my distinguished colleague from Pennsylvania that Senator Simpson saw fit to use these hearings to nominate Senator Hatch in the event Senator Bork is not confirmed. And it is very likely that you might be on the list of considered nominees also for the position.

Senator SPECTER. Not after these hearings, Senator Metzenbaum. [Laughter.]

The CHAIRMAN. You will be on someone's list, though, Arlen.

Senator METZENBAUM. Congresswoman, Professor, I would like to just ask you a question about Judge Bork's approach to antitrust law. I ask it of you because you are a former member of this body, of the Congress, and in his writings in the area of antitrust law he has a rather contentious attitude towards members of Congress. He has written, "Whatever the merits of individual members, Congress as a whole is institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of a rational antitrust policy requires. There is always in Congress, moreover, a strong element of anti-corporate, populace sentiment. The populace sentiment runs strong in Congress, of course, because it runs strong in the electorate."

He then speaks further to that subject and says, "These are perhaps sufficient reasons why Congress has not aided the courts greatly in forming antitrust doctrine, and why any future congressional participation is likely to make matters worse."

Now, as you know, in the book "Antitrust Paradox"—which may or may not have come to your attention—in that book he talks about consumer welfare and makes the point that consumer welfare is helped by corporate efficiency, but at the same time would take issue with the Supreme Court's sustaining of resale price maintenance legislation.

I wondered whether or not you would have any thoughts on that subject.

Ms. **Jordan**. All I can say, Senator, is I am familiar with the disdain which has been expressed by Judge Bork in terms of the Congress taking action in antitrust matters. It appears that from what he has said he does not feel that Congress has enough collective intelligence to act in intelligently in antitrust matters; and I believe that that is simply an arrogance of intellect on his part. It is up to you to decide whether this person is so much brighter than the collective members of the Congress of the United States that he is to simply disregard what Congress has done in antitrust matters and simply say, well, he must be right and we do not have sense enough to act in this area, and so we should not act.

But I certainly disagree with Judge Bork on these matters because, as you know, I served on the House Judiciary Committee and I served on the Antitrust Subcommittee, and I believe that we had a sense of what we were doing. And I will match my wits with Judge Bork at any time, and I would invite him to come into the forum and let us discuss the issue and see who has the proper point of view in antitrust matters and vertical and horizontal integration, which is what he talks about a lot in his theory.

Senator **Metzenbaum**. And he talks about permitting corporations to merge until there are only two, and he talks about corporations being able to maintain prices so that consumers cannot buy at the lowest competitive price.

Ms. **Jordan**. Which, in my opinion, borders on the outlandish.

Senator **Metzenbaum**. Thank you.

I just have one more question. I had said earlier that Judge Bork himself is not a frightening man, but that his views are very frightening to American women, to minorities in this country. You have been in the political mainstream for a good many years. Can you tell me when blacks of this country were as exorcised about an issue as much as they are exorcised and concerned about Judge Bork's nomination? How many years back would we have to go?

Ms. **Jordan**. We would have to go back a long, long way because, as I indicated in response to a question from Senator Kennedy, I have not seen so much energy exorcised on the part of black people and women about an issue in many, many years. They just sense the importance of this.

It has been many, many years since we have seen that kind of energy exorcised.

Senator **Metzenbaum**. Thank you very much. Congress suffered when you left us, but it is a delight to have you back here.

Ms. **Jordan**. Thank you, Senator.

The **Chairman**. Senator Humphrey.

Senator **Humphrey**. Which title do you prefer?

Ms. **Jordan**. Whichever is comfortable for you.

Senator **Humphrey**. You throw it back every time, do you not?

All right. Congresswoman Jordan, let us turn to the Cox affair for a moment, if we may. I think it has been turned to enough times, but it was raised again. In your testimony, in fact, you said that, in your opinion, Robert Bork as Solicitor General violated regulations, if not law, was guilty of such violations.

If that is so, if that were so, was the Senate wrong in confirming Robert Bork? I mean, that violation of law is a matter of integrity. Was the Senate wrong in confirming Robert Bork to the D.C. Circuit Court of Appeals?

Ms. **Jordan**. Senator, inasmuch as I have never been a member of this august body known as the United States Senate, I do not know whether you were wrong. You might have been.

Senator **Humphrey**. In your opinion. I am asking in your opinion.

Ms. **Jordan**. I know. I know what you are asking. But what has to be understood is that the qualifications as set out by the ABA for its ranking and rating of persons who are nominated, those qualifications are totally different from what you as a Senator must consider when you are looking at the nominee.

Senator **Humphrey**. Yes, and the ABA says so.

Ms. **Jordan**. Right. And I would suggest, then, that the Senate in its collective wisdom apparently decided that, given its duty and obligation under the law in its advice and consent function, it was the correct thing for the Senate to do, and I would not second-guess it.

Senator **Humphrey**. Well, really, you are evading the question outrageously. First you accuse Robert Bork of violating the law.

Ms. **Jordan**. He did violate the law.

Senator **Humphrey**. Very well. Then, in your opinion, should the Senate have refused confirmation?

Ms. **Jordan**. And what I am saying to you is I am not going to second-guess the Senate. If the Senate wants to confirm a person who has blatantly violated the law, the Senate must have good reason for doing that.

Senator **Humphrey**. What possible reason could the Senate have for confirming unanimously someone you claim violated the law?

Ms. **Jordan**. The Senate maybe felt that that was not a serious enough aberration for them to deny confirmation.

Senator **Humphrey**. You really cannot be serious. You cannot be serious on that.

Ms. JORDAN. Of course I can be.

Senator HUMPHREY. I have never seen you humorous, I must say, so maybe this is the first time, tongue in cheek.

Well, very well. How about the ABA? As you know, the ABA in 1982 gave Robert Bork the highest qualification, the highest possible rating, exceptionally well qualified, EWQ. Was the ABA wrong if Robert Bork is a criminal, as you suggest?

Ms. JORDAN. Senator Humphrey, I am not calling him a criminal. He committed an illegal act.

Senator HUMPHREY. Yes.

Ms. JORDAN. Every action of illegality does not make a criminal.

Senator HUMPHREY. I see.

Ms. JORDAN. Therefore, I do not call him a criminal. And the ABA gave its highest rating. There is not a body in the land which, in my judgment, is incapable of being from time to time misguided.

Senator HUMPHREY. Indeed. Including the Supreme Court, as you know, and I am sure you would admit in the case of some landmark decisions which have been reversed by one means or another, thank goodness.

You are very good, Professor. I believe I will call you Professor.

Ms. JORDAN. All right.

Senator HUMPHREY. Well, let us talk about another point since I cannot get anywhere. Although I think I could get a lesser person really over a barrel, I cannot get you over that barrel. You said something that disturbed me. I do not know if you meant it quite the way you said it, but you said in reference to your own experience as one who suffered greatly from discrimination—I have forgotten how you phrased it, but you said that—I wish I could remember.

You said something about you personally saw the Supreme Court as the guardian of your rights. Is that a fair paraphrase?

Ms. JORDAN. Guardian of our liberties. Guardian of our liberties, guardian of the rights of the individual.

Senator HUMPHREY. I do not quite agree with that, and I think here is the nub of this controversy. I view the Constitution and not judges as the guardian of our freedom, our rights, our liberty. It is not the opinions of judges, personal opinions which is the guardian of our freedom, I am sure you will agree, but a carefully crafted document.

Ms. JORDAN. Senator, you are right this is the nub of the issue.

Senator HUMPHREY. Got one.

Ms. JORDAN. Finally, you are right. [Laughter.]

The nub of the issue is this: Many people, particularly weak people, underprivileged, unrepresented, under-represented, minority people, particularly the "outs," have looked to the Supreme Court as the rescuer. The Supreme Court will throw out a lifeline when the legislators and the governors and everybody else refuses to do so.

Senator HUMPHREY. Yes.

Ms. JORDAN. And there is, Senator, historical precedent for viewing the Court that way.

That precedent goes all the way back to an exchange of letters between Thomas Jefferson and James Madison. Thomas Jefferson was all for a Bill of Rights being added to the Constitution. This was during the time of the ratification campaign. Thomas Jefferson was all for it. James Madison said no necessity for it.

Thomas Jefferson said, "Well, let me try to explain to you, Mr. Madison, why we need to put these rights in the Constitution. If we put them there, there will be courts to look at them and see that they are protected from intrusion by the government." Madison bought the argument and said, "We will do it because there will be independent judicial tribunals protecting the rights." That is where the correspondence starts.

You can take it up further. There is a most obscure case that I know you have not seen in your deliberations here. It is a footnote in the *Carolene Products Case* v. *U.S.*, a 1938 case, footnote 4. It was so significant that there have been pages and pages written in constitutional texts just about footnote 4. What did footnote 4 say?

The Judiciary has a special and unique task to protect minorities and people who need protection, and that is where that uniqueness of the judicial body comes forth. So, yes, I said the Supreme Court is the protector of the rights of the individuals. I believe in that independent tribunal, not subject to the whims of the electorate, not subject to the bias of the electorate, but above that bias and protecting our rights. I think that is the proper function of the court, and the reason why so many people affected, opposed the nomination of Judge Bork is they do not want to see—we do not want to see an articulate and persuasive voice on the Supreme Court saying "That is not your function."

The **Chairman**. If I could interrupt for just a moment on this point. I would like to quote from Judge Bork on footnote 4 to which you refer. He said, "Footnote 4 of the *Carolene Products* decision, I am thinking of putting errata sheets in every copy of the United States reports stating that footnote was a typographical error, thus wiping out the entire jurisprudential industry and bringing two dozen academic careers to an abrupt conclusion", end of quote.

He obviously has a different view than you.

Ms. **Jordan**. Yes, he does.

The **Chairman**. And I think you are both correct, both my colleague from New Hampshire and my former colleague from Texas, in that that is the nub of the matter.

Ms. **Jordan**. Yes, it is.

The **Chairman**. I beg your pardon. He said that in a 1974 speech at the Mayflower Hotel, and I would ask that it be entered into the record with the appropriate attribution footnoted.

[Material follows:]

MAYFLOWER HOTEL SPEECH

The title given this talk -- "The Consequences of Judicial Imperialism" -- may suggest that part of what ought to be the argument is tucked nearly into the premise, that is the proposition that the judiciary have exceeded the bounds of their legitimate authority. Though the title was assigned, it is only fair to say I did not protest.

It seems to me that in many areas, not merely that of the role of the judiciary, we are more in need of constitutional thinking than at any time since the framing of the Constitution and the period before, during, and after the Civil War. Our society is changing drastically, and the changes to be observed in the judiciary are merely one of the alterations that require thinking about.

Walter Bagehot summed it up best when he said,

> The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created.

One of the greatest of the creations of the American nation is a federal judiciary empowered to set aside the acts of democratic majorities in the name of the enduring values named in the Constitution. It is unique, it has undoubtedly contributed greatly to our freedom and to our sense of nationhood, our sense that America is founded upon the idea of an untouchable core of human freedom. But judicial power is not invariably beneficent. I invite you to compare two reflections by one of America's greatest legal scholars before and after judicial activism had reached its present proportions.

In 1962 Alexander M. Bickel was able to write a book about the federal judiciary entitled, The Least Dangerous Branch, in which he quoted Hamilton's words that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution" because it has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."

Not long before his tragically early death in 1974, Bickel wrote in another vein. In discussing civil disobedience in America, an attitude toward law and rules that had its culmination in Watergate, he said:

> The assault upon the legal order by moral imperatives wasn't only or perhaps even most effectively an assault from the outside. It came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. . . . More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities?

That judiciary had, for Alex Bickel, become a dangerous branch because it increasingly violated a fundamental value of our society. "It is the premise of our legal order," he wrote, "that its own complicated arrangements, although subject to evolutionary change, are more important than any momentary objective."

It is that lesson, that comprehension of this great institution, that we are in danger of losing, and with it much else central to our civilization.

In the time available, I can but briefly outline the dangerous consequences of the era of judicial activism that began with the Warren Court and has not ended yet.

If pressed to prove that courts have become activist I would respond in two ways. First, they have expanded the scope of their authority dramatically in the past twenty years. Activism has appeared before in our history, but it must be admitted that courts legislate more freely and more frequently now, and they have displayed an unprecedented willingness to take over major executive functions. If it has not become routine, it has certainly become common for courts to enter into the detailed administration of prisons, mental homes, police and fire departments, and to review administrative agency decisions with a severity and particularity that replaces agency discretion with judicial discretion.

An alternative measure of judicial activism is the degree to which courts have freed themselves from any meaning to be found in the Constitution by conventional modes of legal interpretation, the degree to which meaning is assigned the Constitution which is not to be found in its text, history, and structure and is often contradicted by text, history, or structure. Hardly anyone denies that is an accurate description of what occurs.

Instead the scholarly debate swirls, or perhaps stagnates, around the issue of whether judicial rewriting of the Constitution is justified. In fact, the debate is less about that than the question of which justification for rewriting the Constitution is better. One popular argument is that courts must cure the failures of democracy by protecting groups identified as "discrete and insular minorities," a notion suggested by footnote four of the Carolene Products decision. I am thinking of putting errata sheets in every copy of volume 304 of the United States Reports stating that footnote four was a typographical error, thus wiping out an entire jurisprudential industry and bringing two dozen academic careers to an abrupt conclusion.

The difficulty with the argument that courts should undertake to repair the defects of democratic processes is that the demonstration of a defect usually consists in pointing to a law that the scholar in question would have vetoed had he been the governor. The process is not really shown to be defective; the result is simply disliked.

The other approach is that of moral philosophy. The law schools are awash with social contractarians, utilitarians, linguistic analysts, and jurisprudes of every persuasion. It has gotten so you can't swing a cat in the faculty lounge without damaging some stern young philosopher -- though there may be room for argument about the social utility of that. Among the more thoughtful attempts to justify a judiciary that departs from the fair meaning of the Constitution is that of Harry Wellington, the dean of the Yale Law School, a man whom I have no desire to hit with a cat for many reasons, some of them not connected with self-interest. He contends that constitutional courts may legitimately enforce against legislatures the conventional morality of our society. The conventional morality is not the judges' morality but ours, the society's. Courts, he believes, are the proper agency for the imposition of principles derived from morality because, being isolated from interest group politics, they are institutionally better equipped than legislatures, to discern conventional morality. He states, "the way in which one learns about the conventional morality of a society is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the method of philosophy."

Among the many reasons for dubiety about this approach is that there does not appear to be a single morality. The morality of complex societies tends not to be monolithic and to be filled with inconsistencies. The method of philosophy, which Wellington prescribes, and which is the method advocated by most friends of an activist judiciary, is a prescription for discerning not the morality of the society at large, but the morality of the upper middle class and, probably, because of the materials from which it will be drawn, primarily the morality of the intellectual-academic segment of that class. The morality of other segments of the community is likely to be largely unpublished, inarticulate, and phrased in ways intellectuals dislike. In any event, the notion that the generality of judges have the time or inclination for rumination and philosophical analysis is at odds with reality. If that is what we want, and I don't, we will have to choose our judges in different ways and drastically reduce their workloads.

These considerations are sufficient, I think, to show that there is no philosophical rudder for judges and that once they depart from the conventional legal modes of constitutional interpretation they are not merely at sea but adrift. That is the fate of activist courts who abandon the confining safeguards of law in order to achieve laudable momentary objectives.

The consequences of judicial activism seem to me damaging in three areas: the effects upon law, upon society, and upon our political arrangements.

The implications for law are fairly obvious. It will display, in greater or less degree, the following characteristics: law will be political, it will display strong signs of incoherence, it will manage affairs increasingly incompetently, and much of it will become trivialized.

The matters with which constitutional law deals are of intense political interest. They are made subject to law and courts precisely to remove them from politics. But that requires other rules to bind the judge. Courts who have moved away from conventional legal materials have no such rules and can only decide politically. It is, moreover, an unsatisfactory form of politics, one hidden from public view, because the inhibitions of the traditional judicial process remain in place so that interest groups have little or no access to the process and no power to censure those responsible for the outcome. As legislatures, in other words, courts are inaccessible and unresponsive.

The body of law produced by a political court will be intellectually incoherent because individual judges will have different hierarchies of political values. I remember a poignant evening when a young, highly philosophical professor from another school came to Yale to talk about his study of the Supreme Court. He had indentified a long list of values that seemed important in the Court's opinions -- equality, freedom, education, leisure, and so on. He had worked his way through the cases to find the philosophical stance of the Court, and he diagrammed the results for us on the blackboard. Unfortunately, what the diagram showed was that value A was preferred to B, B to C, C to D, but D was ranked higher than A. He said he could not believe it and was going back to the drawing board to see what he had missed. What he had missed is that political groups do not produce consistent votes.

Incoherent law is virtually a denial of the idea of law. It works upon litigants, fails to give fair warning, and educates us to see law as essentially manipulative and cynical. At Yale, for reasons we cannot remember, we teach constitutional law in the first semester of the first year, and, try as one will to counteract its baleful influence, the contents of the casebook overwhelm the teacher. It is said that some years ago a politically-oriented version of legal realism flourished at Yale and the faculty taught it to the courts. If that is so, the courts are having their revenge, because now the casebook teaches it to the Yale students.

Political courts will also overload themselves because they push law into areas it had not previously reached. Congress has a great deal of responsibility for overloaded court systems, but I wonder if even that is not partly due to the fact that courts have displayed a willingness to take on policy issues in a legislative manner. In any event, overload diminishes the competence of courts because they deal more rapidly with more problems, more institutions, and more subjects.

Activism also tends to trivialize the Constitution. Once legal interpretation is abandoned in order to produce good results, it is almost impossible to find a stopping point. For example, once the Court expanded the equal protection clause beyond the subject of race, standards for demanding or not demanding equality blurred, and we have arrived at the situation where the Court solemnly addresses itself to the question of what the Constitution of the United States has to say about a state setting the age for drinking 3.2 beer for males at 21 and females at 18. It turned out that the Constitution forbade such treatment of that discrete and insular minority, males, and the dispute generated seven different opinions, suggesting that the issue was of roughly the same portent for the Republic as the Steel Seizure Case. I cannot bring myself to comment upon the recent discovery that the framers of the fourteenth amendment required female reporters in the Yankees' locker room.

I want to turn next to some of the effects of judicial activism upon the society. Two come to mind: the infliction of inefficiency upon social and economic processes, and damage to the community's morale and self-confidence in its moral standards.

The infliction of inefficiency upon economic processes has occurred primarily through the expansive reading of anti-trust and regulatory statutes. That is a subject so familiar that I pause only to mention it. The imposition of added costs on other institutions and processes occurs through the judiciary's tendency to regard judicial processes as the model to which other processes should tend, so that in a variety of contexts the Court requires some form of due process, some kind of a hearing, before action can be taken. This is often quite inappropriate to the processes involved, whether school discipline or the repossession of a television set for nonpayment of installments. So powerful is the influence of that lesson that private institutions such as universities begin to judicialize their processes for discipline and other matters, and the adversary process often polarizes the members of the community in ways that older, more informal processes did not. Increased costs also occur when the courts undertake to prescribe in detail the behavior of institutions such as mental hospitals. In the name of the Constitution, a particular standard of care and theory of therapy is chosen and imposed upon institutions that have some claim to know better how to operate.

More worrisome in many respects is the impact of an activist judiciary upon social morale and self-confidence. Constitutional law as enunciated by the Supreme Court is an enormously powerful moral teacher. Too often its teachings are a rebuke to the traditional moral standards of the community. Local communities are told that their schools may not inflict even light punishment for disciplinary infractions without following procedures prescribed by courts and must then fact possible judicial review of their decisions. The authority of adults, teachers, and institutions other than courts is made suspect and weakened. Local communities are frequently informed that even slight episodes of racial segregation, often well in the past, are so heinous that entire school systems must be reorganized and run by courts. Students must be bused from their neighborhoods in order to achieve specified degrees of racial integration, the lesson being that free social processes and individual choices that did not achieve that integration are blameworthy. This is naturally viewed as rebuke and punishment.

Communities are further informed that their attempts to control pornography and obscenity, to prevent the deterioration of the moral atmosphere in which they live, are in fact benighted violations of First Amendment freedoms. They are often told in fact that the Constitution enshrines moral relativism. When the Court denied state power to punish the public display of an obscenity, the opinion said, with stunning casualness, that "one man's vulgarity is another's lyric." That doctrine would deny society the right to enforce any moral standards against dissenters. We have the judiciary to thank for the current condition of Times Square and the plague of pornography around us.

The subject of the public's frustration with a judicial system that seems unwilling to punish criminals with the severity that the public's moral sense demands is too well known to require extended comment. It is epitomized in the judiciary's whittling away at the death penalty, a punishment explicitly contemplated by the Constitution and obviously desired by a majority of the electorate.

Such judicial behavior cannot but frustrate society, make it doubtful of its own healthiest moral standards, and weaken its morale. That is one of the more serious consequences of judicial imperialism.

I come at the end to consideration of the impact of judicial activism upon our politics. The first and most obvious is that activism requires a degree of disingenuousness. The Court's authority derives largely from the public belief that it really is the Constitution and not the politics of a majority of nine lawyers that requires democratic choices to be overturned. The Court, justifiably concerned about the possibly tenuous base of its power, is careful to insist that its most political decisions are in fact compelled by the Constitution. The opinion in *Harper* v. *Virginia Board of Elections* is typical of many. The Court struck down a poll tax, though it was entirely clear that the framers of the fourteenth amendment had no such result in mind. That difficulty was addressed with this rhetoric: "the Equal Protection Clause is not shackled to the political theory of a particular era... (W)e have never been confined to historic notions of equality." Which is to say that a majority of the Court has substituted a new notion of equality for that of the framers. But then the opinion states, "Our conclusion...is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." The second assertion cannot be true if the first is.

There are worrisome signs, however, that we are coming to political governance by the judiciary. Perhaps, under its tutelage, we have come to believe that democratic processes are suspect, essentially unprincipled and untrustworthy, and that judicial governance is to be preferred. Perhaps prolonged judicial activism is not entirely responsible for that; there are other possible sources of weariness with democracy and self-government. It is also possible that the rise of pervasive, intrusive, and unresponsive bureaucracies has made politics seem relatively ineffectual. The desire for judicial government is dramatically illustrated by the proposed Equal Rights Amendment. It would confirm the courts in their worst tendencies by handling them, without legislative guidance of any sort, the task of making the infinite number of political decisions required in deciding when men and women must be treated alike, when they need not be, and, perhaps, when they may not be. The fact that the courts have already started down that path on their own is no reason to legitimize it. But the fact that adoption of ERA would ratify and forward a dangerous constitutional revolution is the one feature of it that is rarely, if ever, critized.

Finally, it should be noted that an activist judiciary, in our time, will increase the already disproportionate influence of intellectuals upon our politics. Judges have no electorate to face. What they have to face is opinion shaped by the intellectual class, primarily academics and journalists. Judges themselves are members of that class, they tend to respond to its values, and a steady stream of clerks fresh from the law schools reinforce that tendency. Moreover, a judge's current reputation as well as his place in history is likely to be determined by journalists and academics. Over time, a judge who was not influenced by the dominant intellectual and moral climate in which he lives would have to be a very hardy or insensitive characther indeed.

For complicated reasons, which it is no part of my assignment to trace here, the intellectual class tends to be left of center on the American political spectrum, and more egalitarian and morally relativistic as well. It displays the characteristics we see in the movement of constitutional law. This puts a somewhat more somber light than perhaps he intended upon Anthony Lewis' observation that "If American judges are the most powerful on earth, so too American law schools and legal writers are the most influential."

The point I am making is not refuted but reinforced by the reputation of the current Supreme Court as very conservative. It is actually a mildly liberal Court. Though such matters are impressionistic to some degree, most people I have talked to, including those of a liberal persuasion, tend to agree that on issues where the Court has a free vote, where there is no constitutional compulsion, the Court rather regularly produces results more liberal than those you would get after full debate in a national referendum. The Court is viewed as conservative only because of an error of parallax: we see it through the [illegible] the legal academies and the media, and hence from their perspective.

No one can doubt the Court's great educative power, and the fact that it tends to respond to intellectual class values means that its influence is rather steadily pressing our views and our politics to the liberal side of the spectrum. That is one reason that liberals and intellectuals of this generation applaud and encourage judicial imperialism just as businessmen and conservatives of other generations once did.

At the end a pair of caveats are in order. I do not for a moment suggest that [illegible] the trends I have been describing are solely or even primarily caused by judicial activism. I do suggest that activism contributes to them. Nor do I yield to anyone in admiration of the role the federal courts have played and do play in our polity. Without their constitutional function we should be a very much less happy nation than we are. But to say that is not to say that some tendencies are not deeply disturbing. Activism is not the same as judicial enforcement of constitutional guarantees. The consequences of activism by the judiciary are such that they deserve prominence in public discussion. We have created a great institution in the federal judiciary, and we ought not to fail it and ourselves by not comprehending the institution's strengths and the limitations.

Senator HUMPHREY. Well, indeed, we have reached the nub and the essence of the controversy. I doubt that we will resolve it here. The Senate will ultimately resolve it for the moment when we get to a vote on the floor, but that is the ultimate—that is the real essence of the controversy here, whether the court is a place that can disregard the—whether the court is a place to which people can repair who are impatient with the democratic process.

Now you would have had to run several more times for the Texas State Legislature, not eleven times, but more times, you are right, because the democratic process would have worked more slowly, as it does, than does the judicial process of fiat, judicial fiat; no question. Dictatorships are always more efficient, act more quickly than democracies, but in the long-run, Congresswoman and Professor, whom I admire so much, you are wrong. You cannot resort to expediency over principle.

The principle is that where the intent of the framers does not provide a remedy, then the resort is the democratic process, however slow it is, however subject it is to the base instincts of men. That is the best way to proceed.

Ms. JORDAN. Senator, you got off the reservation when you started talking about the intent of the legislators.

Senator HUMPHREY. Framers.

Ms. JORDAN. I mean intent of the framers. I guess you are into the original intent bit.

Senator HUMPHREY. No. What I am not into is judges making up things that are not in the Constitution. That should be the function of the democratically elected legislators, not judges, who have lifetime tenure and are dictators, which is why they can be so efficient when they have a mind to be so.

Ms. JORDAN. Senator, may I ask you a question?

Senator HUMPHREY. Why not?

Ms. JORDAN. How does one arrive at original intent?

Senator HUMPHREY. It is a very difficult process, as all will acknowledge, but it takes—those who do it best are those who have a systematic means of excluding personal preference and bias, such as those who profess judicial restraint.

Ms. JORDAN. And therefore, Senator, entering your definition of original intent, you bring to bear the subjective biases and lenses of the person who is doing the interpreting, correct?

Senator HUMPHREY. All human beings are subject to human failings.

Ms. JORDAN. And that is, I believe, a serious hole in the whole theory of original intent.

Senator HUMPHREY. Yes, but it works in both directions. Judges, with all the integrity they possess, arrive at new meanings of the Constitution are just as prey to that failing as are those who do not see all that is. Right? It works both ways.

Ms. JORDAN. I do not——

Senator HUMPHREY. That is why it is so important that we select carefully because judges are human; they are not objective perfectly. They bring to the court their own set of values. And when they start finding things in the Constitution which are not there, they are in fact substituting their own values. And, boy, it is tough, is it not, finding just a perfectly objective person.

Ms. Jordan. But if they go too far, it is the Congress of the United States that is going to be the corrective.

Senator Humphrey. Indeed, indeed, indeed, the democratic process, resolving it by those who are elected and accountable to the people, and not by judges who are lifetime dictators, accountable to no one.

The Chairman. This is fascinating, and I am not being facetious, but I think we should move on, if we could.

Senator Humphrey. Thank you.

The Chairman. I understand the Senator from Alabama is willing to yield for 60 seconds to the Senator from Utah.

Senator Hatch. Thank you.

I want to thank my colleague from Alabama. I just want to welcome you to the committee, Congressman Jordan——

Ms. Jordan. Thank you, Senator.

Senator Hatch [continuing]. To tell you that I for one have missed your presence here in Washington. I remember those conferences. We were opposite each other on a number of occasions. I just wanted to tell you that we miss you up here.

The Chairman. The Senator from Alabama.

Senator Heflin. Mr. Chairman, I am going to give the words that everybody in this room wants to hear. I have no questions.

The Chairman. Well, Congresswoman, before we conclude I just want to say two things very briefly. There is an old English expression. It says character brings forth character. And you have brought it forth in this body when you were here, and hopefully in the committee the character demonstrated by you will lead us to have the character to do the right thing.

And I would say that since these hearings have begun, I have had a dual role, and a dual goal. The first is to see to it that we move expeditiously, and the second is that we are thorough. I have not cut off any of my colleagues, nor do I intend to, on either side of the aisle, particularly from the testimony from such distinguished witnesses as we have had this morning.

But I would just point out to my colleagues to be guided by their own judgment. We have had two witnesses this morning, starting at ten o'clock. It is now two o'clock. We have a lot of witnesses to come. If we are going to spend this much time, which I am prepared to do, because I think it is very worthwhile, I just want everyone to understand there will be no possibility, not that there is anything chiseled in stone, of us having this before the committee by October the 1st. And again there is nothing magic about that date. It is my intention to still finish then.

But I just admonish my colleagues to think about how they wish this to move. And I apologize. My ranking member may want to make some comment before we adjourn for lunch.

Senator Thurmond. Mr. Chairman, I just want to say, Dr. Jordan, we are glad to have you with us.

Ms. Jordan. Thank you, Senator.

Senator Thurmond. I remember when you were a member of Congress, you were one of the most articulate members. I had the pleasure of serving on the conference committee with you, and I knew you in other ways. Of course, I differ with you on this nomination. But I hope you are getting along nicely in Texas and enjoying your work at the Lyndon Johnson School of Government.

The CHAIRMAN. The hearing will——

Senator THURMOND. Just a minute.

The CHAIRMAN. Yes, sir.

Senator THURMOND. And I want to say that we are very glad to have the Secretary with us this morning. He has done a fine job for the country, and he is a very patriotic, articulate man. He is public-spirited. He is a good lawyer. And, although I differ with him, I have great respect for him. And I just want you to know that, Secretary Coleman.

The CHAIRMAN. We will recess until 3:15.

[Whereupon, at 2:30 p.m., the committee recessed to reconvene at 3:15 p.m. the same day.]

AFTERNOON SESSION

Senator KENNEDY. We will continue with our witnesses. We welcome this afternoon our first witness, the distinguished mayor of the city of Atlanta, a former ambassador to the United Nations, and one of the very significant and important voices in the civil rights movement.

He is no stranger to the Judiciary Committee. He has been a good friend to many of us here on this panel. We always value his testimony and we want to extend a very warm welcome to Mayor Andy Young. We are glad to have you here.

TESTIMONY OF THE HON. ANDREW YOUNG

Mayor YOUNG. Thank you very much, Senator Kennedy and the committee. It is a privilege, a pleasure and quite an honor to be here today, particularly on this day.

I would certainly like to be able to concur with the testimony of Secretary Bill Coleman and Congresswoman Barbara Jordan. But I come not as a lawyer or legal scholar but as mayor of one of the United States' thriving cities.

Atlanta is a thriving city, but 30–35 years ago when I left Washington as a college student, driving back to my home in Louisiana, Georgia was hardly a place where I felt comfortable, and Atlanta was not a city that I even wanted to stop in. And yet, in the period of three decades we have seen the city of Atlanta, the State of Georgia, and the southern part of the United States move forward to the extent that I could not only be mayor, but could have served the Fifth Congressional District of Georgia as a Member of Congress and represented the United States at the United Nations because of a President elected from Georgia.

All of those things, I think, were possible in large measure because of decisions that are now being questioned or challenged in the nomination of Judge Bork.

Senator KENNEDY. Mr. Mayor, would you withhold for a moment until we swear you in. Please stand. Do you swear to tell the truth, the whole truth and nothing but the truth so help you God.

Mayor YOUNG. I do.

Senator KENNEDY. Please proceed.

Mayor YOUNG. I come, as I said, not as a legal scholar or lawyer but as one who has been a benefactor of the activities of the courts of our land and the laws of our land and that watched a level of achievement that very few people could have imagined possible.

In the last 5 years we have seen the city of Atlanta attract some $41 billion worth of new investment and generate more than 400,000 new jobs. We have been able to do this because we have achieved a kind of level of cooperation between blacks and whites that has enabled us to get about the business of meeting the human needs of the region and answering the problems and the challenge of business growth and development.

But that is not a legacy that we came by easily. It is not a legacy that we in the civil rights movement could have achieved alone. It is not a legacy that could have been given to us by the legislatures of the land, for as Congresswoman Barbara Jordan said, they were so mal-apportioned and there were so many problems in terms of registering to vote that I, too, had to run on two different occasions until the State legislatures were forced by the courts of this land to reapportion so that the votes could be counted fairly.

But the people who were responsible for those changes were in no stretch of the imagination liberals or activists when they were appointed. Overwhelmingly most of them were Republican, and men like Judge Tuttle, Judge John Minor Wisdom, Judge Griffin Bell, Richard Reeves, Frank Johnson, Bryan Simpson in Florida. You had men who were courageous enough and visionary enough to see that the courts of the land had to step in and provide an opportunity to the rights and privileges of all of the citizens of that region to be expressed in a nonviolent context.

I would contend that that is a legacy that is still in process. It is still taking shape and it is a legacy that is still rather fragile and one that we are not willing to run the risk of tampering with.

In the recent elections, one of the main concerns of the President was that he would have a mandate from the Senate elections to be able to transform the courts and to transform the nation as he had attempted through legislation in the past.

I think the people of the South not only rejected that, but they gave the Senate a mandate in 1986 that I think is at least as equivalent to the mandate that was given the President in 1984. So I would hope that the Senate would take serious that mandate and would realize that the advise and consent functions are critical to maintaining the kind of balance that we think we need to keep the progress and prosperity moving in the South.

President Reagan has had the opportunity to appoint 322 judges throughout the court system. Of those, very few are women and even fewer are black. I think it is 23 women, five blacks. The difficulty of maintaining the kind of normal progress that we are now enjoying really is something that I think the South—black and white—does not want to reopen.

Whatever we did and for whatever reasons we did it, it has worked for us far better than any of us could have imagined. The city of Atlanta, for instance, was able to build a mass transit system and an airport, in large measure because of a whole notion of sharing in the economic growth and development. Twenty percent of the mass transit system went to minority entrepreneurs—minority and female—25 percent of the airport.

That airport and mass transit system have consistently been under budget and ahead of schedule in terms of their construction. But the difference is that when we have shared the economic benefits of the South, what we have done is, we have given minority and female entrepreneurs an opportunity to train people that in many other places are not being trained. We have our unemployment level down to about 4 percent, and one of the main reasons for that, I contend, is that everybody is sharing in the growth and development.

I contend that one of the reasons for $41 billion worth of new investment over the last 5 years is that people see in the region a stability and a calm. They see us having, in a sense, settled the race question and they see us working together in a very peaceful and profitable manner.

I think and I fear that the appointment and confirmation of Judge Bork to the Supreme Court would at least run the risk of tampering with that. Maybe not in overturning decisions that have already been cast into concrete, but we are still working on these.

We are still a number of reapportionment cases. We still have the question of urban versus rural representation. We are still refining the questions of affirmative action. All of those cases are likely to come up to the Supreme Court and for somebody who really did not seem to understand what was going on during that period to be making the final judgments seems to me to be too great a risk to run.

I think that what we have here is not only the appointment of a judge, but we have an attempt to transform the Court. And I would contend that there is no mandate in the 1986 elections to give the President the power to so completely transform the judiciary that substantive changes in the lifestyle of the people of the United States would ensue.

I do not have anything against Judge Bork personally. I do not know enough law to argue with him. But just listening to him and reading his opinions, I have the feeling that here is a very amiable and intelligent man who is extremely well educated but not necessarily wise. And it seems to me that somewhere in this list of qualifications, a certain kind of wisdom, a certain kind of sensitivity and compassion is needed. Because for us, the Supreme Court has never been just about issues and cases. It really could never be an intellectual feast.

It is about people. It is about Rosa Parks wanting, as a seamstress, to sit down in the bus and not have to stand up when a white man comes on. It is about Charlene Hunter and Hamilton Holmes wanting to go to school at the University of Georgia. My own involvement with the Court of Florida was simply a case where I was trying to walk down the streets in St. Augustine, Florida and was mobbed by a group of klansmen with the assistance of the sheriff. I do not see that there are any competing gratifications there. It was my right to take a walk in a peaceful southern town, and I do not see where they had a right to beat me up.

But they did. Thank goodness Judge Simpson understood that I was not the clear and present danger and that the clear and present danger was mob rule and lawlessness. He also understood that that mob was not a majority of the South. He understood and knew by his own involvement in the South that the overwhelming majority of the people of the South were people of good will who were glad to break down those legal barriers which had artificially separated us on the basis of race.

So he suffered some personal ostracism, but he decided that case clearly in behalf of our first amendment rights. I think consistently down through the history of the civil rights movement we have seen those kinds of judges, and those are the kinds of judges that I think essentially preserve the liberty and the blessings of liberty that are offered by our Constitution.

I also have a concern about—which I probably ought not get into because you have already gotten into it some, but let me just register it—and that is the role of the Congress in such things as the War Powers Act and such things as intelligence monitoring committees. I happen to think that Congress has to have a role in those kinds of issues and I happen to know that Congress has access to as much—sometimes more information—than the executive branch, and that the information which comes to Congressmen and Senators from their constituents who have served around the world as missionaries and as professors and as business persons can be every bit as accurate and often is more accurate than the kinds of studies that the executive branch gets from the traditional intelligence gathering agencies.

But finally, I think, it can probably all be summed up for me in terms of what the Court means to people in the South, in the Montgomery Improvement Association, when every redress locally and politically had been exhausted, when it looked as though the Montgomery Improvement Association was going to have to close down its doors, when it looked like 381 days of nonviolent preaching and teaching would be a failure—on that very day that Martin Luther King was about to announce that he would have to give in to this injunction, the word came down from the Supreme Court that busses in Montgomery, Alabama, had been desegregated.

And one good sister in the church just jumped up and shouted, "Great God almighty done spoke from Washington."

I think that is what we have come to expect from the Supreme Court. We have come to believe that in the Declaration of Independence that all men and women and children are endowed by their creator with certain inalienable rights. And we see the Supreme Court as the final protector and guarantor of those rights. And a Supreme Court that is intellectualizing about those rights, or a Supreme Court that does not understand the passion and anguish of people whose rights are being denied is a Supreme Court which really does not live up to what I think the American dream is all about.

I agree with Congresswoman Jordan and Secretary Coleman that Judge Bork runs the risk of tampering with that Court and certainly changing the tone of debate in that Court, and I do not think that is good for the country and I would hope that you would not confirm the Judge.

[Prepared statement follows:]

CITY OF ATLANTA

CITY HALL • ATLANTA, GEORGIA 30335

404 - 527-7000

ANDREW YOUNG
MAYOR

September 21, 1987

TESTIMONY OF THE HONORABLE ANDREW YOUNG, MAYOR OF ATLANTA, BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE ON THE NOMINATION OF JUDGE ROBERT BORK TO THE UNITED STATES SUPREME COURT.

MR. CHAIRMAN, MEMBERS OF THE SENATE JUDICIARY COMMITTEE, OTHER MEMBERS OF THE UNITED STATES SENATE, LADIES AND GENTLEMEN:

My name is Andrew Young. I am not a lawyer or a legal scholar, but I appear before you today as one whose lifework and career exist because the legal views and legal philosophy held by this nominee are not the law and policy of this nation.

With the Chair's permission, I will submit a prepared text for the record.

I am presently the Mayor of Atlanta. Atlanta is a proud city and I am proud to be its mayor. But we know in the most important sense that Atlanta is not unusual. Atlanta is what this nation should be about, it strives to be what all great American cities strive to be -- a living example of the goals and ideas that the Founders of this country held dear.

The success we enjoy -- the cooperation between the races, the economic prosperity -- has been built upon the foundation of civil rights and equal opportunity which the United States Supreme Court has fostered for the past three decades. Today, I can be Mayor of Atlanta. Yet just a few decades ago, as a college student, I could not stop for gas at many service stations, was told to use "separate" rest rooms and could not stay or be served in downtown hotels and restaurants. Just 25 years ago, black Americans were second class citizens in the City of Atlanta. And white citizens were struggling with a stagnant economy.

But today, many people recognize our city as "the city too busy to hate." We are a city busy providing jobs, developing and protecting the environment, expanding our economy, educating our youth and opening the doors of opportunity for all of our citizens. In the past five years alone, Atlanta has attracted more than $41 billion worth of new investments, created 400,000 new jobs and reduced the unemployment rate to 4.1%. We have achieved this progress because of a spirit of cooperation between blacks and whites, an expectation of fairness, and an environment that encourages everyone to participate in the city's growth and prosperity. But in all honesty, I must say that this spirit of cooperation and fairness and this economic and social prosperity is by and large a contribution to our city from the federal judiciary.

I speak in opposition to Judge Robert Bork today, not because of any animus or ill will towards him -- he is reputedly an amiable man -- nor out of any disrespect for his obviously keen intellect. I speak in opposition to Judge Bork because I view the Supreme Court as the protector of the weak and the underprivileged, the voice of justice for the oppressed, the salvation of the minority against any temptation to tyranny by the majority and everything I have read or heard indicates that Judge Bork is a protector of privilege and power rather than opportunity and freedom.

It is clear to me from studying Judge Bork's public record that he is not a product of the near-center or mainstream of national legal thought. Much of his legal philosophy in fact defines the far extremes of the ideological spectrum.

It is not enough to try now to rationalize this philosophy as the idle work of a theorizing professor. There are distinct patterns; there is a zeal and passion to a dogmatic point of view that would dishonor truly intellectual academic endeavor. His views have been consistently and publicly stated over a sustained period. They are not taken out of contextual, abberational or isolated occurrences. These views are profoundly disturbing and in my judgement would be disastrous at this period of our history on the lives of the people of this country if they were to become the law of our land. Many of his attributed views tear at the very fabric of the Constitution as first spun in Philadelphia 200 years ago and as it matured in the richness and trauma of our national political life since that time.

I would like to reflect momentarily with you on the Senate's historic role in this particular nomination.

I have heard some argue that the Senate s role in this inquiry is a particularly limited one. That by "advice and consent," the Senate must defer to the President's nomination in respect for the popular mandate he was given in 1980 and 1984 to appoint Supreme Court justices in his own image. This argument further states that the nominee s ideological perspective on the Constitution, law and national policy is irrelevant to the Senate inquiry, which should basically focus on his health, his integrity, and his professional competence as a lawyer and a scholar. I disagree with this view and I believe that the weight of historical judgement disagrees with this view.

Our forefathers in Philadelphia created an ingenious living document in our Constitution, a weave of delicate checks and balances, shared powers and responsibilities, and limits on state and national government intrusions on the fundamental liberties of each citizen. Those shared powers and responsibilities ebb and flow as they are exercised over historical periods and their relative strength is a reflection of the current national consensus as expressed in the electoral process. This reflection occurs not only in the presidential elections every four years, but in the election of a third of you Senators every two years and the House of Representatives every two years.

As we now celebrate the Constitutional Bicentennial, we have all read and heard much about the debates and process in Philadelphia in 1787 by which the core document was created, and what the living document has come to mean in 200 years of national life. We have all probably noted the historical fact that the framers had originally drafted and adopted a document that gave the election of Supreme Court justices solely to the Senate, but in the latter days of that hot summer, they tempered and compromised the original thought by assigning to the President the "nomination" of justices and assigning to the Senate the "advice and consent" function.

Present day doubters of this partnership ignore our national history. In point of fact, this body has rejected or forced withdrawal of 27 Supreme Court nominees -- or approximately one in every five.

It is important to emphasize that our core governing document thus created a **partnership** of responsibility, to be **jointly** exercised, and that it is therefore inconsistent to argue that this somehow prevents you as Senators from inquiry into the basic legal views and philosophy of a nominee. Similar shared powers are explicit in other critical functions of our national government. No one argues that even though the Constitution assigns to the President the power to negotiate and submit treaties that the Senate in its "advice and consent" role may not inquire into the merits of a particular treaty. The Senate must consider all the various aspects of a particular nominee to the Supreme Court that the President must consider. It is after all a partnership of responsibility and shared constitutional functions, each partner must respect the perogatives of the other political body.

These doubters ignore the recent historical parallel in 1968 when a Democratic President in his final year of office nominated Justic Abe Fortas to become Chief Justice, and members of his appointive partner in the Senate explicitly asserted their role.

As Joseph Califiano pointed out in a recent editorial in The New York Times, then-Senator Howard Baker said, "In resolving the question of confirmation, the Senate must consider ...their social, economic, and legal philosophies; and the wisdom and desirability of the appointments at this particular time." Califiano also recalls that the current senior minority member of this Committee, its chairman in the last Congress, Senator Strom Thurmond argued that it was each Senator's, "responsibility for assessing the wisdom of the appointment." Senator Thurmond stressed at the time that, "a man's philosophy, both his philosophy of life and his philosophy of judicial interpretation, are extremely relevant."

I am not trying to diminish the importance in this process of Ronald Reagan's presidential victories in 1980 and 1984, because those victories represented some measure of national will at each given time. But this is not 1980 or 1984, this is 1987 and we are fast approaching the final year of the Reagan presidency. We are already engaged in the early stages of the next presidential race.

In 1986, the most recent national election year, President Reagan went to state after state in election after election and explicitly pleaded with the American people to maintain a Republican Senate in order to ensure his capacity to nominate Supreme Court justices in his image. President Reagan urged the American people to restate his particular mandate by retaining a Republican majority in the United States Senate.

The American people spoke in the 1986 Senatorial elections, turning the President's Republican Senate majority into a significant minority.

I make this important point not as a Democrat gloating over the new alignment of this body, but instead to emphasize that the will and mandate of the people expressed in 1980 and 1984 must be tempered with the will and mandate of the people expressed in 1986.

It is especially important to consider the consensus of the American people as it relates to this particular nominee because today's Supreme Court is so closely divided on a variety of important Constitutional issues. Judge Bork's philosophy on these issues would likely be pivotal in determining the majority view on a split court. In the final analysis, you as Senators must only confirm a nominee who is clearly in line with the stated consensus of the American people, for it is those very people who you are elected to represent.

With the nomination of Judge Bork, Ronald Reagan is clearly attempting to to **transform** the Supreme Court of the United States as he has attempted to transform the entire appointive American judiciary during his two terms as President. The nomination of Judge Bork is but a continuation of the 322 lifetime judicial appointments made under this administration. President Reagan has appointed two Associate Justices to the Supreme Court and elevated one Associate Justice to Chief Justice. He has appointed nine judges to specialized courts that handle patent and trade matters, 69 judges to the 12 regional federal appeals courts and 241 judges to the federal district courts. These appointments, which included only five blacks and 23 women, are extremely significant, because the lower federal courts are most often the final arbiters of disputes. Just over 100 cases per year are decided by the Supreme Court, while thousands of cases are decided by the lower federal courts each year.

In light of the 1986 election, the nomination of Judge Bork is clearly an attempt to overplay this President's perogatives within the balance between the power of nomination and the power of "advice and consent."

Some have cited our national experience during the presidency of Franklin Roosevelt for a variety of supporting propositions during this debate. After considerable thought, however, I feel that experience is a compelling illustration of the point I am making.

When President Roosevelt was first elected in 1932, he enjoyed only a relatively small percentage of Democrats in the Congress of the United States. It was in this political context that FDR first embarked on the ambitious legislative agenda known as the New Deal. President Roosevelt was stymied in his effort to bring this country out of depression by a Supreme Court which refused to recognize that the commerce clause empowered the President and Congress to legitimately fashion much of that day's New Deal legislation. In response, President Roosevelt tried to enlarge the Court in his 1937 court-packing plan, which the Congress flatly refused.

In the subsequent elections, however, Roosevelt was re-elected along with massive numbers of Democrats who eventually formed a huge majority in the Congress. These elections reflected a continual national consensus of thought and allowed Roosevelt and the Senate to appoint Supreme Court justices reflective of that national consensus.

It was clear that unlike today, the President and the Senate by then shared a view of the national will and consensus and responded through nomination power and the power of "advice and consent" accordingly. Transforming the Supreme Court was never conceived to be accomplished at the will of a President alone.

Reagan's present attempt at transformation of the Supreme Court is like Roosevelt's early attempts at transformation, it is simply not reflective of a clear national consensus of thought.

In that light, this body has an especially significant function in the "advice and consent" role. You should not approve a nominee for the Court from the far fringes of legal thought and philosophy when there are strongly conflicting signals of the national will. Instead, you should, in my judgement, recognize these conflicting signals as a mandate for you and the President to chart a mainstream, centrist course of national policy and directive.

I also see no reason to press forward with the approval of Judge Bork simply to fill the vacant seat on the Court. Rather than force the transformation of the Court at a time of ill-defined national will, it is far better for the seat to remain vacant until this President or the next one submits a qualified nominee who is more representative of the mainstream of American political thought.

Should the President fail to present an acceptable choice to the Senate, his partner in the appointive process, the history of the Court shows clearly that it has been able to function successfully at various times with both a greater and lesser number of justices.

In those rare cases where a majority could not be reached without a ninth justice, it is better to postpone radical changes in constitutional doctrine. It is better for the nation to avoid narrow five to four decisions on landmark issues of constitutional doctrine when the fifth vote might come from a transforming justice who comes from the far fringes of legal thought and philosophy at a time when no clear mandate exists from the people.

Let me now discuss briefly several specific areas of Judge Bork's record, specific views he has expressed both on and off his current judicial post, that I find deeply troubling and clearly indicative that his position is on the far extreme fringes of American legal and political thought.

The record as it exists demonstrates that Judge Bork has consistently been squarely against those Supreme Court decisions which have contributed so significantly to the evolution of the prosperity and goodwill that exists in the City of Atlanta today. The same can be said for Birmingham, Jacksonville, Charlotte, Little Rock, Dallas and many other areas both in and out of the South.

Judge Bork, in Senator Heflin's characterization last Wednesday, seems to require a carrot before his eyes before he can take a step forward. He is no doubt a very educated man, but he has not been a wise man. Back in the sixties, many of the judges within the old Fifth Circuit were thankfully heroic and wise men. They were white male Southerners, many of who were appointed during the Eisenhower years, some of whom were self-styled conservatives. These men -- men like Elbert Tuttle, Bryan Simpson, Frank Johnson, Griffin Bell, Richard Rives, John Minor Wisdom -- and I don't mean to overstate it, saved the country by giving meaning to the Constitution. These men were not "judicial activists" except to the extent that they preserved and protected the rights of the people embodied in the Constitution. They did not mask their decisions or philosophies in meaningless sophistry about the "original intent" of the framers, but implemented what was in fact a living Constitution.

Given the numerous conversions to which he now attests in confirmation, perhaps Judge Bork would even concede that he has not shown such wisdom in his view of the Constitution over the years for so many specific matters.

I do not believe we should appoint to the Court a man who has demonstrated that he does not have the vision to see the right and proper course of the significant issues of the day either before or as they are occurring. These hard, important cases cannot be decided as they occur with the benefit of Judge Bork's surer-sighted hindsight.

Senator DeConcini asked Judge Bork Wednesday to assume that if he were black, and that he had heard his many expressed statements in the area of civil rights over the years, whether he would be concerned with this nomination. Judge Bork answered by saying that he had a good civil rights record.

The fact of the matter is that the record is replete with examples showing that Judge Bork has always been on the negative side of the ledger by some theory or rationalization that may for his purposes suit the moment. There is nothing in his public record to suggest that his core attitude toward the equal participation in our society by blacks, women, Hispanics, or others is anything but hostile. He asserts that he is not a racist or a bigot. If he were confirmed and continued to judge in the pattern of his expressed opinions over the years, it would be much more devastating to the realization of an America of, "life, liberty and the pursuit of happiness," for all, than all of the Bull Connors of the world and their dogs combined.

It is the kinds of advances which he has consistently opposed, such as the 1964 Civil Rights Act, open housing laws, protection of voting rights, dismantling of poll taxes and literacy tests, affirmative action and equal rights for women and minorities that have been the essential building blocks on which the foundation of Atlanta's growth and prosperity have rested.

Had Judge Bork's truncated view of the First Amendment prevailed, Dr. Martin Luther King, Jr. would not be a venerated national hero -- he would instead be serving a jail sentence in Alabama and the non-violent method of social change might never have found root on American soil. Had Judge Bork's view on personal freedom prevailed, the Public Accomodations Act would have never opened the doors of the hotel and convention industry which is now Atlanta's lifeblood and the city's largest employer. Had Judge Bork's view of affirmative action prevailed, the City of Atlanta would not have been able to set up our Minority Business Participation Program which has enabled us to construct the world's largest airport, under budget and ahead of schedule, with 25% minority contractor participation. Had Judge Bork's restrictive interpretation of freedom of speech and the Fourteenth Amendment prevailed, I might have been branded a terrorist and jailed for my participation in the civil rights movement instead of becoming the first black elected to Congress from Atlanta in more than 100 years.

Had Judge Bork's view of the Constitution prevailed over the past thirty years, my city would not be a city too busy too hate, but a city too oppressed to create.

I also find appalling and disingenuous Judge Bork's repeated rejection of the long standing notion that the Fourteenth Amendment includes the fundamental rights of "personal liberty" and "privacy." He has agonized in his testimony about where a right of privacy is found in the Constitution. As a non-lawyer, I do not pretend to be a student of the nuances of constitutional law, but what is liberty as a core value of the Constitution if it does not embrace personal privacy?

If Judge Bork is confirmed as a Supreme Court justice, I fear possible reconsideration of such cases of long standing as the right of married people to use contraceptives; the right of chicken thieves not to be sterilized; the right to be taught foreign language; even the right of a grandmother to live with her children, even if her neighbors disapprove.

What is also particularly troubling for me in accepting Judge Bork's current professions of moderation and his embracing "judicial restraint" as a rhetorical description of his philosophy is his legal activism in fact and abandonment of any reliance on "original intent" when it comes to other areas of the law that those shallow, rigid concepts simply do not fit. For example, Judge Bork has been vigorously hostile to the shared consitutional balance between the executive and legislative branches. The overwhelming dominance he finds for the executive has no pretence of rationale based on "judicial restraint" or "original intent." If plain language of the Constitution were to control, the result would be different. He has abandoned these doctrines in this area for a good reason: the facts are not supportive -- the framers were of course extremely wary of a strong executive after the war with King George.

Judge Bork not only argues that in many areas of some Congressional role, there is a preference for the position of the executive; he also goes further and argues that in his view of the Constitution, Congress is actually prohibited from acting in other areas. As a former Member of Congress, I would hope that you as Senators would particularly view these attitudes with alarm.

One may argue about the merits of any one specific issue in isolation, but again the pattern of his attitude should give us all concern.

Specifically, Judge Bork has at times argued that the War Powers Act is unconstitutional, that it is unconstitutional for the Congress to restrict the President from invading a country with which we are not at war and that it is unconstitutional for Congress to adopt a charter for the CIA. He has also held that it is unconstitutional for Congress to require a judicial warrant before the executive branch undertakes electronic surveillance of American citizens to investigate security matters, as Judge Griffin Bell in 1978 successfully championed during the Carter years. He has said that it is unconstitutional for Congress to adopt a "special prosecutor" law to provide for the independent investigation of allegations of criminal actions within the executive branch, that it is unconstitutional for Congress to adopt legislation implementing Fourteenth Amendment rights and that it is unconstitutional for Congress to authorize Congressional standing to initiate Court challenges to unlawful presidential interference with Congressional perogatives.

There are many other areas of the record that should and will be explored by others I hope in detail.

About the only thing which I have read in which I agree with Judge Bork is that he is neither a liberal nor a conservative. He is neither -- he is an extremist whose zealous dogmatic view of the world allows him to travel many rationalized paths to his negative ends.

Gentlemen, there are those who rightly point to the charm, wit and brilliance of Judge Bork, and I am sure that he is an outstanding teacher, lawyer and jurist. By all normal considerations he certainly deserves confirmation, but I am asking you to deny that confirmation to the highest court in our great nation, because with all the brilliance, there seems to be little compassion or vision within this man.

The Supreme Court is not primarily about principles or cases, it is about people, ordinary people like Rosa Parks, a seamstress trying to ride the buses of her native Montgomery; Linda Brown, a child in search of an elementary education; Charlayne Hunter and Hamilton Holmes seeking entry into the University of Georgia; or a chamber maid against a hotel chain and laundress in a sweat shop work environment as Ted Koppel and David Brinkley so graphically reminded us on the ABC special, the Blessing of Liberty.

For all his brilliance, Judge Bork has never used his legal mind on behalf of "the least of these, God's children," who are too poor to run for public office and whose poetic eloquence could not make the editorial pages because of imprecise grammar and spelling.

To these ordinary Americans of all races, creeds and gender, Judge Bork speaks not of justice or even mercy but instead of, "competing gratifications."

It is my contention that this reflects a basic misunderstanding of what America is all about. America is about an economy which has flourished and expanded as it has opened the doors of opportunity for the poor, the immigrant and the oppressed, it is not a closed order of "competing gratifications."

The South represents an example of expanded progress and profit as it has become more racially inclusive. The rights and privileges of the majority, we have seen, are dramatically increased by the end of racial strife.

The Declaration of Independence prophetically proclaimed that, "all men are endowed by their creator with certain inalienable rights," and even though our founding fathers could not face the question of slavery at that moment in history, they opened the door to Constitutional evolution by ending the slave trades 20 years hence.

History and technology are propelling us at break neck speed into a challenging, awe-inspiring and even frightening future. The Supreme Court must be visionary and courageous as we seek to "preserve liberty for ourselves and our posterity."

The CHAIRMAN. Thank you very much, Mr. Mayor. I only have one brief question and then I will yield to Senator Thurmond.

Your statement, because of your experience, is obviously a compelling one: But I would like to ask you about one aspect of the statement, and only one, and that is that you make the point, as I understood it—correct me if I am wrong—that it is not merely whether or not he would go back and undo things, but that there is much left to be done. And part of what is left to be done still has not been poured in concrete in the law.

For example, affirmative action, the continuation of issues that will arise about the accommodation of the rights of minorities—Blacks in particular, but all Americans—that are going to come up in the future. Is that the point you are making?

Mayor YOUNG. It is. But I was trying to make the point that the victories of the South and the progress of the South, the $41 billion worth of investment in the Atlanta area is not going just to black people. There is a level of progress and prosperity in Atlanta and Birmingham and Jacksonville and Tampa that could not have been imagined in a segregated society, or in a society where the race question was still a matter of contention. It is the fact that it is settled for all practical purposes, which makes this possible.

And yet, even as we say it is settled, with more and more women—women heads of households, women starting business, more and more women and children being in poverty, we are finding that we have got to use our affirmative actions statutes at the city level to encourage women to be entrepreneurs. And we have created—set aside for female entrepreneurs to give them a chance to get into the mainstream of the economy and it is working for us.

The CHAIRMAN. I think the—and I will conclude with this—the point that I have heard you make before, you have made to me personally, you have made publicly, you have made here again, that I think is worth noting in the record, that notwithstanding what non-southerners and non-border State folks think, that, in my view—and the point you are making, I think—is that the South is well within the mainstream of America on race, and quite frankly, in my view, in many ways ahead of the rest of the nation on the issue.

Mayor YOUNG. Well, we have had to struggle with the problem and we have not been able to escape it. But we could not have done what we have without a court system.

The CHAIRMAN. I yield to my colleague from South Carolina. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Mayor, we are glad to have you here. We are running so far behind I am going to forego any questions.

The CHAIRMAN. Thank you very much. Senator Kennedy.

Senator KENNEDY. Mayor, I think you have made an extraordinary, eloquent statement and have brought back those times in the early part of the 1960's when the protections of the first amendment for Dr. King, yourself, and many other courageous people, white and black alike in the South, were really being tested with nonviolent demonstrations to protest laws which had existed on the books in many parts of our country that separated the races.

I imagine one of the feelings that you have today is for the importance and the significance of the enhanced first amendment rights guaranteed under the Constitution and the power those rights had in preserving nonviolence in our society and how they permitted you and others to be able to raise the specter of the laws which discriminated against individuals on the basis of their skin color.

Do you believe, having gone through that period, and looking down the road in terms of the future, that we should risk placing someone on the Court who, it certainly would appear, both in terms of statements and speeches, to have a more cramped view of the first amendment than has been accepted by the current Supreme Court. Would you be concerned about that as well?

Mayor YOUNG. Well, I would, because some of the things that have come from Judge Bork, some of his theorizing about the first amendment, Bull Connor would not have even considered. The notion that Martin Luther King would not have the right to stand up and advocate the deliberate violation of an ordinance in order to test its worth in the courts, and the advocacy of doing that, I think is frightening. We never had any problem from the Bull Connors until we actually got out and confronted their authority in the streets.

I think Judge Bork's intellectual threat is that it is a kind of a game with him, it seems, to the lay person looking on from outside. It is a game being played with other people's lives, and to think that we would not have been able to give the kind of aggressive non-violent leadership during that period is, to me, also frightening.

Senator KENNEDY. During the course of the examination of Judge Bork, I reviewed in some detail his opposition to the *Shelley* v. *Kraemer,* the restrictive covenants decision; the position that he took in terms of the poll tax—where he was not aroused about its discriminatory features either on race or against those that are experiencing poverty; the one man, one vote decision, which he opposed; the striking down of the literacy test, which he opposed, and the whole range of different questions. Many of us saw in the period of the 1960's a number of measures really discouraged minorities and poor people from being able to involve themselves in what was the most basic and fundamental right of all, and that is the right to vote and participate in the democracy.

We have discussed his opposition to the public accommodations law. Dr. King and yourself were here, it was August of 1963, when he was the author of that article opposing that particular provision. But the whole focus in the country was on this issue. And also on his willingness to oppose those provisions that require equality in employment.

Now much is being made in terms of whether you are talking about mainstream or not mainstream. But what would Atlanta look like today if his position had been sustained in each of those areas, and what would it mean in terms of the New South, which you so eloquently speak to, if his positions had been the majority positions in the courts?

Mayor YOUNG. It is frightening to even anticipate it, but if nonviolent leadership had been restrained or jailed, it would not have been an end to it. These rights are inalienable. We are endowed by our creator with those rights. All Americans, black and white, have come up believing give me liberty or give me death.

It would have produced a kind of turmoil that is unimaginable now. And I hesitate to even go back and think about it, because I think we are beyond it. But we clearly could not have had a convention industry employing 81,000 people in Atlanta. We even would not have had people investing in those kinds of hotels to make possible a convention industry. Money is coming to the United States, and one of the reasons our economy has been able to survive is that the one asset that we have in competition to the rest of the world is we have stability and security.

I say that economic stability and security in the United States rests on a constitutional framework that has been interpreted by a court that has been sensitive to the trends of history and to people. And it is not enough to say you are right 10 years late.

What you need is somebody sensitive to what is going on at the time, because these are important decisions. In fact, I have got to get back home because I am being picketed now. I have been sued under the 14th amendment and found guilty interestingly enough because an administration that is predominantly, well half and half, black and white was charged by a young white male with discrimination because we hired a white female. And the federal courts extended to him the protection of the 14th amendment.

And I did not like to admit it, and fortunately they did not find me personally guilty. But when you come right down to it, these human rights' amendments are vital to the American way of life, and it is much better for the government to be restrained in relationship to abuse of individual rights and freedom than for any government, however well intentioned or honorable as I think mine is, to overrun the rights of a single individual. That is what America is all about.

Senator KENNEDY. What you are basically saying is that we should not take a risk with an individual who may reopen old wounds and force us to refight old battles, when we thought we have made progress to make this a better land and a better country in these past years. We should not risk someone who has taken serious exception to those landmark decisions which have really struck at the core of racism.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Mayor Young, I have read your 10-page statement, and I believe I understand the considerations that you are raising, and I am going to be very brief because we are falling way behind and we are trying to maintain an October 1st date, but just a couple of questions.

In your testimony, you refer to a suit by a young white man suing you under the 14th amendment. The statement shows that you are familiar with Judge Bork's philosophy, and you may know that in his writings he said that the 14th amendment—he said that the framers was to have it apply only to blacks.

Now if Judge Bork were correct on that and had adhered to that view, you would have been immuned from suit by that young white male. Would that make any difference on your opinion of Judge Bork?

Mayor YOUNG. Well, no, because I think we probably deserve to be sued. At least, he thought we deserve to be sued. And I think it is better—the purpose of the Constitution, it seems to me, is to restrain government from taking advantage of people. And I think there is at least a measure of doubt in my mind that, though we thought we were operating without discrimination, that there possibly was some level of discrimination there, and the courts so decided. And we just decided not to appeal.

Senator SPECTER. I thought that would be your position, and I understand it.

Did Judge Bork's position make any difference to you last week when he said that he would accept the clear and present danger test as the freedom of speech, and that as a matter of settled law he would accept the application of equal protection of the law to apply not only to blacks and to ethnics, as he put it, but also to women and indigents and illegitimates?

Mayor YOUNG. It does, except that it does not answer my question, which is, you know, it is 20 years after the crisis. And I do not know that it helps very much to take this long. In fact, the thing that disturbs me is that none of these things was said before Judge Bork was nominated. And so it is a kind of a, you know, confirmation conversion.

And so we as preachers are always glad to see people converted, but you do not get converted and become the pastor of the church the next day or the archbishop the day after. There ought to be a little time to see what the conversion is all about. And I just express reservations about that.

Senator SPECTER. The only point in your prepared statement that I would ask you about would be the reference you make to the victories by President Reagan in 1980 and 1984, and let us say that they ought to be tempered by the loss of the Senate in 1986. And then you refer at page 5 to President Reagan's present attempt to transformation of the court. Like President Roosevelt's early attempts of transformation, it is simply not reflective of a clear national consensus of thought.

It seems to me that Supreme Court nominations really ought not to turn on election victories, not that the will of the people is irrelevant, but that the constitutional framework of our government is to protect minorities from the majority, and that there ought to be a more restraining influence in constitutional doctrine.

At least speaking for myself, that is what I have looked for in terms of whether Judge Bork fits within the tradition of constitutional jurisprudence, which is a protection of minority views, and that the critical question does not turn on who won the election and by how much or the Senate election, but really on the tradition of U.S. constitutional tradition, which, as I say, emphasizes protection of minorities. Would you care to comment on that?

Mayor YOUNG. I said, as I began, I am not commenting as a lawyer or scholar. I am a politician though. And I happen to believe that elections and the Constitution are about the way power is defined. And while we want to keep the Supreme Court as neutral as possible, when you get to critical times like this where a series of historic accidents, you might say, or maybe deliberate political action ended up taking Judge Tom Clark off the court, and Judge Goldberg going to the United Nations, and Judge Fortas not being confirmed.

You know, three strong judges that might be around and, if that were the case, it might be different today. But the thing that makes this so critical is that in the context of 322 appointments a transforming appointment on the Supreme Court, to have someone who is at least up until the time of confirmation extreme in his views to me makes it a political event.

I think the President made it political, and I think the Senate has a responsibility and an obligation to respond politically.

Senator SPECTER. Well, Mayor Young, if it turns on politics, then it might well be that the President has the prerogative of naming his man. If it turns on advise and consent function with the Senate being concerned about minority rights, then there may be a different conclusion depending on how we ultimately read Judge Bork's constitutional jurisprudence on equal protection in the first amendment.

Mayor YOUNG. I think though that I tried to say that——

Senator SPECTER. I am a member of the Senate Minority, you see. So it turns around a little bit for me.

Mayor YOUNG. But I would hope that Secretary Coleman addressed your legal concerns far better than I could. I am only qualified to talk politics, and I may not even be qualified to talk that.

Senator SPECTER. Well, I understand your point, and I thought it worth pursuing just for a moment or two, but you cannot keep politics out of it entirely. But to the extent you can, I think it is highly desirable, and that is why I focused on the constitutional tradition.

Thank you very much, Mayor Young.

Thank you, Mr. Chairman.

Senator KENNEDY. The Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. Mayor Young, back in the 1960s you were very active in the civil rights' movement. It is now 20, 25 years since those very active years.

I would like your candid and frank evaluation as to what the blacks of the South or the North, are saying about this nomination? What they are doing? Is there a degree of apprehension? Is there an indifference? Is it a non-issue?

I hear different reports. You are the mayor of a major city in the South, and you have been part of the mainstream of the civil rights' movement in this country. I hear that some churches get excited about it, and some do not.

I wonder if you are in a position to give us an honest appraisal as to whether blacks are very much concerned about this appointment, or whether there were just some prominent spokespersons who were saying they are excited about it.

Mayor YOUNG. I think that it is very hard for me to be objective about it. I would say that if you are talking about racial stability and security, that both blacks and whites want to maintain it.

I think that black citizens tend to be a bit more anxious because the Supreme Court has been literally the voice of God for us for so long. So it is a very critical issue.

I think that it is hard for people to dissect the kind of legal debate that has been going on with Judge Bork last week, where it is a discussion of footnotes and cases. We do not see the court—I mean, we do not see this as a legal struggle. We see it as an intensely personal struggle, a struggle for survival and for continued coexistence and the right to keep on as we are going.

But I do not think there is a great deal of difference. It probably breaks down on a variety of issues rather than by race. I think those that are concerned about the civil rights' issues are intensely concerned. There are probably some that are concerned about other privacy issues that have a different kind of concern.

But I would say that on the kind of testimony that I have addressed, there would be pretty close to a majority consensus across the South that things are going well, let us keep them going well.

Senator METZENBAUM. And you say there is a majority consensus, among blacks and whites alike, that the cooperative relationship presently existing might be harmed if Judge Bork were on the Court—or am I misreading your statement?

Mayor YOUNG. I think that is our fear that one or two court cases toppling the other way, could reintroduce a kind of polarization that we desperately have been struggling to put behind us.

Senator METZENBAUM. Actually, the thrust of my original question was the degree of concern that you are aware of, if you know, in the black community.

Mayor YOUNG. Well, I think there is a tremendous concern, and I have not been to a single gathering where this issue has not been discussed, and where "turn back the clock of history" language is usually used.

Senator METZENBAUM. Thank you very much.

Senator KENNEDY. Senator Humphrey.

Senator HUMPHREY. Another choice of titles—is it Ambassador, Mayor or Reverend?

Mayor YOUNG. Mayor is fine.

Senator HUMPHREY. Mr. Mayor, you have pointed out with great eloquence the astounding progress in Atlanta and throughout the South and indeed in our country in recent decades, all of which is a matter of great satisfaction to every American citizen.

But sort of implicit in that is the suggestion that somehow Robert Bork would block that kind of progress. You have not said that, but that is sort of implicit in your statement, it seems to me.

I simply want to reiterate—and frankly, that is all we are doing this week, as far as I can, is reiteration. I have not heard a new issue raised or a new facet explored this week.

But nonetheless I want to reiterate that as judge, and on that basis primarily, we ought to evaluate Robert Bork's capacity as a Supreme Court Justice, and on the basis of his record as a judge in the DC Circuit Court. He has had a fine record in the area of civil rights, equality for women and blacks and minorities, and even before that as Solicitor General that he filed amicus briefs in, I think it was, 15 or 17 cases where he wanted to expand or apply more broadly the coverage of various civil rights' statutes, and in many cases the Supreme Court would not go along with him. He wanted to apply them more broadly than even the Supreme Court was willing to do.

So I just want to clear the air on that point. It seemed to be an unspoken suggestion there. I do not know if you meant it that way, but that is sort of the way that it came across, that Robert Bork and those who believe that judges ought to be very careful to find, to divine, if you will, the true intent of the framers or the legislators or the democratically-elected members when resolving cases that they are somehow enemies of this kind of progress, which has been so beneficial to our whole society.

Yes, of course, Robert Bork has changed over the years, as have many members of this committee and as have you, Mr. Mayor. I know you have probably made a few statements as a passionate man that you would probably would phrase in other words at this point, expressed a few thoughts you wish you had not expressed some years ago. We all do that.

And I want to quote from a Wall Street Journal editorial of a few days ago, which makes the case rather well in this respect. "As a student of the University of Chicago, he, Bork, made the conversion from mild socialist to enthusiastic democratic capitalist. At Yale he moved from pure libertarian to the founders' view of ordered liberty under the rule of Constitutional law." Yes, of course, he has matured.

I find it unfortunate that his critics almost exclusively focus on his statements and his writings of 20, 25 years ago, and would have us ignore completely his record as a judge and Solicitor General. It is unfair on its face.

Mr. Chairman, we have been on this panel, including recess, for 6 hours. I guess that works out to about 5 hours. We have another panel. If we were to spend 5 hours on the next panel we would be here until 9 o'clock tonight, not counting recess time, so I am not going to ask any further questions.

I think out of fairness we ought to give the next panel as much time as we can. Obviously, they are not going to get equal time in terms of exact same number of minutes until we are here until well after the chickens have gone to bed. So I will cut it off right here.

Senator KENNEDY. The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. Mayor Young, good to see you again.

I should note for all the people who are here to testify, I am delighted you are, and I can say the same for the groups coming in tomorrow and the next day and on, both for Judge Bork and against Judge Bork. I would think that all of you would realize, though, that those of us on this panel will probably make up our mind predominantly if not exclusively based on what Judge Bork said in answer to our questions and the questions of each of us on both sides of this aisle.

I know in my case what he has said would answer for me really all the questions I had and give me enough substance to make up my mind of how to vote. I have heard, however, from an awful lot of other Senators who are quite interested, who are not on this committee, in what each of you are going to say. And because of that, especially, I think it is good that all of you—again, both those for and against Judge Bork—have taken the time to be here.

I know how hard it is to fit any time in anyone's schedule for anything these days, and you are each spending a great deal of time.

I would like to ask you, Mr. Mayor, Judge Bork said often in one way or another in his testimony that when minority rights are expanded, the rights of the majority are diminished. And I believe I am being fair to him when I say that he said, when pushed on that question, that is a simple matter of arithmetic. So let me ask you a question in this area.

When black southerners' rights were expanded, as indeed they were as a result of the civil rights movement, whose rights were diminished?

Mayor YOUNG. Actually, the rights of whites have expanded far beyond the rights of blacks as a result of the civil rights movement. I think you can put dollars and cents on that. Black income at the time Martin Luther King wrote "Stride Toward Freedom" was $18 billion annually, in 1958–59. Last year black income was $205 billion. At the same time, during the same period, the income gap between blacks and whites has actually widened.

The opportunities that are now flourishing in the city of Atlanta for whites would be impossible if they had not given basic human rights and human dignity to black citizens. I think that is one of the things that really disturbs me about Judge Bork's world view. I think it is very un-American. I think a free market capitalist economy is an expanding economy. It is an economy that grows as you bring people into the bottom, or anywhere in it.

It expands. It is an expansive concept. And it is not a closed economy.

Senator LEAHY. So you would not accept that there is some kind of an arithmetical or computer-type program that if you expand minority rights, then you have got to cut majority rights? What you are saying in effect is that, at least with the civil rights area, that when the rights of blacks were expanded, the rights of whites were expanded also?

Mayor YOUNG. If you will forgive me, Senator, that view really sounds rather Marxist, that you have got to have a class struggle to get justice for the people on the bottom.

Senator LEAHY. I am not suggesting this is my view.

Mayor YOUNG. No, I know. We proved that that is not the case, I think, in America; that the more we have expanded opportunities for the least of these God's children, the more those opportunities have accrued to the entire society.

Senator LEAHY. My last question, I spent most of my time—in fact, about an hour and a half or so—asking Judge Bork his position on the first amendment, predominantly freedom of speech questions. In fact, I might say that the questioning, again, on both sides of the aisle was very extensive and went into a lot of subjects. But that was one that, as the son of a printer and one that has published a weekly newspaper and all, it is something that has been driven home to me, the right of free speech.

So I was concerned about that.

We talked, again, about the civil rights movement and the Supreme Court decisions on segregation were, of course, extremely important to you. How important, also, were the Supreme Court decisions on the right of free speech to the civil rights movement?

Mayor YOUNG. Well, actually, the——

Senator LEAHY. And could you have had one, really, without that?

Mayor YOUNG. No, we could not. The civil rights movement was essentially a free speech movement. It was a first amendment, 14th amendment movement. And it was first the idea that we could achieve justice without racial segregation. That idea, I think, has been carried out. I mean, it is in the process of being realized in our nation in ways that surprise us all, particular those of us who grew up in a South that was quite different.

Senator LEAHY. Thank you very much, Mr. Mayor.

Senator METZENBAUM. Senator Grassley?

Senator GRASSLEY. Mr. Chairman, I have no questions, but I want to welcome Mayor Young. I know Mayor Young from 2 of the 6 years he spent in the House of Representatives as a forceful speaker for and representative for his point of view as well as his constituency and know him to be a man of integrity and I respect his view.

I am afraid on this appointment we probably will end up on opposite sides of the fence, but I appreciate very much his willingness to lend his expertise and leadership to this cause.

Senator METZENBAUM. Thank you, Senator Grassley. Senator Heflin?

Senator HEFLIN. I have no questions.

Senator METZENBAUM. Senator Humphrey?

Senator HUMPHREY. I have had my round. Thank you.

Senator METZENBAUM. Thank you very much, and thank you, Mayor Young. We appreciate having you appear with us.

Our next witness is Burke Marshall. We are happy to have you with us.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth so help you God?

Mr. MARSHALL. I do.

The CHAIRMAN. I apologize. We are trying to line up the following witnesses. Senator Thurmond has, since former Attorney General Levi—I beg your pardon—former Attorney General William French Smith has a plane to catch. If this witness is kept—and Mr. Marshall, I give you an option—either if you are going to be relatively short, we will go forward now and then get the Attorney General. If not, I would beg your forbearance and bring the Attorney General forward at this time and then come back to you.

Which do you think is likely to be the case?

Mr. MARSHALL. Well, Mr. Chairman, I am going to be fairly short, but I am not alone in the room

The CHAIRMAN. Why do we not just go forward then, Mr. Marshall. Thank you very much for you indulgence, and General Smith, we will be to you next.

Thank you for waiting, by the way, so long. You have been here all morning and I appreciate that.

TESTIMONY OF BURKE MARSHALL

Mr. **Marshall.** Mr. Chairman, I do have a very short statement and I will leave out parts of it in the interest of time. I appreciate the opportunity the committee has given me to appear before it.

I am presently the Nicholas de B. Katzenbach Professor of Law at the Yale Law School. I thought I should mention that, even——

The **Chairman.** Nicholas de Katzenbach is sitting behind you on your right.

Mr. **Marshall.** Right. And I have been teaching law at the Yale Law School since 1970, so my period of teaching has overlapped with that of Judge Bork twice and for a total of about 6 years.

I should say that what I have to say is based primarily, of necessity, on what Judge Bork has written and said on his own prior to these hearings. I realize that there is a body of judicial work also before the committee and the Senate and I have taken that work into account.

What I have not fully taken into account in this opening statement, because of pressures of time, is what Judge Bork said before this committee last week by way of modification or qualification or shifts in his views. His testimony does not appear to me to affect the thrust of what I have to say, although it would affect some details.

I would, of course, be glad to respond to questions from the committee on those matters.

I do not speak for the faculty of the Yale Law School, only for myself. And I wanted to mention to you that I have been in private practice. I worked for IBM for 5 years as their general counsel and senior vice president, and I also had the pleasure of serving for 4 years as Assistant Attorney General in charge of the civil rights division for President Kennedy and President Johnson.

The basic reason that I believe the Senate should not confirm Judge Bork's appointment is this. He has shown himself, in his writings, over and over again to be adamantly opposed to the long and well established judicial role of protecting individual liberty and disadvantaged an unpopular minority groups against government coercion. At that same time, he has appeared to me to have favored uncontrolled executive power, free from congressional constraints.

In this statement I would like to speak to just three areas of concern. The first is the general shape of Judge Bork's constitutional theories. It is easy to summarize his judicial philosophy from his writings. He has been opposed in those writings to any but the most narrow protection of personal freedoms and individual liberty against government intrusion.

In this area he does not appear to believe in an important aspect of the principle of government limited by law. That is to say, in the proposition which I believe to be basic to constitutional government, and especially to the Bill of Rights, that is the special role of the judicial branch vigorously to protect the people against the command of their government that controls or interferes with their rights to behave as they choose, to speak and write as they choose, to read what they choose, and to go make freely their own decisions about their own personal affairs.

The committee has heard lots of evidence on this and will hear a lot more. It is, of course, a fair and relevant question, one which the members of the committee and each Senator will have to answer personally, whether Judge Bork really believes what he has said on these matters and whether he would hold to and apply them if confirmed to the position of the Court.

I refer in the statement to some of the language that he has used in his criticism of the Court's opinions. It is, as has just been mentioned, very vigorous and, indeed, almost violent language, which is detailed in my statement. I also give, in the statement, some examples of logic which seem to me to be consistent, perhaps, with a judicial theoretician but not with a judge who is concerned with the wise and prudent use of judicial power under the Constitution, rather than theorizing about it.

The second area has to do with the great constitutional drive for equality. Judge Bork's conception of the equal protection clause in the past has been extraordinarily crabbed and narrow on any view of the matter. He has rejected the one person/one vote position of the Supreme Court, and he has also in past years stated that the clause should be confined to distinctions made by the State on the basis of race and analogous groups, thus denying its full protection to other historically disadvantaged groups, including women.

I realize that he has shifted his position on this and I will be glad to comment on that if any members of the committee wish me to do so. But it is on Judge Bork's approach to problems of racial disadvantages that I want to focus. It appears to me that at every turning point in the past quarter century on which there was still room for disagreement, Judge Bork has favored positions that did harm to minorities.

He has stated clearly that he accepts and defends the decision of the Court in the school desegregation case, but he has seemed cool to the measures necessary for its implementation. His position with respect to the public accommodations title of the Civil Rights Act of 1964 has been referred to over and over again.

Judge Bork has also criticized a number—as you have heard this morning—of critical Supreme Court cases in this area. But it is not my purpose to go through these cases one by one. No doubt there is something to his views in each case considered separately. No doubt there is indeed some arguably valid ground on which any Supreme Court decision can be described as incompletely or wrongly reasoned. But the real concern is with the tenor, the tone and the substance of Judge Bork's discussion of these matters.

It seems to have shown no awareness, no understanding of the enormity and the scope of the system of racial injustice that was implemented by law in this country for so many decades, and that insensitivity has to do, importantly, with what is wrong, both historically in terms of constitutional purpose, with Judge Bork's ungenerous concept of the role of the federal judiciary, and especially of the Supreme Court under the equal protection clause and other provisions of the Civil War Amendments.

It was the judiciary, followed by the executive branch, and then followed again by the Congress, with its actions in turn legitimated and fortified by the judiciary that enabled this nation finally to confront and to resolve under law the terrible burdens of racial oppression. It seems to me that Judge Bork's reactions to racial issues and his whole concept of the constitutional role of the federal judiciary would have stifled rather than supported the accomplishments of this period.

Mr. Chairman, I will omit the rest of my statement. I have a statement with respect to the concept of judicial restraint which I say in the statement seems to me to be a description of a result looking for an explanation. And I will go into that also if members of the committee choose, but I will not take more of the committee's time on the text of the statement I have submitted to the committee.

[Prepared statement follows:]

TESTIMONY OF BURKE MARSHALL ON THE NOMINATION OF JUDGE ROBERT H. BORK TO THE SUPREME COURT

Mr. Chairman, I appreciate very much the invitation of the Committee to appear before it and briefly to explain why I reluctantly, but with deep conviction, oppose the confirmation of Judge Bork to an appointment as an Associate Justice of the Supreme Court of the United States.

My present job is as the Nicholas deB. Katzenbach Professor of Law at the Yale Law School. I have been teaching at the Law School as a professor since 1970, mostly in the field of constitutional law and related subjects. From 1970 to 1975 I was in addition Deputy Dean of the school. I was thus a colleague of Judge Bork at Yale from 1970 to 1973 and again from 1977 to 1981, when he was appointed to his present position. My understanding of Judge Bork's approach to the role of the judiciary is therefore based in part on this personal acquaintance with his mind and intellectual framework, as well as on his public writings and speeches, which I have read with care.

I do not, of course, speak in any degree for the faculty of the Yale Law School, or for any other group; only for myself. Let me emphasize also by way of background that my assessment of Judge Bork's qualifications for a position on the Supreme Court is not based just on my work in constitutional law, or on colleagueship at Yale. I also spent ten years in private practice with the firm of Covington & Burling in Washington, and five years in corporate practice as vice-president and general counsel, and then senior vice-president, of the International

Business Machines Corporation. Finally, I served four years in the Department of Justice, as Assistant Attorney General in charge of the Civil Rights Division, from 1961 to 1965, under Presidents Kennedy and Johnson. My assessment of Judge Bork's qualifications is formed and affected by the experience and perspectives gained in all these capacities.

The basic reason I believe that the Senate should not confirm Judge Bork's appointment is this: He has shown himself over and over again to be adamantly opposed to the long and well-established judicial role of protecting individual liberty, and especially disadvantaged and unpopular minority groups, against government coercion. At the same time he has appeared to favor uncontrolled executive power, free from Congressional checks and balances. He finds support for these positions in his view of the Constitution, and of the judicial function under it. I think he is wholly wrong about these matters, and that the Senate should not endorse and legitimate his views by a vote for confirmation.

In this statement, I would like to speak to just three specific but crucial areas of concern, which illustrate the reasons for my opposition. The first has to do with the general shape of Judge Bork's constitutional theories; the second with the impact his approach would have, in the past and in the future, in the search for racial justice; and the third with the supposed concept of judicial restraint.

On the first of these points, it is easy, from what he has said in his academic writings over the past twenty-five years, to summarize Judge Bork's judicial philosophy. In short, he is opposed in almost every context to any but the narrowest judicial protection of personal freedoms and individual liberty against government intrusion. In this area he does not believe in the principle of government limited by law -- that is to say in the proposition, which I believe to be basic to constitutional government and especially the Bill of Rights, that it is a special role of the judicial branch vigorously to protect people against commands of their government that control or interfere with their rights to speak and write what they choose, to read what they want, to assemble peaceably to persuade others to heed their grievances, to worship or refrain from worship, in their own way, and to engage without government harassment in their own activities and make freely their own decisions about their personal affairs about family life, and the creation of children.

The Committee has been and will be furnished voluminous evidence from Judge Bork's writings and speeches concerning each of these areas, and I do not intend to go beyond their summary. It is clear that his general position departs radically from the thrust of the constitutional history of many decades. It is, of course, a fair and relevant question -- one which the members of the Committee and each Senator will have to answer personally -- whether Judge Bork really believes what he has said on these matters, and whether he would hold to and apply his beliefs if confirmed to a position on the Court. But both the language he has used and the way he thinks on such questions is highly revealing. As to language, he has continuously referred to years of Supreme Court decisions as "lawless", "unconstitutional", "improper", "utterly specious", "pernicious", "unprincipled", and "deficient" in "candor", "logic", and "legitimacy". As to his reasoning, let me mention two examples. In the first, he compared the use of contraceptives by married couples to smoke pollution by a public utility -- certainly one of the most extraordinarily insensitive analogies in legal writing. Judge Bork called the cases "identical". The second example is of his use of logic. Judge Bork rejects, as is well known, the Court's decision in Roe v. Wade, the abortion decision, which was joined, incidentally, by Chief Justice Burger and Justice Potter Stewart. Judge Bork calls the decision "unconstitutional", among other things. Because Roe is based on Griswold v. Connecticut, the contraceptive case just referred to, he rejects that case as well, and then because Griswold in turn is based on decisions protecting persons from compulsory sterilization, and safeguarding the right to send children to private schools, and to have them taught foreign languages there, "logic" compelled the conclusion, for Judge Bork, that those decisions also should not be respected. This, I believe, is because of an overriding and totally academic concern for consistency in abstract theory, as against the wise and prudent use of judicial power under the Constitution. It seems to me to reflect a judicial temperament wholly inappropriate to the work of the Supreme Court.

The second area of concern I would like to touch upon is that of the great constitutional drive for equality that stems from the Fourteenth Amendment. Judge Bork's general conception of the equal protection clause has been, of course, extraordinarily crabbed and narrow on any view of the matter. He completely rejects the constitutional requirement of one-person one-vote, accepted and acted on by the states over and over again during the past twenty years. He has also stated that the clause should be confined to distinctions made by the state on the basis of race and possibly ethnicity, thus denying its protection to other historically disadvantaged groups, including women. By these two strokes, he sweeps aside scores of Supreme Court decisions of the past three decades.

But it is on Judge Bork's approach to problems of racial disadvantages that I want to focus. It appears to me that at every turning point in the last quarter century on which there was still room for disagree-ment, Judge Bork favored the positions that did harm to minorities. He has stated clearly that he accepts and defends the decision of the Court in the School Desegregation cases; yet he has always seemed cool to the measures necessary for its implementation, which are the heart of the matter. In a celebrated piece in 1963, he opposed the public accommodations title to the Civil Rights Act of 1964 on the extraordinary theory that the liberty at stake was not that of the blacks turned away by the establishments covered by the statute, but that of the establishments themselves to discriminate against blacks. Judge Bork has since changed his mind on the issue, but it was, of course, one's position at the time that counted, not that taken some ten years later. Further his change of mind was described at the time he announced it -- in confirmation hearings before the Senate -- as based on the fact that the law worked, and not on some principle of justice.

Judge Bork has also criticized a number of more recent Supreme Court decisions concerned with racial justice. Among them are Harper v. Virginia Board of Education, which declared poll taxes to be unconstitutional restrictions on the right to vote in state elections; the Bakke case, permitting a degree of special consideration to benefit minority groups; and Katzenbach v. Morgan and Oregon v. Mitchell, confirming applications of congressional power to ensure the right to vote by minority citizens. It is frequently noted that he has even characterized as wrongly decided, as having "no warrant anywhere," the forty-year-old, unanimous decision in Shelley v. Kraemer, holding unenforceable racially restrictive covenants intended to prevent a willing white seller from conveying property to a willing black buyer.

But it is not my purpose to criticize Judge Bork for his views about any single one of these decisions. No doubt there is something to his views in each case, considered separately. No doubt there is indeed some arguably valid ground on which any Supreme Court decision can be described as incompletely or wrongly reasoned. The real concern is with the tenor, the tone and the substance of Judge Bork's discussion of these matters. It seems to show no awareness, no understanding of the enormity and the scope of the system of racial injustice that was implemented by law in this country. And that insensivity has to do importantly with what is wrong, both historically and in terms of constitutional purpose, with Judge Bork's ungenerous concept of the role of the federal judiciary, and especially the Supreme Court, under the equal protection clause and the other provisions of the Civil War amendments. It was the judiciary, followed by the executive, and then followed again by the Congress, with its actions in turn legitimated and fortified by the judiciary that enabled this nation finally to confront and to resolve under law the terrible burdens of racial oppression. It seems to me that Judge Bork's reactions to racial issues, and his whole concept of the constitutional role of the federal judiciary, would have stifled rather than supported the accomplishments of the period. It should be remembered that those accomplishments were not just substantive, but must also be measured in terms of the success of the civil rights movement as an instrument of protest. It fell to the federal judiciary to be a shelter not only for the rights of simple justice that were at stake, but also for the freedom effectively and massively to protest their denial. There thus occurred a period of what must be described as vigorous judicial implementation of long suppressed constitutional rights -- judicial activism, if you will, in that sense -- that is one of the glories of our national history. That role appears to me to be denied the judicial branch under Judge Bork's scheme of things, especially in view of his long-standing and explicit rejection of the Holmes-Brandeis approach to the scope of protection of advocacy of active resistance to an entrenched political system -- a test which was of course made authoritative doctrine by the Court at least thirty-five years ago.

Finally, let me say a word about what is called "judicial restraint." This is a term that has become for me the description of a result looking for an explanation. I do not credit Judge Bork with this obfuscation of language; he is quite precise in his own use of words. In the context of the issue now before the Senate, "judicial restraint" appears to mean deference to majoritarian rule, or the decisions of the legislature. This meaning does not seem to me to be capable of being applied consistently to Judge Bork's judicial philosophy. Certainly he advocates such deference when the issue turns on limitations on government interference with individual rights and personal liberties, even though the principal body of law involved, which is the Bill of Rights, is the most explicitly anti-majoritarian part of the Constitution. Yet he does not seem to believe in such deference for affirmative action programs that take the form of majoritarian efforts to confer special benefits on disadvantaged groups. Nor does he appear to apply it to majoritarian action in the form of Congressional checks on Presidential or executive branch decisions and behaviour, as in the case of the creation of the office of independent counsel. Sometimes, furthermore, Judge Bork seems to rely heavily on the text of the Constitution, yet he departs from this principle as well when he constructs his own theory of limitations on the Speech Clause, or when he discusses issues of structure. My point is not that Judge Bork is wrong on all these points, but that his judicial philosophy as a whole simply cannot be explained by some such simplified characterizations as "judicial restraint."

I should repeat that my views concerning Judge Bork's ideas and judicial philosophy rest primarily, of necessity, on what he has written and said on his own prior to these hearings. I realize that there is a body of judicial work also before the Committee and the Senate, and have taken that work into account, but in the main it is not concerned with the matters that I have discussed, and is in any event, as Judge Bork has said, constrained by the hierarchal structure of the judiciary, so that the court on which he sits is bound to follow what the Supreme Court has decided.

I thank the Committee very much for its time and attention.

The **Chairman.** Thank you very much, Professor. Let me make sure I understand.

At some point you have taught at the law school, at the same time that Judge Bork was teaching at the Yale Law School?

Mr. **Marshall.** From 1970 to 1973, and then from 1977 to 1981.

The **Chairman.** This must be difficult, for you to be here. Let me ask you another question.

You indicated that you would not—unless the committee wished you to—take the time to go into questions about the consistency—maybe the wrong word—of Judge Bork's testimony, and how that comported with what he has written, and what he has spoken, to your knowledge, about his views on many of the subjects he addressed during his testimony.

Did you have an opportunity to observe any of the testimony that Judge Bork gave in the last week?

Mr. **Marshall.** Mr. Chairman, I looked at some, I have read some, and I have read summaries of the rest of it, and I think that I understand the general tenor, maybe not the details on every point, but the general tenors of his discussions with members of the committee with respect to the principal areas of concern to the committee, and I will be glad to speak to those.

The **Chairman.** Well, the principal areas of concern, I think it is fair to say, that we focused on, were the 14th amendment, the right of privacy, the definition of liberty, the ninth amendment, the first amendment, and in a general sense, the judge's view of precedent.

Now it seemed to me, having read, I believe—I want to be clear about this. I believe that in everything that the judge had written, there was not a case that discussed Judge Bork's evolving notion of precedent and its role, and how much a Supreme Court Justice was bound by it, or he felt bound—seemed to have evolved from his writings, to what he said at the hearing. My impression, not yours.

Can you give me, to the extent you are able, your impression of Judge Bork's explanation of the role of precedent before the committee, as opposed to—if at all opposed to—his writings and/or utterances, to the best of your knowledge, on precedent prior to his testifying.

Mr. **Marshall.** Well, Mr. Chairman, prior to his testimony, he said on several occasions that it is a function of a Justice of the Supreme Court to overturn decisions, to vote to overturn decisions that the Justice thought were not based on principle, on constitutional principle.

Now I may say, Mr. Chairman, that many Justices over the course of history have said that they have thought that they should rethink for themselves constitutional questions, because the Congress and the legislative branch is unable to change their decisions on those matters, and if they have made a mistake, the Court has to change it itself. So that is not totally unorthodox, since what he had said before the committee—as I understood it—was that there are areas in which he feels that he would be bound by precedent because the precedent has established so many institutions of government, so many built-in expectations of our society, that he would not feel free to overturn them.

The one area that he has been specific about along those lines, that I know of, is the commerce clause decisions. I think that he may, on principle, disagree with the scope of the commerce clause, as it has been defined by the Supreme Court in the last 50 years, during this century.

But I think that he has been clear that he would not tamper with those decisions, although he might limit them in some cases where there are overriding or new principles of Federalism that have not been dealt with before.

The CHAIRMAN. How about the judge's view stated here—I think he acknowledged, and I look to my colleagues, Senators Hatch and Thurmond to correct me if I am wrong on this—I think that he indicated for the first time, having publicly articulated it—that is, that he accepted the standard of reasonableness for making determinations on due-process questions under the 14th amendment.

Mr. MARSHALL. On the equal protection clause.

The CHAIRMAN. Excuse me. On the equal protection clause, the 14th amendment. Is that a different standard than you anticipated he would use, or did you know that to be his standard? Did he talk about that?

Mr. MARSHALL. No, Mr. Chairman. There is nothing that I know of, in Judge Bork's scholarly work, or opinions, or speeches, or anywhere, prior to these hearings, that adopted that. His view of the equal protection clause, until recently, has been as I stated it in my text.

It has been that the core value protected by the equal protection clause is a value against racial discrimination, and he would extend that to analogues of racial discrimination, period.

In these hearings, as I understand them, he has said that the equal protection clause is not limited in its protection to those groups, but that it protects all groups. But in doing that he shifted, and adopted a new view of the standard of scrutiny that the Supreme Court would give.

Of course, Mr. Chairman, it has been true from the beginning, that the equal protection clause protects all groups. The whole issue has been the degree of scrutiny, the degree of judicial judgment that is brought to bear upon legislative determinations with respect to what groups to benefit and what groups to disadvantage in their legislation, and it is in that context that the so-called three-tier of scrutiny, triple tier of scrutiny came up under the equal protection clause.

Now to bring in other groups, and then apply a standard of reasonableness to all of them does two things, it seems to me.

One is that it unquestionably lessens the judicial protection of the groups that have heretofore been specially protected. That is, racial groups, women, illegitimate children, aliens, and possibly others. And the other is that it sort of leads up for judicial grabs, the determination of reasonableness across the whole spectrum of the equal protection clause litigation, in a way that seems to me, I must say, to be inconsistent with Judge Bork's general philosophy of judicial restraint and of not leaving that kind of discretion in the judiciary to decide what they think is reasonable and what they think is not reasonable, without any specific guiding standards inside the Constitution.

The CHAIRMAN. Thank you. I yield to the Senator from South Carolina.

Senator **THURMOND**. Thank you very much, Mr. Chairman.

Mr. Marshall, we are glad to have you here. On account of the lateness of the situation I am going to forego any questions.

The **CHAIRMAN**. The Senator from Ohio.

Senator **METZENBAUM**. Professor Marshall, you were a colleague of Judge Bork for many years at Yale. You are personally familiar with his philosophy. In all the years you have known him, did he ever say, prior to these hearings, that the equal protection clause applies to women?

Mr. **MARSHALL**. No, Senator. I think everything that I have seen that he has written and said has been to the contrary. That it has been limited to the protection, or at least the special protection of racial groups and their analogues, which I take are ethnic groups.

Senator **METZENBAUM**. How much confidence would you have that Judge Bork, if confirmed, would apply the equal protection clause in a vigorous and compassionate way, prohibit discrimination against women, blacks, and other disadvantaged members of our society?

Mr. **MARSHALL**. Senator, I think that is not an answerable question. At least it is not answerable to me. He has specifically adopted a new standard.

He has said in these hearings, that in his view, that any distinctions based on race are unreasonable, and that they therefore would flunk his test.

The trouble is that that is his view, and the test that he has announced is one of reasonableness. Now it may be that to other judges in the future, and even to Judge Bork in the future under evolving circumstances, some distinctions will be made by legislatures that he will view as reasonable.

The same with respect to women, Senator Metzenbaum. He has never favored giving special protection to women. He also said in these hearings that he thought that many distinctions between men and women were unreasonable.

But that is, you know, it seems to me, a substitution of the judge's view of reasonableness for somebody else's.

Senator **METZENBAUM**. He testified that he would apply the equal protection clause to women about the same way the Supreme Court does now.

However, he stated that the decision to strike down different minimum drinking ages for men and women trivialized—and that is his word—the Constitution.

As a professor, as the student of the law, can you reconcile those two statements?

Mr. **MARSHALL**. Senator, I think they illustrate what I just said. He has disparaged the opinion of the Court in *Craig* v. *Boren.* I think that is the opinion that you were referring to. So he thought that was wrong.

Now he takes a reasonableness standard. It seems to me that he probably would still think it was wrong, and that in that case at least, the distinction made between men and women was reasonable. So that is what I mean by—I do not think that this committee—and of course this is an evolving thing, it may take years to sort out if that standard is applied by the Supreme Court instead of the standard of scrutiny that is now applied. But I think it is highly unpredictable at least, Senator Metzenbaum.

Senator Metzenbaum. Thank you, Professor Marshall. Thank you for being with us. Our next witness is—Senator Hatch.

Senator Hatch. Professor Marshall, I just want to ask one question. It was reputed in a panel discussion last week at Yale, you said of Justice Frankfurter that, quote, "On many scores, I think he was a disaster as a Justice of the Supreme Court."

Is that correct?

Mr. Marshall. Something like that, Senator.

Senator Hatch. The point that I think needs to be made here is that given the similarity of Judge Bork, in many respects, to Justice Frankfurter—you know—in one sense this may be the central issue of this whole battle, and the debate.

Could Justice Frankfurter, who was one of the giants of American jurisprudence, and of American law, in any era—could he be confirmed today under the standards that are being applied to Judge Bork?

And under the ideological scrutiny that some, including yourself, are providing here today? And I have to say I fear that he would not.

Mr. Marshall. Senator, may I explain that?

Senator Hatch. Because as you know, he criticized the Court in the same areas that Judge Bork has been critical of the Court.

He was against one man, one vote. The *Baker* v. *Carr* decision. The *Reynolds* v. *Sims* decision. The poll tax cases. The *Harper* case.

He was probably on the wrong side on that, according to those whose ideology differ with him. The imminent lawlessness speech with regard to the *Brandenburg* case, and you can go on and on.

Mr. Marshall. Senator, my comment about Justice Frankfurter was made in the course of a discussion on this question: What value is to be put on academic credentials and an academic career in judging qualifications for sitting on the Supreme Court of the United States?

My point was, that what somebody did, and the function of somebody, as an academic was inconsistent, I think, with training to be a Justice, a good Justice of the Supreme Court of the United States.

Justice Frankfurter was difficult to get along with, with his colleagues. He lectured them. His opinions are full of lectures that are sort of repetitive.

He had a hard time deciding some matters. That comment did not, in any respect, go to Justice Frankfurter's substantive view with respect to the Constitution.

On his substantive view, Justice Frankfurter over and over again adopted a due-process standard for the implementation of substantive rights.

In fact the whole fight between Justice Frankfurter and Justice Black was on that issue, so that Justice Frankfurter's career with respect to that issue, and the privacy issue in these hearings—and I think would be with respect to this element of reasonableness as being the standard for equal protection clause, is inconsistent with Judge Bork's view.

Judge Bork is looking for certainty, bright lines, a constitutional theory that can be picked up and applied to any case that comes along.

Justice Frankfurter was constantly striving for flexibility, for decisions that were based on, as he said over and over again, that were rooted in the traditions of the country, and in the precedents of the Supreme Court.

So I think that on the merits, on the substantive merits, on what you have called ideology, Justice Frankfurter and Judge Bork are quite far apart.

Senator HATCH. Well, you and I differ on that, but nevertheless, it seems to me that it is an important point that has to be made. If Justice Frankfurter came up for his nomination today, he would have a heck of a time getting through certain members of this committee, and it would be on the basis of ideology.

And I think there are many similarities between Justice Frankfurter, and, now, Judge Bork, but be that as it may, we appreciate having you here.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. We are running 2 or 3 hours behind time, so I withhold asking any questions at this time.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Professor Marshall, you say in your statement you served three- and four-year tenures as a colleague with Professor Bork.

During that 7 years—is that right? About 7 years?

Mr. MARSHALL. About 7 years, Senator.

Senator GRASSLEY. Have you, during that period of time, been able to become acquainted with him enough, sit down and talk with him about his views on the Constitution, particularly how his views related to the protection of minority rights?

So you kind of feel like you really got to know him as an individual, other than just how he wrote, or what he wrote?

Mr. MARSHALL. Senator, there is nothing that I can tell you that is based—I know Judge Bork reasonably well as a colleague. I do not know him personally, as a personal friend. I have been in many meetings with him, and conversations with him. I do not remember ever discussing with him, specifically, matters that involved racial minorities. So I cannot add to his writings from my personal experience.

Senator GRASSLEY. Well, I ask that because those of us on this committee, we just spent more than 30 hours aggressively interviewing Robert Bork.

Is there anything in that more than 30 hours—and you said you have had a chance to see or review part of it—to suggest that Judge Bork lacks judicial temperament, and the integrity that a person serving on the Supreme Court ought to have?

Mr. MARSHALL. Senator, it depends on what you mean by "temperament." I am sure that Judge Bork is an intelligent and skilled lawyer, and he has been an intelligent and skilled judge so far as I know.

He would not throw chalk at people. He would behave himself on the bench. He has that kind of judicial temperament. What I am concerned about is his academic, or highly intellectual approach to an institution, and the work of an institution which is effectively a very important policy-making institution, one of the three branches of our government, and I do not think that it should be looked at, or its work should be looked at, like an intellectual enterprise, an intellectual game. Now that may not be a matter of temperament, as you put it.

Senator GRASSLEY. Well, is there anything, from your perspective, as you viewed Judge Bork, as you got acquainted with him, whether you were a personal friend or not—you said you were not—but you obviously had more contact with him than most members of this committee did.

Is there anything that you know about him we ought to be aware of—and again, keeping in mind these 30 hours we spent with him, and there is going to be a written record for us to study.

Is there anything about Judge Bork that maybe we ought to take into consideration? In any way, would he mislead us, under oath, about whether or not he would uphold the Constitution?

Mr. MARSHALL. I do not believe he would mislead you at all under oath about whether he would uphold the Constitution as he sees it.

Senator GRASSLEY. You would declare then from the standpoint of his intellect and as he approached the subject that he is intellectually honest?

Mr. MARSHALL. Yes. That does not mean he is predictable, but I think that he is intellectually coherent as he develops his theories and then changes them.

And he is certainly honest in the personal sense, Senator, if that is what you are asking.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Marshall, I had upset myself for a few moments, but I have heard about all of your testimony on radio and television. It is easy to attend these hearings; you do not have to be here. They follow you wherever you go.

I wanted to ask you a few questions. You knew and know Judge Bork. I believe I saw you quoted in the press saying that as a matter of integrity you trusted him. I believe you testified pretty much to that effect today. Is that an accurate statement?

Mr. MARSHALL. I have no question about that, Senator.

Senator SPECTER. Professor Marshall, when he appeared here and testified, he did shift position, as I see it, but he ended up accepting more than the Supreme Court's interpretation of the Commerce clause as an acceptable settled law beyond what original intent was.

The CHAIRMAN. Excuse me. I hate to do this, Senator. I would like to ask if we can come back to the question. I am told Attorney General Smith has a 5:15 plane. Unless he comes up now, there is no chance of him making that plane.

Would you mind us interrupting at this point, and then we will come back to that question?

General Smith, would you come up and be sworn? Please come up, General Smith. If it is within minutes, yes. If not—General Smith, you are going to miss your plane.

Mr. SMITH. I am not going to make it anyway.

The CHAIRMAN. Well, if that is the case, then we will just complete the testimony. All right. Come back up, Mr. Marshall. Sorry.

Senator SPECTER. Professor Marshall, we were in the midst of examining doctrines which Judge Bork has accepted even though beyond the scope of original intent, and you had commented in your testimony that he had said the Commerce clause was accepted even though it was not what the framers intended.

In the course of his testimony here he went beyond that. For example, on the issue of clear and present danger he said that he accepted the *Brandenburg* decision, although he did not agree with it philosophically.

Now would you accept his statement that he would interpret *Brandenburg* v. *Ohio* on the clear and present danger test, the freedom of speech, the settled law and faithfully carry out that constitutional doctrine?

Mr. MARSHALL. Senator, I have no way of quarreling with that. If he said he is going to do that, I am sure he is going to do that. As was developed during Judge Bork's testimony, there are certain ambiguities about that statement, however. He has not said that he accepts the intellectual and historic and traditional underpinning of *Brandenburg*.

Senator SPECTER. On the contrary, he says he disagrees with it.

Mr. MARSHALL. He disagrees with it. Yet the sense dissents and the concurrence in *Whitney*, of Holmes and Brandeis are to my mind and to the mind of many scholars a part of the great tradition of the first amendment in this country.

So I think to say that he accepts *Brandenburg* as precedent and at the same time denies the historic purpose of *Brandenburg* is an ambiguous position. That gets us, Senator, into the question of what *Brandenburg* is, and *Brandenburg* is a holding in Ohio, I guess it was, that a statute was unconstitutional on its face. The Ohio court construed it not to have any clear and present danger test in it, relying on *Gitlow*.

So that in *Brandenburg* v. *Ohio*, all the court said really was that a statute framed in those terms is unconstitutional.

Now, as I believe you developed, Senator, in your colloquy with Judge Bork there are fact nuances, there are all kinds of ways that if you do not accept sort of the grand theory of the first amendment developed by Holmes and Brandeis, that the acceptance of *Brandenburg* as a precedent is a limited statement with respect to the scope of the first amendment in my judgment.

Senator SPECTER. Professor Marshall, there are two dominant legal doctrines, which are unresolved by Judge Bork's testimony as I see it. One is the free speech, clear and present danger issue, and the second is the equal protection clause. There are many more issues—the privacy issue or due process of the 14th amendment, an Executive, legislative conflict. There are many, many others, but these are the two that I want to ask you about

Now you say you know him. He says that he accepts the *Brandenburg* doctrine. I said to him "How could we be sure if you disagree with the philosophy, that you can apply it?" And he said, "Because I will do my very best. I am making commitments in this proceeding. I would look foolish in history."

You know the man, and that is why I ask you the question to give us whatever guidance and insights you can as to what he would do. You say that you think he would follow *Brandenburg*, and then you qualify it saying subject to disagreement with philosophical underpinnings.

But can you do any better than that, or is that as much as you can say?

Mr. MARSHALL. Senator, I do not think that there is anything from my personal acquaintance with Judge Bork that will cast any light on this. But I do think that his statement—he is a careful lawyer. He is careful in what he says, and his statement was that he accepted *Brandenburg* as a precedent and that he would not overturn it.

Senator SPECTER. And that he would apply it.

Mr. MARSHALL. And he would apply it. And what is a precedent for is the question? It is the precedent for the fact that a statute, written as that Ohio statute was, which was based on the syndicalism act, that was declared constitutional in *Gitlow*, is no longer constitutional.

I think, Senator Specter, that that does not tell me much with respect to in what was Judge Bork has agreed with you, or how he will approach the first amendment problems of that sort.

May I add, Senator Specter, that I am also in this area deeply troubled by Judge Bork's rejection of *Cohen* v. *California*. *Cohen* v. *California* involved explicitly political speech, and Judge Bork thinks it is wrongly decided because he thinks that the state can control the language, the way in which an explicitly political statement can be stated.

I think that that is also awfully open-ended and a matter of great concern to the first amendment people.

I have some reservations—if I may, I have one other point, Senator Specter in the first amendment area, because I think you are going to move to something else. I am concerned about him with respect to content neutrality.

The issue in *Finzer* v. *Barry* that is not much of a case really in a way—but the principal issue, the issue of principle is one of content neutrality. And he has written other things with respect to content neutrality, and the belief that the state can control speech on the basis of content because it does not like the possible acceptance of the message in the content that troubled me also.

Senator SPECTER. Professor Marshall, because of the shortage of time, let me move now to the equal protection issue. The upshot of where you come out on clear and present danger in the first amendment speech, you are inclined to accept him as an honorable man on what he says, but you have some doubts as to his ability to apply a doctrine where he does not agree with its philosophical basis. That is the essence of it?

Mr. MARSHALL. I think it just limits the meaningfulness of the statement that he will apply that as a precedent, yes, Senator.

Senator SPECTER. With respect to the issue of equal protection of the law, Senator Metzenbaum asked you if you had known about any time he had expanded equal protection of the law beyond what he had written that race was the core value, as you testified. In one of his speeches, he expanded it to ethnic matters.

Have you ever had any conversations with Judge Bork about this subject which would go beyond his written materials?

Mr. **Marshall**. No, I have not, Senator,

Senator **Specter**. So you know the same amount that we do from access to his written materials?

Mr. **Marshall**. That is right. His position on equal protection. His expansion of it—I am not sure that is a correct characterization of it—but his reformulation of it was a complete surprise to me.

Senator **Specter**. Well, he said in this room last week that he would be committed to the settled doctrine of equal protection, as the court has now applied it, beyond race and ethnic matters to include women and illegitimates and indigents and aliens, and so forth, as the court has interpreted it.

Would you have any reason to doubt his sincerity on that sweep of interpretation?

Mr. **Marshall**. No, Senator, but that is not the question. The question is the degree of scrutiny——

Senator **Specter**. Well, that is the next question; that is the next question which I am about to discuss with you, as I did with Secretary Coleman this morning.

But deal with my question for a moment. You would have no reason to doubt his sincerity in applying equal protection as he committed to under oath on the stand, so to speak, here?

Mr. **Marshall**. Yes. If I may say so, Senator, this may be apart from what you are asking me about, but there has never been any question to Judge Bork or anybody that it applies to gender classifications or illegitimacy classifications. The question has been: What degree of judicial scrutiny does the court give to those classifications?

And it has always been true that any classification is given some judicial scrutiny. The judicial scrutiny that is given historically for many decades has been is it a rational classification.

Senator **Specter**. Professor Marshall, as far as Judge Bork is concerned, that is not so based on his writings. He said in response to my question that the equal protection clause was the only basis to reach gender and indigents and illegitimates. And based on his writing, he said it did not apply. He would allow the majority rule to determine that without any judicial scrutiny until he expanded that range here.

Mr. **Marshall**. Well, what I am saying, Senator, is that I guess that I would have to accept that was his position but it is historically a totally untenable position.

Senator **Specter**. Well, okay. So you accept the position that he has taken here in the hearings.

Now the next question, which is the one I discussed at some length with former Transportation Secretary—and I will try to make this reasonably brief because we have so many more witnesses.

I will ask you the same question that I asked Secretary Coleman that you heard, and that is: Once Judge Bork has accepted Justice Stevens' articulation of a doctrine for equal protection of the law as Justice Stevens adopted it in *City of Cleborne* v. *Cleborne Living Center*, where Justice Stevens starts out disagreeing with the threetiered test and comes to what he classifies as the rational test, considering the tradition of disfavor, and of course this is the context where Justice Stevens does not have any ax to grind.

My question is: Are you sure that the prevailing Supreme Court test on equal protection of strict scrutiny is any different than the test articulated by Justice Stevens in the *Cleborne* case?

Mr. **MARSHALL**. I think it is, yes, Senator.

Senator **SPECTER**. Why?

Mr. **MARSHALL**. Because I think that Judge Stevens' test—as you say, Judge Stevens does not have any agenda. He is trying to clean up the doctrine, and he is trying to clean it up by having one test for all equal protection cases.

But I think to say that there is one test for all classifications and then further denote that test, characterize it as being one of reasonableness, both necessarily lowers the degree of scrutiny given to hitherto specially protected classes, and puts them on a par as far as the court is concerned with other classes that have not been specially protected. And that the consequence of that, Senator, over the years I could not predict.

But I notice that nobody but Justice Stevens has taken that position on the Supreme Court, I believe.

Senator **SPECTER**. Well, this is an evolving doctrine. As I pointed out this morning, you were here and heard me comment that in *Craig* v. *Boren*, trying to find a definition for equal protection of the law, there were nine Justices and there were seven opinions. So this is a doctrine which is very much in a state of flux.

And I am not sure that Justice Stevens' test is not as rigorous as strict scrutiny. There just has not been enough delineation to really follow it through, but I am interested very much in the opinion which you have given here.

The final question I have, Professor Marshall, turns on the statement which you have made objecting or raising a question as to what Judge Bork has said about Supreme Court decisions as lawless, unconstitutional, et cetera. You have not picked out the toughest language. The tougher language was that when there is a proceeding without any basis, that it is a sign of guilt of civil disobedience, or the language that if there is no basis for an argument, why not make the argument to the Joint Chiefs of Staff, which has a better way of carrying out its edicts.

But the question I have for you, that in the realm of professorial writing where you are trying to attract some attention for your doctrines and try to have some impact on the development of the law, why is it not fair to use this kind of strong language? Why is it not fair to use it really pretty much by analogy to Holmes of strong language to the break of imminent violence, to try to carry forth an idea and to have it accepted?

Mr. **MARSHALL**. Senator, I used that language not to object to the use of language, but to illustrate the strength of the ideas. The question before the Senate is his ideas.

Now his ideas have been shifted perhaps, qualified, modified, explained, elaborated, whatever word you want to use, in these hearings. But prior to this, I am saying, Senator, that he was not just throwing out ideas. He was preaching, and he was preaching very, very strongly.

Senator **Specter**. How does that differ with throwing out ideas?

Mr. **Marshall**. I think, Senator, it goes to the question of whether or not he is sort of playing around or whether he is saying something that he is deeply committed to. And I think that this language, among other things, shows that he was deeply committed to the ideas behind them, and that the ideas behind them are what he has described over and over again, that in connection with a contest, a contest between personal liberty, individual freedom and majoritarian rule, even on questions of personal morality, that it is the majoritarian rule as the rule of government coercion that prevails unless he can find a very specific and very compelling, an inescapable constitutional prohibition against that government action.

Senator **Specter**. Thank you very much, Mr. Chairman.

Thank you, Professor Marshall.

The **Chairman**. Does my colleague from New Hampshire have any questions?

Senator **Humphrey**. I just wanted to follow up very quickly on the colloquy between the professor and Senator Specter, and point out that once again the most frequently cited source of Judge Bork's academic views, or his views as an academic, is the 1971 Indiana Law Journal, a 26-year-old publication, in which he says, very clearly at the outset, and I think at the conclusion, "These are tentative thoughts." And so that is, I think, more of the nature of inquiry than it is the nature of preaching as you seem to suggest, Professor.

When someone clearly says "These are tentative thoughts," that is hardly a case of someone pouring "fire and brimstone" from the pulpit.

Mr. **Marshall**. But Senator, he has said, as I am sure you know—it is in the record—over and over again, that those are the ideas—he says—pretty well the ideas that I developed in 1971, are the ideas I believe in.

Now I think that he has modified them, and I think that there was one sort of totally untenable idea in there, and that is that the first amendment was limited in its protection to explicitly political speech and did not cover anything else.

And I think that over the years, in answer to academic combat, that he has abandoned that idea because it was never a tenable idea. But with respect to the approach, with respect to the judicial philosophy, with respect to the notion of what the judicial function is with respect to the privacy cases—all of that in his 1971 article—he has generally held to.

Senator **Humphrey**. Mr. Chairman, out of respect for our witnesses who are waiting I will not ask for further time, but let me make this observation, that a very unfortunate decision has developed here, not through any fault of the chairman, or any member, or anyone.

But we have spent 9 hours on one panel. We have got two more panels waiting. We have kept Attorneys General sitting on their keesters for hours on end here, not that they are anybody special at this point, they are just ordinary citizens, but we must be very careful that this citizen does not repeat, out of fairness to other witnesses, and of fairness to both sides. We just must not let this happen again.

I do not know what the solution is, but it is terrible, really is unfortunate.

The **Chairman**. I guess to stop is the solution. I want to thank you very much.

Now let me ask, while General Levi and General Smith are coming forward, if those two people would come forward, let me explain what my intentions are for the remainder of the day.

We did start at 10. We have been going a total of 6 hours with a 1-hour break.

My intention is to continue to go until we are finished with today's witnesses, including the bar association.

So let us go to General Smith and General Levi, and then we will go with Mr. Katzenbach who has also been waiting, and then we will go with probably one of the best-loved Senators and Attorneys General. Attorney General William Saxbe who we have missed seeing around here, and I believe also Secretary Rogers, Attorney General Rogers.

And then we will go with the ABA.

I understand, General Levi, that you have the next plane to catch, so why don't we begin with you, have questions of you, and let you go, if we can, and I hope everyone remembers their own words about wanting to keep this short.

I would note that the chairman has not asked more than 5 to 7 minutes worth of questions of any witness.

If we all did that, maybe we would make it.

General Levi, welcome back.

Mr. **Levi**. Thank you. Aren't you going to make me swear anything?

The **Chairman**. Oh, I should. I have so much confidence in you. I will swear you both.

Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. **Levi**. I do.

Mr. **French Smith**. I do.

The **Chairman**. Thanks for reminding me, General. Fire away.

TESTIMONY OF EDWARD LEVI

Mr. Levi. Mr. Chairman, members of the committee, I have a statement, and the statement is built around my peculiar idea, I suppose, of my relationship with Judge Bork, since I have seen him at different periods over a long time.

Five years ago, I had the honor of speaking at the formal investiture of Judge Bork as a judge of the U.S. Court of Appeals.

I then stated that my credential for this privilege was that he was my friend, and that my association with him began years ago when he was a student at the University of Chicago.

He came to the university after service in the Marine Corps. I believe I was the professor of the first class which he took in the law school. That was in 1948.

It was a course in jurisprudence called Elements of the Law, and this seems to have been a seminar on that.

Robert Bork was called back to military service in 1950 and returned as a law student in the summer of 1952. Then I participated with Aaron Director, an influential and pioneering scholar in the field of law and economics in conducting the course in competition and monopoly, or, you might say antitrust law, which Robert Bork took as a student in the spring of 1953, just before he received his law degree.

He then stayed on for an additional year at the invitation of the law faculty as a research associate in the law school's program in law and economics, and during that year he wrote a most important essay on vertical integration and the Sherman Act, "The Legal History of an Economic Misconception."

In 1973, after years in the practice of law, and in teaching at Yale Law School, Robert Bork, as we know, became Solicitor General of the United States, and I was most fortunate to have him in the Department of Justice as Solicitor General when I became Attorney General in February 1975.

We worked together with our other colleagues, including Harold Tyler, and many, many others, with what I trust was a sensitivity to the basic values of the law.

I recite these facts by way of disclosure, and also to claim some basis for having an informed judgment about him. I gather from the questions which have been asked of Robert Bork, that there is an understandable interest in four questions, and then, perhaps, a final question.

The first question is does he have views, and the answer to that clearly is yes, he does. He has an inquiring and powerful mind. He cares about our society and he cares about people, and he cares about we can best have a good society under our constitutional system.

When I first knew him he was a student responding to the writings of the great philosophers, and was also learning about the craft and techniques of the law.

It may be of interest to you to know that the first assignment in the elements course which he took in 1948 was the first book of Plato's "Republic" which is about the meaning of justice.

Socrates, in that book, is attempting to answer the charge that justice is nothing other than that which is advantageous to the stronger.

Socrates appears to have demolished such a charge, but is clearly not satisfied, nor should he have been with his own answer.

Now, if you think about that, and the terms of the development and the retention of persistent inquiries, Robert Bork speaking at the University of San Diego School of Law, in 1985, spoke about the Madisonian dilemma, the evolution of which he said has always been and always will be the problem for constitutional law.

The United States, Bork said, was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of law, simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control.

The dilemma, he said, is that neither the majority nor the minority can be trusted to define the proper sphere of democratic authority and individual liberty.

The first would court tyranny by the majority, the second tyranny by the minority. Over time, Bork said, it has come to be thought that the resolution of this problem—the definition of majority and minority freedom—is primarily the function of the judiciary, and most especially the function of the Supreme Court.

That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legislative right to govern.

And then he says, asks the question, how can that be done?

Now the second question is, does he change his views? Here, I think the answer is also, clearly, yes. We know he has done so. There was a time when he took the position, not unknown to some quite distinguished economists—which does not make their views on this correct—that civil rights could be better protected simply through the removal of government-imposed segregation, a position which he later rejected.

One of the consequences of having an inquiring mind is that you do change positions. The third question is would he change his views for personal gain?

To that, my experience with him is that I give a resounding no. I have never seen that happen in my experience with him. I am certain his integrity and inner strength, and the value he places on collective discourse would not permit that. And the fourth question is, are his views appropriate for a Supreme Court Justice?

The answer to this I think is yes, because he is concerned about those fundamental matters which a Supreme Court Justice should be concerned about, and because he has the knowledge and legal craftsmanship necessary for a truly great Justice.

I know there is concern about *Roe* v. *Wade* and the right of privacy, but *Roe* v. *Wade* is not in trouble because of Robert Bork.

In 1976, Archibald Cox, in his book "The Role of the Supreme Court in American Government" wrote about *Roe* v. *Wade* as follows:

> My criticism of *Roe* v. *Wade* is that the Court failed to establish the legitimacy of the decision by articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences.

And Cox continues:

> Nor can I articulate such a principle, unless it be that a State cannot interfere with individual decisions relating to sex, procreation and family, with only a moral or a philosophical state justification, a principle,

Cox says:

> which I cannot accept or believe will be accepted by the American people.
>
> The failure to confront the issue in principle terms—I am still reading Cox—leaves the opinion to read like a set of hospital rules and regulations whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion, or new advances in providing for the separate existence of a fetus.
>
> Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either the natural law or the Constitution.

Then Cox goes on to say:

> Constitutional rights ought not be created under the due process clause, unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to life them above the level of the pragmatic political judgments of a particular time and place.

I may add that Mr. Cox has also written copiously about *Roe* v. *Wade* in his new book just out, "The Court and the Constitution." I have a quote from that but I am not going to add it. I do not think it basically changes his position. It reflects a continued worry.

I think of both *Roe* v. *Wade* and the right of privacy as a separate concept. If they are to continue in the structure of our law, need a lawyer to establish a better basis for them. I do not know how he would come out, but I would trust Robert Bork to try to do that.

I suppose the final and all-embracing question about Bob Bork is what kind of a person is he? I certainly would not want to fault him for reading philosophy or economics, or being learned, or being concerned that the inner structure of the law is kept firm as the law develops, and changes as it must.

Or that the legitimacy of the Supreme Court is recognized so that in times of great stress and need—as during the period of the civil rights movement—its mandates are obeyed.

Nor would I really fault him for talking so much, or changing his mind, and looking for a better answer. He speaks because he wants an answer, he is trying out his views, and he hopes, if you do not agree, he will convince you or you will convince him, or that out of it a discussion will arise, a new understanding.

The law progresses through that kind of criticism, and through collegiality, and this really has been the strength of our special common law, which is our constitutional law.

In my experience with him, I would say that Judge Bork is an able person of honor, kindness, and fairness, and I would say with practical wisdom, which he has shown as an outstanding Solicitor General, and an outstanding and eloquent judge, and for the sake of our country, I very much hope he will be confirmed.

[Prepared statement follows:]

STATEMENT OF THE HONORABLE EDWARD LEVI

ON THE CONFIRMATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Five years ago I had the honor of speaking at the formal investiture of Robert Bork as a Judge of the United States Court of Appeals. I then stated that my credential for this privilege was that he was my friend, and that my association with him began years ago when he was a student at the University of Chicago. Robert Bork came to the University after service in the Marine Corps, I believe I was the professor in the first class which he took in the law school - that was in 1948. It was a course in jurisprudence called Elements of the Law. Robert Bork was called back to military service in 1950, and returned as a law student in the summer of 1952. I claim that I taught the last course he took as a law student. I participated with Aaron Director, an influential and pioneering scholar in the field of law and economics, in conducting the course in Competition and Monopoly, which Robert Bork took as a student in the Spring of 1953, just before he received his law degree. He then stayed on for an additional year at the invitation of the law faculty, as a research associate in the law school's program in law and economics. During that year he wrote an important essay on Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception. In 1973, after years in the practice of law and in teaching at Yale Law School, Robert Bork became Solicitor General for the United States. I was most fortunate to have him there when I became Attorney General in February 1975. For almost two years thereafter we were colleagues in the Department. We worked together with our other colleagues, including Harold Tyler and many, many others, with what I think was a sensitivity to the basic values of the law.

I recite these facts by way of disclosure and also to claim some basis for having an informed judgment about him.

I gather from the questions which have been asked of Robert Bork that there is understandable interest in four questions, and then perhaps a final question. The first question is "Does he have views?" The answer to that clearly is "yes he does." He has an inquiring and powerful mind. He cares about our society, and he cares about people, and he cares about how we can best have a good society under our constitutional system. When I first knew him, he was a student responding to the writings of the great philosophers, and was also learning about the craft and techniques of the law. It may be of interest to you to know that the first assignment in the Elements course which he took in 1948 was the first book of Plato's Republic, which is about the meaning of justice. Socrates in that book is attempting to answer the charge that justice is nothing other than that which is advantageous to the stronger. Socrates appears to have demolished such a charge but is clearly not satisfied - nor should he have been with his own answer. Robert Bork, speaking at the University of San Diego School of Law in 1985, spoke about the Madisonian dilemma - the revolution of which he said has always been and always will be the problem for constitutional law. "The United States," Bork said, "was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper sphere of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority."

"Over time" Bork said, "It has come to be thought that the resolution of the Madison problem - the definition of majority and minority freedom - is primarily the function of the judiciary, and most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legislative right to govern. How can that be done.

The second question is "Does he change his views?" Here I think the answer is also clearly "yes". We know he has done so. There was a time when he took the position, not unknown to some economists, that civil rights could be better protected simply through the removal of government imposed segregation - a position which he later rejected. One of the consequences of having an enquiring mind is that you do change positions.

The third question is would he change his views for personal gain? To that I give a resounding "no". I have never seen that happen in my experience with him. I am certain his integrity and inner strength and the value he places on collective discourse would not permit it.

The fourth question is: "Are his views appropriate for a Supreme Court justice?" The answer to this is "yes", because he is concerned about those fundamental matters which a Supreme Court Justice should be concerned about, and because he has the knowledge and legal craftsmanship necessary for a truly great justice.

I know there is concern about Roe v. Wade and the right of privacy. But Roe v. Wade is not in trouble because of Robert Bork. In 1976 Arhibald Cox in his book "The Role of the Supreme Court in American Government" wrote about Roe v. Wade as follows: "My criticism of Roe v. Wade is that the Court failed to establish the legitimacy of the decision by articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences." Cox continues, Nor can I articulate such a principle-unless it be that a State cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical State justification: a principle which I cannot accept or believe will be accepted by the American people. The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulation, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a fetus. Neither historian, laymen, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either the natural law or the Constitution. Cox goes on to say constitutional rights ought not be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them about the level of the pragmatic political judgments of a particular time and place." (I may add that Mr. Cox has also written copiously about the problems of *Roe* v. *Wade*, in his new book, *The Court and the Constitution*).

I think both *Roe* v. *Wade* and the right of privacy as a separate concept, if they are to continue in the structure of our law, need a lawyer to establish a better basis for them. I don't know how he would come out, but I would trust Robert Bork to try to do that.

I suppose the final and all embracing question about Bob Bork is what kind of a person is he. I certainly would not want to fault him for reading philosophy or economics, or being learned, or being concerned that the inner structure of the law is kept firm as the law develops and changes as it must, or that the legitimacy of the Supreme Court is recognized so that in times of great stress its mandates are obeyed. Nor would I really fault him for talking so much or changing his mind and looking for a beter answer. Bob Bork speaks because he wants an answer; he is trying out his views and he hopes if you don't agree, he will convince you or you will convince him, or that out of the discussion will arise a new understanding. The law progresses through criticism, and through collegiality, and this really has been the strength of our special common law.

Judge Bork is an able person, of honor, kindness, and fairness and, I would say, with practical wisdom, which he has shown, as an outstanding Solicitor General and an outstanding and eloquent judge. For the sake of our country, I very much hope he will be confirmed.

The CHAIRMAN. Thank you. We are going to proceed right to questions, General Levi, and then if you do not mind, General Smith, and to give you an opportunity to catch your plane, and I will forebear and probably submit only two questions to you in writing, and I yield to my colleague from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

General Levi, we are glad to see you again, and glad to have you back in Washington.

You were Attorney General during the presidency of Gerald Ford, I believe. During your time at least there was one appointee to the Supreme Court, Justice Stevens, was it not?

Mr. LEVI. Yes.

Senator THURMOND. Was there another, or was he the only one?

Mr. LEVI. He was the only one. It was the only opportunity we had.

Senator THURMOND. How is that?

Mr. LEVI. It was the only opportunity that we had.

Senator THURMOND. That is right.

Now we have been going on here for days and days, and hours and hours, discussing equal protection, racial matters, privacy matters, executive power, and free speech, and all those things.

There is no use in going into all of these questions with you. There is only one question we ought to know from you, and that is this. Is it your opinion that Judge Bork has the competency, the dedication, the courage, the character and integrity, and the fairness to be a Justice of the Supreme Court?

Mr. LEVI. Absolutely.

Senator THURMOND. That is all. Thank you.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. No questions.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I do not think this works.

The CHAIRMAN. It is not a plot, Orrin. I noticed that, too. Hold on just a second. There you go. Now it is working.

Senator HATCH. Once again, you have known Judge Bork all of his life, or, most of his life, certainly his professional life, from since the time he went to law school, and you, better than anyone else, it seems to me would know, if his judicial philosophy is difficult to predict or has made marked changes.

Have you, during the time that you have known him, or during his TV testimony, or during his work as a judge, have you seen any significant shifts in his judicial philosophy or his judicial method?

Mr. LEVI. I think his judicial philosophy—well, you have to take it—during the period that he has been a judge, I don't know that I see dramatic shifts in his philosophy. If one takes it over the entire span of his career before he was a judge and before he was a government official, it is quite clear that he went in many different directions. By the time I saw him and worked with him as Solicitor General, I really have not seen dramatic changes; in part, because I think that his judicial philosophy is really quite central.

He works with the cases. He worries about those cases that his great predecessor judges all worried about, and I think he tries very hard to see how they can be worked into that kind of a structure where the law can be applied equally, which is, after all, an important part of justice. So I think there is an inner consistency to what he has done, but I also think that his views have changed. And I am not sure that his discussion with this rather strange assembly, if I may call you that, may not have had—may not have given him some thoughts, too.

That is, I explained, his method of working is to talk and in a sense to try to change his position. That is, to try to understand, to say am I right? If I am not right, tell me why I am wrong. It is true that the conversation I guess sometimes has been rough, but never really in the conversations with me.

The CHAIRMAN. If I may interrupt just a second. I have no intention of keeping you from speaking, General. I just want to remind you it is 5:30 now. You are welcome to stay and speak and my colleagues are welcome to ask you questions as long as they want because you deserve every bit of our attention. But I just want you to know it is 5:30, and they tell me your plane is at 6:15.

Senator HATCH. Well, I am only going to ask one more question, and mainly I will make it a statement, and that is one other problem that has arisen is the controversy in the Ford administration over the pocket veto. We have heard that Judge Bork, some people think he always sides with the executive branch against Congress. Yet here, while in the executive branch, he argued and eventually prevailed in defending Congress' rights against the executive, and to do this he had to overcome, as I understand it, executive opposition in the White House. But, ultimately, President Ford agreed with him and it went forward.

Is that a fair characterization of the pocket veto situation?

Mr. LEVI. It is. It is, yes.

Senator HATCH. Well, that is fine. That is all we need.

Mr. LEVI. I would like to add, if I can, very quickly and still catch a plane, that I know also that there may be some interest in the Boston school desegregation case which came up when I was Attorney General. He was Solicitor General.

There had been a decision of the court of appeals. The government was not a party, but there was a question as to whether we should file an amicus brief asking the Supreme Court to take the case. And that became a rather notorious incident, because even though we had 2 months of serious discussion about it at the Department hoping that it was a confidential discussion, of course it leaked and it became known all over the country and so on.

I understand from some quarter that there is a kind of a rumor that Solicitor General Bork wanted us to file the amicus brief to overturn the court of appeals decision which provided for large-scale, as you know, compulsory busing and what not. But we decided not to file the amicus brief, and I want to assure your committee that that was a judgment reached by both Judge Bork and me.

Senator HATCH. Well, thank you, sir.

The CHAIRMAN. Senator Heflin?

Senator HEFLIN. I will let you catch your plane.

The CHAIRMAN. Senator Grassley?

Senator GRASSLEY. No questions.

The CHAIRMAN. Senator Specter?

Senator SPECTER. One question only. Attorney General Levi, you commented that *Roe* v. *Wade* was not in trouble because of Judge

Bork, and then you quoted extensively from a statement made by Archibald Cox. And you said that what the case needed was a better lawyer and that you don't know how it would turn out, and I believe you said that you trust Robert Bork on that.

Do you mean to suggest that you think that he would uphold *Roe* v. *Wade*?

Mr. LEVI. Well, one can't make predictions of that kind. I think that I can predict this. That a Supreme Court Justice faced with the problem of a case such as *Roe* v. *Wade* would not take lightly the notion of overruling it.

It is a part of the fabric of our law, to some extent, but there is something wrong with it. It is misshapen. It doesn't fit. It does not pass the law that some of you may recall, the Karl Llewellyn law of fitness and flavor. It just is a strange thing. It reads like a statute. It is not clear what part of the Constitution it comes from. Its scope is uncertain, and it is based on—gives a great deal of credence to particular evidence which may completely shift it. And it is also not clear, and there will be many more cases on that, as to how it is applied.

So it really needs some lawyer-like attention. And I think as Judge Bork has said repeatedly, and I would say, I don't think the question is so much the result, although that kind of a result can perhaps be reached in much better ways, but the case itself cries out for a reformulation, a reunderstanding. Something has to be done.

One of the law professors, I think in an admiring way, said that it was a happening. It wasn't—it is not, a reasoned case. It was just a happening.

Senator SPECTER. Attorney General Levi, Judge Bork shifted his position on the clear and present danger test and expanded his view of equal protection of the law, but when it came to privacy in *Griswold* he talked in generalized principles about stare decisis but he made no commitments to this committee.

One of the cases that he decided on the court of appeals was *Dronenburg* involving the issue of discharge by the Navy of a homosexual, and in that case Judge Bork dealt directly with the issue of *Griswold*, disagreeing with it so much when there was a petition for consideration by the court en banc the other judges who hadn't sat on the case criticized Judge Bork for criticizing the Supreme Court, and Judge Bork then wrote another opinion saying that he felt, although bound by the Supreme Court decision, the necessity to comment or criticize it and that it would be disassembling if he didn't raise that kind of an issue.

So on that very forceful opinion in an exchange with the balance of the court, it seems to me Judge Bork has spoken rather explicitly recently as a judge on the *Griswold* issue. So that I would find it surprising, but I am interested in your view, that there is a—I see you articulating there is some realistic chance in your view that he would uphold the doctrine of privacy in the conclusion of *Roe* v. *Wade*.

Mr. LEVI. I am not sure that it would be put in terms of the doctrine of privacy. That is really one of the problems. If you take *Griswold* as a settled case, and based on the facts, nobody would want to reopen that or do anything about it.

It is not the result in that case that is now upsetting. It is that privacy is a construct that hasn't been worked out. No one knows its limitations, and the language itself is not helpful. And since one can't point—and there isn't agreement as to what part of the Constitution to point to in terms of helping to define it—it needs more work. It needs more lawyer's work.

Senator SPECTER. Well, I would like to pursue it, but we know the limitation of 6:15. Thank you very much, Attorney General.

The CHAIRMAN. I would ask my colleagues to—it is important the Attorney General catch the plane. I would ask them to forebear and let him catch his plane and submit their questions in writing. I hate to do that to those who haven't asked yet, but I know of no other way for him to be able to do it. Objection?

Senator METZENBAUM. He is not going to make the 6:15.

The CHAIRMAN. Well, he has time to make it, and we could probably get you a police escort to do it. I will talk to somebody important.

Senator Thurmond, would you see about getting a police escort for General Levi?

Thank you very much, General.

General Smith, welcome. Thank you for your forbearance. It is nice to see you back before this committee. I know it is some travail to come back East like this, but you are here to testify on an important matter, we take your opinion very seriously, and please proceed.

I am going to insist that my colleagues stick to 10 minutes in their questioning. I am now going to begin to cut every one of my colleagues off that go beyond 10 minutes.

TESTIMONY OF HON. WILLIAM FRENCH SMITH

Mr. SMITH. Thank you very much, Mr. Chairman. I should say that I am very pleased to be back, but particularly pleased to know that I can also leave. [Laughter.]

I want to express my thanks to you for being solicitous about these airplane schedules. They are a factor of life, and we are grateful to you for doing that.

I wanted to adopt as my own the comments of Attorney General Levi with respect to Judge Bork, and then to add some comments on my own which reflect the experience that I have had with him. Before doing that, though, I know that Senator Specter has been very interested in this question of *Griswold* v. *Connecticut* and the right of privacy, and I thought I might just relate to him the fact that I have a friend who was a very close friend of Justice Black, who asked Justice Black why he had dissented in that case. And Justice Black responded by saying, "Do you want nine old men"—and they were nine men at that time—"to decide and tell each of the States what laws are good and what laws are bad, particularly nine old men who make up an institution that has no guidelines in that area, who has no fact-finding facilities, and must decide only those cases and controversies that are presented to them, and whose decisions are final, final, final." That was Justice Black's response.

And I think in very simple terms, that raises or puts in focus in simple terms what the question is here, and the question is what should the power of the Supreme Court be? What are its powers as compared to other institutions of government under a system of separation of powers? And we all know that a power is a power and it can be exercised any way once it is lodged, and I would speculate, as would others, as to what the position would be of those who are opposing Judge Bork for this position if during the last 30 years that power had been exercised to create results contrary to the ones that have been created during that period.

In other words, if the last 30 years have been made up of *Lockner* and a host of other cases of that kind, so that the Supreme Court in exercising this power had produced a result or a series of results which were directly contrary to the results that those who now oppose his nomination would like to see happen, what would they be saying at this point? What would their position be with respect to whether or not Judge Bork's viewpoint with respect to so-called judicial restraint was correct or not? I say that I think it would be very interesting speculation.

I became intimately familiar with Robert Bork's career in 1981 when evaluating his suitability for appointment to the U.S. Court of Appeals for the District of Columbia Circuit, perhaps the most important appeals court after the Supreme Court. In considering whether to recommend that President Reagan nominate him for this prestigious post, I focused my attention on the three factors scrutinized by the American Bar Association in evaluating judicial candidates: personal qualifications, integrity and temperament.

Based on my consideration of these factors, I determined that Robert Bork was superbly qualified to serve on the court of appeals. Indeed, after an exhaustive search, I concluded that Judge Bork was the individual best qualified for appointment to the court.

It was apparent in 1981 that Judge Bork possessed impeccable professional credentials. He had compiled a superior academic record at the University of Chicago, where he served as executive editor of the University of Chicago Law Review. He had established a reputation as a legal scholar of the first rank during his 15 years of service on the Yale Law School faculty. He had also enjoyed a very successful career in private practice, having been elected to the partnership of Kirkland and Ellis. Last, but certainly not least, Robert Bork had rendered exemplary public service during a 4-year stint as Solicitor General of the United States. No one was better qualified professionally to sit on the court of appeals than Robert Bork.

In assessing Judge Bork's integrity, I closely scrutinized his writings and his record. His writings on judicial philosophy had stressed that a judge should be faithful to the words of the statutory and constitutional provision being interpreted. This philosophy is one that I, like Judge Bork, strongly endorse. It promotes judicial integrity. It is faithful to the rule of law. It constrains judges from imposing their own policy preferences on the public without legal authority. It thereby enhances predictability and respect for the law. In short, this philosophy requires that the law be applied fairly and consistently. It is a classic approach to judging with restraint. Judge Bork and I agree that it is the only approach that is truly compatible with our constitutionally-based, democratic form of government.

Judge Bork's record indicated that his conduct on the bench would be true to the model of judicial integrity that his writing so elegantly described. As a private practitioner, as a law professor and as a public servant, he had met the highest standards of integrity.

I closely studied the circumstances surrounding the evening when Solicitor General Bork obeyed President Nixon's order to dismiss Watergate Special Prosecutor Archibald Cox. I concluded that Judge Bork's actions under extremely trying circumstances demonstrated the highest possible integrity. As former Attorney General Eliot Richardson has indicated, Bork very properly acted to forestall a series of mass resignations that could have decimated the Justice Department and diminished its effectiveness.

Judge Bork moved decisively in convincing President Nixon to name a new Special Prosecutor with undiminished authority, Leon Jaworski. The result was a successful culmination of the Watergate investigation. In short, Solicitor General Bork accomplished the extremely difficult dual tasks of preserving the effectiveness of the Justice Department, while keeping the Watergate Special Prosecution force alive. To my mind, his performance at that time exemplified his exceptional character and extremely sound judgment.

My study of Robert Bork's record also prompted the conclusion that he possessed the requisite temperament to be a successful, fair-minded judge. His writings indicated that judges should neutrally apply the law to the facts presented. Such an approach aptly describes the behavior of jurists who possess true judicial temperament. Those who knew Robert Bork attested to his fair-mindedness, his sense of humor and his balance—character traits that are synonymous with the possession of judicial temperament.

My personal contacts with Robert Bork certainly convinced me that his temperament was ideally suited for the Federal bench. The American Bar Association fully agreed with my assessment of these qualifications, of his integrity and of his temperament. The ABA rated him exceptionally well qualified for appointment to the court of appeals, the highest possible rating. The full Senate, of course, unanimously confirmed Judge Bork for that court.

Having studied Robert Bork's 5-year record on the court of appeals, I am more than ever convinced that the Senate made a wise choice in consenting unanimously to his nomination. Simply put, Judge Bork's judicial record is marked by great distinction, high integrity and true judicial temperament. None of Judge Bork's majority opinions has been reversed by the Supreme Court, and only one of those opinions was reversed by the DC Circuit en banc; and, notably, this en banc reversal of his panel opinion was authored by Judge Bork himself.

Some critics of Judge Bork's nomination nevertheless have categorized particular holdings of his as being for or against certain interests. That seems to be the substance of most of the objections that I have heard during these proceedings.

With all due respect, those critics are simply missing the point. Judge Bork neutrally and fairly applies the law to the facts at hand; he does not approach a case by asking which side deserves to win. All judges reach substantive results that are displeasing to particular interest groups. It is part and parcel of the judicial task that one side will lose.

In evaluating a judge's ability, the key question is not who won, but rather, how did the judge reach his or her decision. Evaluated according to that standard—the correct standard—there is no question that Judge Bork has been an outstanding jurist.

Five years ago, Robert Bork was superbly qualified to sit on the Supreme Court. His distinguished judicial service on the court of appeals has only served to enhance his qualifications. Former Chief Justice Burger recently stated that there has not been a better-qualified Supreme Court nominee than Judge Bork over the past 50 years. And Justice Stevens has echoed those sentiments, as do I. In my view, there is no one better-qualified to sit on the Supreme Court.

In sum, Judge Bork is a highly distinguished, fair-minded jurist and scholar of the highest professional integrity. He has all the earmarks of a great Supreme Court Justice.

On a personal level, let me add that Judge Bork is not just a great judge; he is a delightful, good-natured person whose balance, temperament and keen sense of humor will always stand him in good stead.

I strongly recommend that you confirm his recommendation to the Supreme Court.

Thank you.

[Prepared statement follows:]

STATEMENT OF THE HONORABLE WILLIAM FRENCH SMITH, FORMER ATTORNEY GENERAL OF THE UNITED STATES, BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, ON BEHALF OF THE NOMINATION TO THE SUPREME COURT OF JUDGE ROBERT HERON BORK

Mr. Chairman and Members of the Committee. I am honored to appear before you today to testify in favor of President Reagan's nomination of Judge Robert H. Bork to the Supreme Court. Judge Bork is a distinguished jurist of the highest integrity. I am convinced that, if confirmed, Judge Bork would render outstanding service on the Court.

I became intimately familiar with Robert Bork's career in 1981, when evaluating his suitability for appointment to the United States Court of Appeals for the District of Columbia Circuit -- perhaps the most important appeals court after the Supreme Court. In considering whether to recommend that President Reagan nominate him for this prestigious post, I focused my attention on the three factors scrutinized by the American Bar Association in evaluating judicial candidates: professional qualifications, integrity, and temperament. Based on my consideration of these factors, I determined that Robert Bork was superbly qualified to serve on the Court of Appeals. Indeed, after an exhaustive search, I concluded that Judge Bork was the individual best qualified for appointment to that Court.

It was apparent in 1981 that Judge Bork possessed impeccable professional credentials. He had compiled a superior academic record at the University of Chicago, where he served as Executive Editor of the *University of Chicago Law Review*. He had established a reputation as a legal scholar of the first rank, during his 15 years of service on the Yale Law School Faculty. He had also enjoyed a very successful career in private practice, having being elected to the partnership at Kirkland and Ellis. Last but certainly not least, Robert Bork had rendered exemplary public service during a four year stint as Solicitor General of the United States. No one was better qualified professionally to sit on the Court of Appeals than Robert Bork.

In assessing Judge Bork's integrity, I closely scrutinized his writings and his record. His writings on judicial philosophy had stressed that a judge should be faithful to the words of the statutory or constitutional provision being interpreted. This philosophy is one that I, like Judge Bork, strongly endorse. It promotes judicial integrity. It is faithful to the rule of law. It constrains judges from imposing their own policy preferences on the public without legal authority. It thereby enhances predictability and respect for the law. In short, this philosophy requires that the law be applied fairly and consistently. It is the classic approach to judging with restraint. Judge Bork and I agree that it is the only approach that is truly compatible with our constitutionally-based, democratic form of government.

Robert Bork's record indicated that his conduct on the bench would be true to the model of judicial integrity that his writings so eloquently described. As a private practitioner, as a law professor, and as a public servant, he had met the highest standards of integrity.

I closely studied the circumstances surrounding the evening when Solicitor General Bork obeyed President Nixon's order to dismiss Watergate Special Prosecutor Archibald Cox. I concluded that Robert Bork's actions under extremely trying circumstances demonstrated the highest possible integrity. As former Attorney General Elliot Richardson has indicated, Bork very properly acted to forestall a series of mass resignations that could have decimated the Justice Department and diminished its effectiveness. Bork moved decisively in convincing President Nixon to name a new Special Prosecutor with undiminished authority, Leon Jaworski. The result was the successful culmination of the Watergate investigation. In short, Solicitor General Bork accomplished the extremely difficult dual tasks of preserving the effectiveness of the Justice Department while keeping the Watergate Special Prosecution force alive. To my mind, his performance at that time exemplified his exceptional character and extremely sound judgment.

My study of Robert Bork's record also prompted the conclusion that he possessed the requisite temperament to be a successful, fair-minded judge. His writings indicated that judges should neutrally apply the law to the facts presented them. Such an approach aptly describes the behavior of jurists who possess true judicial temperament. Those who knew Robert Bork attested to his fair-mindedness, his sense of humor, and his balance -- character traits that are synonymous with the possession of judicial temperament. My personal contacts with Robert Bork certainly convinced me that his temperament was ideally suited for the federal bench.

The American Bar Association fully agreed with my assessment of Judge Bork's qualifications, integrity, and temperament. The ABA rated him "exceptionally well qualified" for appointment to the Court of Appeals -- the highest possible rating. The full Senate, of course, unanimously confirmed Judge Bork for that Court.

Having studied Robert Bork's five year record on the Court of Appeals, I am more than ever convinced that the Senate made a wise choice in consenting unanimously to his nomination. Simply put, Judge Bork's judicial record is marked by great distinction, high integrity, and true judicial temperament. None of Judge Bork's majority opinions has been reversed by the Supreme Court, and only one of those opinions was reversed by the D.C. Circuit en banc. Notably, this en banc reversal of his panel opinion was authored by Judge Bork himself. thus demonstrating his open-mindedness.[1]

Some critics of Judge Bork's nomination nevertheless have categorized particular holdings of his as being "for" or "against" certain interests. With all due respect, those critics are simply missing the point, and I might say that is a vast understatement. Judge Bork neutrally and fairly applies the law to the facts at hand -- he does not approach a case by asking which side "deserves" to win. All judges reach substantive results that are displeasing to particular interest groups. It is part and parcel of the judicial task that one side will lose. In evaluating a judge's abilities, the key question is not "who won," but rather "how did the judge reach his or her decision?" Evaluated according to that standard -- the correct standard -- there is no question that Judge Bork has been an outstanding jurist.

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[1] Natural Resources Defense Council v. Thomas (D.C. Cir. July 28, 1987) (Bork, J.) (en banc) (slip op.), overruling Natural Resources Defense Council v. Thomas, 804 F.2d 710 (D.C. Cir. 1986) (Bork, J.).

Five years ago Robert Bork was superbly qualified to sit on the Supreme Court. His distinguished judicial service on the Court of Appeals has only served to enhance his qualifications. Former Chief Justice Burger recently stated that there has not been a better-qualified Supreme Court nominee than Judge Bork over the past 50 years. Justice Stevens has echoed these sentiments. So do I. In my view, there is no one better qualified than Judge Bork to sit on the Supreme Court.

In sum, Judge Bork is a highly distinguished, fair-minded jurist and scholar of the highest professional integrity. He has all the earmarks of a great Supreme Court Justice. On a personal level, let me add that Judge Bork is not just a great judge. He is a delightful, good-natured person whose balanced temperament and keen sense of humor will always stand him in good stead. I strongly recommend that you confirm his nomination to the Supreme Court.

The CHAIRMAN. Thank you.

Senator Thurmond?

Senator THURMOND. Mr. Attorney General, we are glad to see you again. We hope you and your lovely wife are enjoying good health.

Mr. SMITH. Thank you.

Senator THURMOND. I just want to ask you this question. The American Bar Association, as you indicated, has found him exceptionally well-qualified. Do you agree with that conclusion?

Mr. SMITH. Completely.

Senator THURMOND. The American Bar Association considers integrity, judicial temperament, and professional competence; is that correct?

Mr. SMITH. That is correct.

Senator THURMOND. Does he meet the specifications of those qualities to be a Supreme Court Justice?

Mr. SMITH. On all three counts, in my opinion, Senator.

Senator THURMOND. Do you know of anything that Judge Bork has said or done that should disqualify him to be a Supreme Court Justice?

Mr. SMITH. I do not.

Senator THURMOND. Do you recommend to this committee that they approve his confirmation to the Supreme Court?

Mr. SMITH. As one who proposed his nomination to the President for the circuit court, I certainly strongly endorse the recommendation and his nomination to the Supreme Court.

Senator THURMOND. Thank you very much.

The CHAIRMAN. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Attorney General, I concur with Senator Thurmond, wishing you and Mrs. Smith the best. I hope you are enjoying California.

Mr. SMITH. Thank you very much; very much so.

Senator LEAHY. On page 4 of your statement, you said none of Judge Bork's majority opinions have been reversed by the Supreme Court. Do you know how many of his opinions have had cert granted?

Mr. SMITH. No, I do not. I do know that he has been involved in some 100 decisions that certainly could have arrived there. How many petitions for cert were filed, or how many granted, I just could not tell you offhand.

Senator LEAHY. Well, I should note for the record, because a number of people have said that he has never been reversed by the Supreme Court, that only one of his cases, only one of his majority opinions has gone up on cert, and that is presently pending before the Supreme Court. It has not yet been heard.

Some others, cert has been denied, and some of his dissents have become the basis of a subsequent majority opinion.

But just so that people will fully understand, only one of his majority opinions has had cert granted.

Mr. SMITH. Well, actually, Senator, I think the significant fact is that he has not been reversed. The rest of——

Senator LEAHY. Well, it has not been heard yet, so we do not know whether it is going to be reversed or not.

Mr. **Smith**. Well, but at the same time it seems to me that this is pretty much statistical nonsense. When you have the Chief Justice, and you have Justice Stevens, who certainly cannot be characterized as a right-wing idealogue, coming out, which is highly unusual, and in effect supporting his nomination, I think that speaks——

Senator **Leahy**. Well, yes. And of course, that is an entirely different thing, and we will be speaking to Chief Justice Burger. That is an entirely different thing. And I agree with you, it could be statistical nonsense. I was just concerned by a number of people who have spoken that on 400 cases, he has never been reversed. I have had people ask me about that in Vermont—what about his 400 cases in the Supreme Court. And I just want to make sure that people understand that one majority opinion has gone up to the Supreme Court where cert has been granted, and that one has not yet been argued.

That is the statistic, and I think that what is of more significance, of course, are the answers that Judge Bork gave in an extraordinary session here last week, where he answered on and on, all our questions. I think that is what speaks far more in his favor. I think he is sometimes done a disfavor by people—and you did not use that number—but others have thrown out the number of 400 cases have never been reversed, because it is too easy a statistic to shoot down.

Mr. **Smith**. Well, I think the point there is that if he had been reversed, let us say 50 percent of the time, or a very high percentage, that would be an item of substantial interest and concern. And the other side of that is the fact that he has never been reversed once, regardless of what the figures may show, is an item of significance, and I think it is something to be considered.

Senator **Leahy**. I agree with that. And on the one case where there is a chance to either uphold or reverse his majority decision, that decision will come down after these confirmation hearings are over.

So we are talking about one case, we do not know what the results are going to be, and none of us will make up our minds, based on projecting what that result might be.

Mr. **Smith**. Well, it is a little like a client saying his lawyer has never lost a case.

Senator **Leahy**. That is true.

Mr. **Smith**. If he has never lost a case, he has not tried very many, or he is only taking sure winners. So those statistics really do not mean very much, in my opinion.

Senator **Leahy**. Well, I absolutely agree with you; they mean nothing. And that is why I would hope that people would not keep relying on them.

Mr. **Smith**. But there is a significance there. I do not mean to say there is no significance; I think there is.

The **Chairman**. Senator Grassley.

Senator **Leahy**. It has escaped me.

The **Chairman**. Oh, I am sorry.

Senator **Leahy**. That is all.

Senator **Grassley**. Attorney General Smith, before you came to the table with Attorney General Levi, you have heard some very powerful and moving testimony from some people who have some very deeply-held views. They spoke with considerable passion, and you heard that. And it ought to give all of us hearing that testimony some pause. And this Senator and everybody else on this committee, as far as I know, is not going to retreat one inch from the gains that have been made in this country to advance equality for every member of society.

And I do not want, and I do not believe my colleagues want, to live in a society where such a crabbed view of human liberty is a rule.

But if all of what was said today were true, we would be left to conclude that the cause of freedom and our very system of justice would be undermined, then, by the appointment of Judge Bork to the Court.

So I guess my fundamental question to you is this. Knowing this candidate for the Supreme Court as you do, and you have known him over many years, you have read his writings, you know his record on the court of appeals—you just discussed that to a great extent—you have known him when he was Solicitor General, I assume, although I did not hear you comment on that—my question is, what can you say in response, what can you say to calm the fears that were expressed for five hours today?

Mr. SMITH. Well, Certainly, so many of the criticisms that have been made here represent, I think, extreme distortion, because in essence, as I mentioned before, both in his writing and in his decisions, insofar as I can divine, Judge Bork has been wrestling with the problem of how powers are distributed in our system of government. And in coming to the conclusions that he has come to, it is applying that test, in effect, grappling with that issue.

That in some cases has produced results that various interest groups do not like, and as a matter of fact, some results that perhaps a lot of other people would not like. But it is not because that is a result he wants to achieve. It is because that is where his legal reasoning has led him in determining whether a power resides in this branch or in that branch.

Therefore I think there has been this effort, for example, with respect to minority rights. I have not heard one word, nor have I read a single word, from Judge Bork which would indicate anything other than that he feels like all the rest of us do with respect to discrimination. And any cases that have come out which have made those who oppose him so unhappy have not come out because of that being his intent, in any sense of the word. They have come out because that is the result that is produced by the way he would allocate the powers among the various branches of government, and indeed, between the Federal Government and the State; and I will have to say, in most cases, although I am not that familiar with all of the decisions, that it is probably where I would come out in terms of where power should properly be placed.

Senator GRASSLEY. I hope that people who heard this morning's testimony would take note of what you just said, having known Judge Bork over a long period of time, because I do think that we do need to have reason prevail over fear, if the fear is unjustified.

Mr. Chairman, I am finished.

The CHAIRMAN. Thank you.

Senator Metzenbaum?

Senator METZENBAUM. I was just interested in my colleague's comment that we have to have reason prevail over fear. I gather that you do not fear Judge Bork; if he goes on the Supreme Court, you would not worry about how he would hold in cases, would you?

Mr. SMITH. No, I would not. I think he is a very fair-minded individual. I think he is very principled. I think he would apply, for lack of a better term, neutral principles in coming to the conclusions he comes to.

There has been so much talk here that seems to lead to the conclusion that if a right is not protected here, it will not be protected anywhere else. That is not the way our system works. A right which is not protected here may very well be protected somewhere else. But it seems that so much of the talk here is that power either lies with the Supreme Court or nowhere else, and that is just not true.

Senator METZENBAUM. But General Smith, it is also fair to say that you are not necessarily or could you claim to be the spokesperson for blacks, or Hispanics, consumers, women. How do you account for the fact that you do not fear Judge Bork, but millions of Americans are listening intently to every word that goes on in these hearings and are more apprehensive about this appointment than they were about Justice O'Connor; even the confirmation of Justice Rehnquist, where there was a good deal of opposition—I opposed him—and Justice Scalia. How do you account for the fact that in connection with this appointment, there is such fear out there. You cannot walk down the street without a woman telling you, "I hope you won't vote for Bork."

I do not care if you are on the plane, when you are flying back to California tonight—take a poll of the stewardesses on that plane, wherever. And what bothers me is that you and General Levi appear before us, tell us what a scholarly and able man Judge Bork is, but do not seem to have any sensitivity to the fears of millions of Americans at this very moment, that if Judge Bork goes on the Bench, things are going to be different, and they are going to be worse for them.

Mr. SMITH. Well, Senator Metzenbaum, let me say this. I walk down quite a few streets, and I have not run across the kind of fear that you are talking about at all. But to the extent that fear exists, I think a large part of it is due to the misrepresentations and the distortions and the propaganda that has been put out about this man. And when I say that, I say it with strong emphasis. That is exactly what it has been, because of—for example, take *Roe* v. *Wade,* or any of these cases——

Senator METZENBAUM. Take *Griswold,* take *Griswold,* about whether or not the State of California could ban the right for you and Mrs. Smith to use contraceptives if you decided to do so in your bedroom. Take that case and tell me how you justify his position.

Mr. SMITH. Well, all right, take that case. What you have done is propagandize that issue. You——

Senator METZENBAUM. "Propagandize", my eye.

Mr. SMITH. You are propagandizing, and what you are——

Senator METZENBAUM. What you are doing——

The CHAIRMAN. Let him answer the question.

Senator THURMOND. Let him answer.

Mr. SMITH. What you are saying is, and the impression you are creating, is that Judge Bork wants to control the use of contraceptives in the bedroom. That is the image you are projecting through the kind of proganda and distortions being thrown out.

That is not true, and I suspect and I am willing to say you know it is not true. But that is the impression that is being created. And you can multiply that by every, single issue—race relations, women, everything that has come before this group. That is why there is fear out there.

Senator METZENBAUM. Everything is just a figment of our imaginations?

Mr. SMITH. That is why there is fear out there, is because his record has not been properly portrayed.

Senator METZENBAUM. Everything is just a figment of our imagination; is that it, General Smith?

Mr. SMITH. Well, you can—I have said what I have to say. You can characterize it any way you want to.

Senator METZENBAUM. And the court decisions and the statements he has made, and his writings you say we should pay no attention to that——

Mr. SMITH. Yes, every single one of those is the result of a good faith analysis of the distribution of power under our system of government—every single one—and you know that.

Senator METZENBAUM. Oh, I do not doubt his good faith; I do not question his good faith at all.

Mr. SMITH. And you convert that into his being opposed to the races, opposed to women, opposed to contraceptives in the bedroom. And that is false, and it borders on dishonesty, and it borders on lying to the American public.

Senator METZENBAUM. I wish there were some supporting evidence to indicate that you are right and I am wrong, but I see no supporting evidence in his words, in his writings——

Mr. SMITH. Maybe you do not. But any objective analysis will establish the truth of what I have just said.

Senator METZENBAUM. Take a poll of the stewardesses on that plane you are going home on tonight, General Smith.

Mr. SMITH. I am willing to wager not a single one will have known that this issue has been raised.

Senator METZENBAUM. You name the bet, and I will cover it about that.

Mr. SMITH. Okay.

The CHAIRMAN. General, I think that—correct me if I am wrong—you stated that it is not the intention of Judge Bork to reach many of these conclusions, but he goes where his natural, neutral principles take him.

Mr. SMITH. Yes, and that is a proper function of a judge.

The CHAIRMAN. Right. We can argue about that. I just want to make sure that you understand. From what I heard from the committee over the days that he was here, from all the committee members, including from Senator Metzenbaum, was no question about whether he personally wanted to control contraceptives in the bedroom.

Mr. SMITH. No, but that is the impression that is being created out there, far and wide.

The CHAIRMAN. But—but—whether or not he thought that if a State wanted to, they could. And I believe you would argue, subscribing to the same principles, that where the power rests in the State, if a State wishes to do that, they should be able to; correct?

Mr. SMITH. Yes. And I do not for one minute purport to say that this is an easy line to draw. It is a very, very difficult line to draw. There is just no question about that, and we will be wrestling with this issue for as long as this system lasts, because it was set up to create tensions, tensions between three branches. And that is what all of this is really all about.

The CHAIRMAN. Since I became chairman of this committee and ranking member, I have spent almost all my energies, as you will recall, diminishing tension on this committee. And with that in mind, I am going to try to move on.

Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman.

Attorney General Smith, in the few minutes allotted to me, I would like to take up the two issues which I consider to be central to Judge Bork's nomination—the issue of first amendment freedom of speech, clear and present danger, and the issue of equal protection of the law.

Judge Bork had written extensively that he disagreed with the philosophical basis for Justice Holmes' clear and present danger test. And when he was here last week, he reaffirmed that philosophical opposition, saying that he did not believe that you should wait until violence was imminent on freedom of speech. Holmes, as you know, said people should be able to speak until there is a clear and present danger of violence.

Then, Judge Bork said that notwithstanding his philosophical views, he would accept the subtle principles of the *Brandenburg* decision, which incorporated the clear and present danger test.

And the question that I have and would like your thought on is what is the predictability that Judge Bork can, will, in fact, apply the subtle law of clear and present danger in a context where he candidly tells this committee that he disagrees with the philosophy, and in the context, as you know, where every case is different on its facts, the precise facts of *Brandenburg* will not be repeated. What is the predictability that could assure the committee that Judge Bork can carry out the subtle principle, conceding that he disagrees with the philosophy?

Mr. SMITH. Senator Specter, I have been involved in the judicial selection process for 20 years, at the State level and at the federal level, in depth. And the result of that experience is, really, that you cannot predict anything along this line, nor can the candidate himself. I think it is impossible for a candidate himself really to say, "This is the way I am going to act when I get on the Bench."

I think it is almost an impossible question to ask him, because by the time he gets on the Bench, and by the time he faces these issues, and by the time, particularly on the Supreme Court, when he starts looking at things through global eyes, his perspective may be so different and the circumstances so different that what he says now could be meaningless.

We have seen this happen time and time again. You take Justice Brennan, you take Justice Warren, you take all of the well-known examples. I just do not think it is possible to predict.

That all adds up to this conclusion. The important thing to do when you are selecting a judge is to find somebody who does have the qualifications, who does have the integrity, who does have the temperament, to properly perform the function of a judge. That is really the role, in my opinion, of this committee. It is the role of the President, the role of the Attorney General in making recommendations to the President.

Senator SPECTER. Do you think that Judge Bork may turn out for President Reagan like Chief Justice Warren turned out for President Eisenhower?

Mr. SMITH. Well, let me say this. I would not be a bit surprised, I would not be a bit surprised—and I am not sure I like this—I would not be a bit surprised if he does not turn out to disappoint the conservatives more than he turns out to disappoint the liberals—whatever those terms mean.

Senator SPECTER. Attorney General Smith, I appreciate the fact that there is no certainty, predictability, in a finite sense. But when you selected Judge Bork for the court of appeals, you did so on the basis of your reading and of your approval, generally, of his neutral principles. That was the basis that you made the selection.

Mr. SMITH. Well, that was a basis.

Senator SPECTER. Well, that was a philosophical basis.

Now you have Judge Bork coming in—and let me move in the few minutes I have left to the equal protection issue—you have Judge Bork, having written extensively over many years that equal protection applies only to the core value of race. And then, more recently, he has said that it applies as well to ethnic matters.

Now he has come before this committee, and he has said that he would accept the Court's interpretation of equal protection in a much broader context, to include women's rights, to include poor people, to include illegitimates, to include aliens, and so forth.

Now, in that context, what again is the assurance, reliability, predictability, that Judge Bork will carry out and apply the doctrine of the court in a context where it is a fairly sharp shift from what he had said equal protection meant in terms of neutral principles and the framers' intent?

Mr. SMITH. Well, I think I have to go back once again. You are talking about the man. You are talking about his intellect, you are talking about his heart, you are talking about how he looks overall at these basic issues.

I really think that the attempt to sort of diagnose or blueprint in specific terms, as perhaps you are doing here, may be a very difficult thing to do. I think what you have to do is find out whether or not this candidate has a discriminatory bone in his body.

Senator SPECTER. How do you do that—x ray him?

Mr. SMITH. Well, you look at his record; you use all of the criteria that are available to you to find out. And it seems to me that that is where the thrust of this inquiry ought to be. I do not think that you can, nor do I think you should, try to pin him down and ask him are you going to do this or are you going to do that when you get on the Court. That is a futile endeavor.

And I might say—I told you I had been involved in judicial selection for 20 years. I have gone through this time and time and time again—what are the criteria used; how can you be sure—all of this. The net of it is you go after the individual, basically what kind of a person he is, what is his intellect, does he have feeling, compassion, does he have anything that would indicate what I would call a discriminatory bone in his body. Those are the things.

I have had, for example, a candidate for a very important judgeship in California sit across from my desk and tell me that he was in favor of capital punishment, in those words. The first thing that happened when he got on the court was to vote against it. Not only did he vote against it; he wrote the opinion.

Now, trying to get somebody to say this is the way I feel, in my opinion, and I say it with a great deal of experience, is a futile effort.

Senator SPECTER. Well, I agree that there is no certainty. But it is true, isn't it, that when the administration makes a selection of a person for the Supreme Court that they are looking for judicial restraint; that it is an attractive principle; that Judge Bork is a man who believes in original intent. What effect does it have on your thinking? Would the President have nominated Judge Bork had he believed that Judge Bork did not believe in original intent, as Judge Bork originally said that the equal protection clause was limited to race?

There was an effort at the outset with the administration to find someone with judicial restraint, original intent, neutral principles.

Mr. SMITH. Well, I do not think there is any question about that. Those terms are so difficult to define. Judicial restraint is sort of an encapsulated term one uses to describe a certain philosophy. How you apply it in a given case, I do not know.

No, I think you are absolutely right. I think that was what the President wanted. And I think——

Senator SPECTER. Would he be disappointed to know that Judge Bork has moved from original intent to say that equal protection applies much more broadly than the framers said?

Mr. SMITH. I do not know. I do not know. It depends on how that ultimately is applied in given cases, I suppose.

Senator SPECTER. My time is almost up; final question.

The CHAIRMAN. You have two and one-half minutes.

Senator SPECTER. Next question. What basis, if any, do you have for the observation you made a moment ago that the conservatives are likely to be disappointed in Judge Bork?

Mr. SMITH. Oh, that is strictly visceral.

Senator SPECTER. Tell us about it.

Mr. SMITH. Well, how do you explain visceral? I do not know. I just think that Judge Bork, probably more so than any judicial candidate that I know of—insofar as you can ever measure these things—is more dedicated to applying neutral principles than, as I say, than anybody else that I know.

If he does that, which he will, in my opinion, the result that comes from that analysis could very well disappoint conservatives as much as or more than liberals in terms of how he comes out, because he is not going to come out just because this is the conservative answer. He is going to come out where his analysis leads.

And if it is conservative, so be it; if it is liberal, so be it, or if it is something in between, so be it. That is the way he is going to come out.

Now, that means, in my opinion, that he is going to be far less predictable than what has been referred to here so many times as a right-wing idealogue. That in essence is what I am saying, but it is probably more visceral than explainable.

Senator SPECTER. So you think, as Attorney General Levi said, that the issue of *Roe* v. *Wade* is pretty much up in the air, even as to how Judge Bork may come down on it if confirmed?

Mr. SMITH. Well, that is a different question, that is a different question. *Roe* v. *Wade* was wrongly decided in my opinion; and wrongly decided in Judge Bork's opinion; wrongly decided in Attorney General Levi's opinion——

Senator SPECTER. But Attorney General Levi thought that a good lawyer like Judge Bork might find another rationale to uphold it.

Mr. SMITH. Well, quite possible. But what I am saying is when you ask that question, you are injecting another element, namely, the stare decisis, the value of precedent. And I do not know; if I were going on that Court, and the issue came up again, I think I would vote to overrule it, but I am not at all sure Judge Bork would.

Senator SPECTER. That may pose a problem on your confirmation, Attorney General Smith.

Mr. SMITH. Yes. Thank you.

Senator SPECTER. Thank you very much, Mr. Attorney General. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey?

Senator HUMPHREY. General Smith, I was pleased to see a sense of indignation arise from your ordinarily well-composed presence.

Mr. SMITH. That is just a cover.

Senator HUMPHREY. That indignation is well-justified. One of the Senators, I have forgotten now which, talked about the concern that women have. My gosh, it is hardly any wonder when you look at the fear-mongering that is being resorted to by the opponents.

I have seen full-page ads in major newspapers—God knows how much they cost. One of them, I recall, the headline was, "What Women have to Fear from Robert Bork" and then it was followed by a whole bunch of demagoguery.

Mr. SMITH. Absolutely outrageous, absolutely outrageous.

Senator HUMPHREY. Followed by a whole bunch of demagoguery. And that is typical of what a number of organizations are doing. They are resorting to demagoguery, distortion, and assassination of this nominee. I think it is outrageous—and not only to defeat it but, as Senator Grassley pointed out, to fill the coffers of their treasury.

Now, something else that disturbs me is the persistent effort of Judge Bork's detractors to dismiss as irrelevant 4 or 5 years as Solicitor General—his record, that is, of 4 or 5 years as Solicitor General—and 5½ years on the second most important court in this country. And our friend from Vermont tried it just a moment ago—Senator Leahy, if you want to listen to this.

Once again, we had an effort to dismiss the extraordinarily important and impressive fact that Robert Bork has written 106 opinions, Senator Leahy, only one of which, on which, the Supreme Court granted cert, in other words, agreed to review. Out of 106 opinions which he wrote, the Court agreed to review only one and upheld him on that one. More in just a moment.

But what does it tell you when the lawyers in 105 of 106 cases decided that the decision was so sound it was not worth appealing, or conversely, the Court refused to grant cert? What does that tell you about the soundness of this man's reasoning?

Mr. SMITH. Well, it certainly seems to me you can draw some very good conclusions from that.

Senator HUMPHREY. Of course. If the lawyers decide not to challenge, they know they are beaten. If the Supreme Court will not grant cert, it is because those seeking the writ do not have a good case.

Mr. SMITH. It really is an extraordinary record.

Senator HUMPHREY. Just that clearcut. And in 105 of 106 decisions which he wrote, either the lawyers did not appeal because they knew they had a lousy case, or the Court said they had a lousy case, and would not accept it—except in one case, where the Supreme Court upheld Judge Bork.

Mr. SMITH. Right.

Senator HUMPHREY. Now, that is relevant. And to dismiss that as irrelevant is irresponsible and, in my opinion, far worse than irresponsible.

In addition, on a broader scale, Judge Bork has participated in, as opposed to having written himself, joined in, 432 cases of which 40 have been appealed to the Supreme Court. Okay, that is 40. So that leaves 392 in which either the lawyers decided not to appeal because Bork's decision in which he joined was so sound, or the Court said, "We will not consider the case"—392 out of 432.

Of the 40 successfully—this gets pretty confusing, I must admit; I might have even confused myself at this point—but in any event, 432 opinions he has joined in. There have been 40 attempts to appeal to the Supreme Court. The Court said no in 35. Three cases, it has accepted, given cert—granted cert—I am not a lawyer, so I have a hard time with these terms—35, it said no cert; 5, it said yes; 3 are pending, and the 2 that have been disposed of, Robert Bork was affirmed on those two.

In addition to that, when he was on the minority side, in about 20 cases, 6 have been successfully appealed, that is to say, the Supreme Court has agreed to review 6. And in every one of those 6, even though Robert Bork was on the minority side of the opinion, the Supreme Court upheld it, 100 percent, 6 out of 6.

Mr. SMITH. That is quite a record.

Senator HUMPHREY. Now, if I did not explain that with perfect clarity, I apologize—because I am tired—and I am tired of the demagoguery, I am tired of the distortion. I am tired of the long hours, too, I will tell you that.

Now let me go on to something Senator Metzenbaum said—and I am sorry he has not been here, because he has got wax in his ears, too. He will not listen to the facts.

He suggested you check with the flight attendants—I think he said "stewardesses"; that belies a certain sexism, if you ask me—I suggest he check with the flight attendants when you go home, particularly if it is Northwest Airlines, because I remind Senator Metzenbaum, if it is worth reminding anybody of the facts—and I have real doubts about whether it is worth reminding some of these characters of the facts—that Robert Bork—did he write it or did he join in it—he wrote an opinion in which he found that Northwest Airlines had discriminated against female flight attendants. The result of that finding was that these female flight attendants got back pay with interest.

So you tell that to the flight attendants, and you see what they think of Robert Bork and his defense of the rights of each citizen before the law.

The CHAIRMAN. You are going to have an interesting flight, General. [Laughter.]

Senator HUMPHREY. Well, how do you explain this extraordinary discrepancy, this inconsistency where, on the one hand, this august body, this committee, the full Senate, unanimously confirmed Robert Bork to the second most important court in the country 5 years ago, when all of these writings, which have been almost the exclusive focus of criticism, were fully available to Senators, and today, when they claim that they have a case that these writings disqualify Robert Bork from serving on the Supreme Court?

What do you think of that discrepancy, that inconsistency? Do you see anything inconsistent there?

Mr. SMITH. Well, I will have to say I—perhaps I should not be surprised, but I am surprised—at the way this whole situation has developed, because before his nomination came up, and certainly during all the time when I was in office, and since, whenever any group of names were put together with respect to potential Supreme Court nominees, Judge Bork's name was always on that list—and, I might add, subscribed to in effect by both sides of the aisle. Therefore, it was almost a given that he was on any likely list, and it certainly developed into quite a surprise that when the nomination actually comes up, that we run into this kind of a maelstrom.

Senator HUMPHREY. Mr. Chairman, I thank General Smith.

The CHAIRMAN. Thank you.

General, I appreciate your time and the effort—I beg your pardon. I am sorry.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I will submit my questions in writing.

I just want to greet William French Smith, a man I came to know well in my work here. It is good to see you, sir, as always, my old sidekick on immigration reform and other odds and ends.

Mr. SMITH. Thank you.

Senator SIMPSON. It is pleasing to have you here. I was watching your testimony, and then came over to participate in the rest of the evening's activities, if that is where we are going, I will stick around.

But I just want to say you have seen a few things. And I remember that you came to this nation's capitol as a lawyer's lawyer. That is the highest tribute I can pay as a fellow lawyer. And I watched you do your work, and I watched you take some cheap shots. You remember some of those, don't you?

Mr. Smith. Yes, indeed.

Senator Simpson. You have been on the receiving end of those.

Mr. Smith. Standard fare here in this city.

Senator Simpson. Standard fare; kind of a heavy diet. You do not get fat on it, but it goes with the territory. Even the counsel at the Iran-Contra hearings said, "You know, I am from New York, and I thought I was a pretty tough cookie, but I have never seen anything like this place. This is an eat them up and spit them out place."

I said, "Yes, it is." But we do take care of every known living thing other than human beings, who are under the gun in this town. We have organizations to protect all other living things, except human beings when they are on the course, when we are on the track of them.

But you have been on the receiving end, and you have seen a few of these, and you know what distortion is. And being the civil man you are, I saw you take a lot of abuse, and it was tough for you; I remember that, and how you handled that, you and your wife Jean, both, with great grace.

And so my question—and it is only one—in all your time here, in the time you have been in it and the things we have seen, through two administrations—go back—have you ever really seen one that had more distortion in it than this one? Let me ask you that.

Mr. Smith. I do not think I can think of a close second. And it reached the point where one wonders whether anyone is willing to subject himself to this kind of a process in order to get even that high a position.

The thing that is distressing to me is that it really is not just propaganda. Propaganda, you can understand. That is part of the way we do things. But in this case, I have never seen such misrepresentation, such distortion, and such outright lying. I mean, there are people in very important positions in this government who are lying to the American public. Now, that is hard to take.

And the problem is, I say "lying" because they know what they say is not true—and not just people in this government, but people on law school campuses and elsewhere who presumably are supposedly responsible people.

I have never seen anything like it. I hope I never see anything like it again, and I find it really—well, "inexcusable" is a very soft term to use for it.

Senator Simpson. Well, that is the phrase I used the other day, and I do not believe I have used it in 9 years here. I used the word "lie" and I really meant what I said. And I said——

Mr. Smith. I used it a little earlier here, myself, and I meant what I said.

Senator Simpson. Yes. And I visited with executive directors of some of these various groups who are in opposition, and it is very interesting to watch them, and they say, oh, we were just going through the record carefully—non-unanimous decisions, odds and ends, and come up with somebody is doing the ads, but no one really owns up. Well, they say, there is the organization; they have signed it at the bottom. And I say, yes, but who are they? Who are they? Is it just a mimeograph machine and a phone bank? Who do they represent? Who funds them?

And so, if the intent is to say that the American people are frightened, or that flight attendants are frightened—I would be frightened, too, if I read that crap. And that is where we are right now on this one; that somehow, this man is a racist because of a poll tax case which did not have anything to do with racisim; that he would sterilize all of our fellow human beings in some quirk, or for some really bizarre reason; that he fired Archibald Cox; that he discriminates against blacks and women; that he is anti-consumer, antieverything; and everything he has done in public life, except the article in 1971 of the Indiana Law Review, which was just a ranging series of proposals, and how a guy can be on the U.S. Circuit Court of Appeals, and do what Senator Grassley has portrayed, Senator Humphrey has portrayed—and the next witnesses will be from the American Bar, and we will certainly want to try to find out what he did that was so bad between the years 1982 and 1987, when none of his opinions have been overturned—and if that is not blatant politics, I do not know what it is—you can call it anything you want—we will find that out.

But no wonder they are frightened. And I personally have never seen such a distortion in all my time here, in my nine years, an organized campaign of distortion to frighten the American public. And it has worked, because they came out of the box first.

But the mail to my office, not only from my State, but through the United States, is beginning to turn rapidly, like, wait a minute, this cannot be. There is no one like this who has been endorsed by or spoken on behalf of by Justice Burger, Justice Stevens, and now Justice White, who have all said this would be a remarkable addition to the Court.

And to really believe that this lumbering, Neanderthal, hideous, bestial man is somehow going to go to the Supreme Court and wrench four of those remarkable eight people off their noodle and make them all go his way and just destroy America—now, that, they really lost their lunch on that one, they lost their marbles.

It is a tedious thing to watch. I get dispassionate, as does Senator Humphrey. Maybe the other side went that far, too, in the beginning; maybe they did. Maybe they polarized themselves. But we deserve better in the United States than this, with a man who has never been challenged in these other areas, and so you use emotion, fear, guilt and racisim to whip him down. He will not be whipped down. He will prevail, and we will get him.

That is all I have to say, Mr. Chairman.

Thank you for being here.

Mr. SMITH. Well, Senator Simpson, thank you. And I do not think I can remember an occasion in the past when I was back here that I ever disagreed with you, and what you have just said falls into the same category. And as a matter of fact, if you want to be the fourth candidate for President of the United States on this Committee, I will be glad to support you.

The CHAIRMAN. Me, too.

Senator SIMPSON. There are only three electoral votes in Wyoming. It would be a lost cause.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Mr. Attorney General, I just want to compliment you on your great work here as Attorney General. I have been in the Senate now for 33 years, and I do not think we have had a more able lawyer or a finer man to serve in that position, and we are proud of you.

Mr. **Smith**. Thank you very much, Mr. Chairman.

The **Chairman**. General, enjoy your flight.

Mr. **Smith**. Thank you very much.

The **Chairman**. Our next witness is former Attorney General Katzenbach. And while he is coming to this Chair, to his seat, I want my colleagues to know that I plan on sitting straight through. I understand others may have to take a break on occasion to meet responsibilities. We are going to finish with the witness list tonight.

I ask my colleagues to limit their questions to ten minutes, and I will not be offended if they do not take 10 minutes.

We have Attorneys General Rogers and Saxbee, still waiting.

General, welcome. Thank you for waiting. Thank you for your forbearance.

Please proceed.

TESTIMONY OF HON. NICHOLAS KATZENBACH

Mr. **Katzenbach**. Thank you, Mr. Chairman.

I would like to make a very brief statement, which will perhaps focus some of your attention on where I am coming from.

I signed the statement by the Lawyers' Committee on Civil Rights which opposed the appointment of Judge Bork to the Supreme Court. I am not here today on behalf of the Lawyers' Committee. Other witnesses will perform that role, although I would be perfectly happy to defend that position.

I just want to make it clear that what I am saying now, I am saying simply on my own behalf.

I am opposed to the appointment of Judge Bork. But I do not come to that decision easily, and I do not come to that decision happily.

It is not easy for me, and I suspect it is not easy for the members of this committee and for the Senate. Judge Bork's extraordinary performance as a witness last week does not make the decision any easier. He has exhibited erudition, integrity, humor, patience.

He also modified and moderated views which I confess are largely the basis for my opposition to his appointment to the Supreme Court. So I think it is a tough decision. That is where I am coming from. It is also an important one.

There is relatively little that I can add to the substantive arguments that have been so eloquently made here. Were I in your position, the central question that I would be asking myself would be this. Is Judge Bork a man of judgment—not intellect, not reasoning, not lawyering skills, not ideology, not philosophy—simply, judgment. Is he a wise person? Is he a person you would seek out if you had a difficult problem, for advice? Does he come through to you as the kind of person who is sensitive to human problem, to racial problems, to the role of political institutions, in resolving them?

I have seen some evidence that makes me skeptical. His 1963 article in The New Republic on the Civil Rights Act of 1964 is one example, and I know you will understand why that is one that I remember very well. It was then, and is now, absolutely inconceivable to me that a man of intelligence and perception and feeling could have opposed that legislation on the grounds that it deprived people of freedom of association.

It meant, and it could only have meant, that he valued the right of people in public situations to discriminate against blacks if that is what they chose to do.

What kind of judgment does that demostrate?

I realize that Judge Bork has done at least a partial mea culpa with respect to that article—not good enough for me, at least. He said that he was on the wrong track—I think I am quoting him correctly—that the Act worked out a lot better than he expected it to do so. I do not think I would accept that kind of apology for a judgment so wrong-headed, so totally insensitive to the whole world around him in 1963.

Not even youth can serve as an excuse; he was of an age with Attorney General Kennedy.

Judge Bork has an intellectual and philosophical bent which, in some contexts, is admirable. He is learned in the profession, far more learned than I, perhaps even more learned than some members of this committee.

My question—does that very learning, does that very philosophical bent, tend to obscure and obfuscate common sense and sound judgment?

If it has led him to conclusions that many of us would question, does it bother him, or does he simply plunge right ahead?

Judge Bork and his supporters defend his views in part as the advocacy of a scholar for a particular viewpoint. That gives me difficulty. The scholars I know advocate positions because they believe in them. They do not do so simply to be provocative. Unlike practicing lawyers, whose conclusions come necessarily from their clients, and unlike lower court judges, who take the law from the Supreme Court and the legislature, scholars, like Supreme Court Justices themselves, can and should advocate positions that they believe in, arrive at objectively as possible.

Surely those writings stated Judge Bork's then best judgment about the Constitution and how it should be interpreted. Some of the views were expressed as tentative, although he adheres to them. But my point is, he did not write them as exercises in futility.

In his testimony before this committee, Judge Bork emphasized that a judge, even a Supreme Court Justice, must take the law as he finds it, must build on past wisdom, must not disappoint the expectations of society. Those statements did not sound to me like the professor who called these precedents unconstitutional and a lot of other very, very strong words.

To a considerable degree, it seems to me, Judge Bork simply superimposes his newly-found truths on the older ones. His views on original intent and the restrained policy role of judges continue, albeit somewhat modified by a late-coming concern about precedent.

So frankly, I do not know where he stands. But that is not really my point. Shouldn't we be concerned about the judgment that a Justice can ride several unruly horses at the same time? Isn't that a matter of concern?

I would also ask myself just how far Judge Bork goes in espousing judicial restraint. I think judicial restraint, like judicial activism, is often more in the eyes of the beholder than the actor. Most of us mistake, hesitate—hesitate—to criticize results we think wise, simply on the grounds of judicial activism. And all of us have criticized decisions we disapproved of as going too far. And of course, some Justices have historically had broader views of the Court's role than others. But I believe all Justices believe that role is limited and restrained, and of course, it is.

We also have to be conscious of the fact that in our constitutional system, the Supreme Court was given an ultimate political role in guaranteeing people various freedoms—freedoms from government itself. And protecting those freedoms from executive and legislative abuse, and, though more rarely, from executive and legislative inaction, is an essential and important role of the Court.

I am not sure that Judge Bork feels very comfortable with that role. His views, unleavened by the recent testimony, have been critical of many decisions. But the point I wish to emphasize is that his writings almost invariably seek some kind of certainty, some philosophical purity. He searches for neutral principles, which reflects to me a discomfort with the policy judgments the Supreme Court has always been called upon to make; yet his unqualified past views would have had radical results quite inconsistent, I would think, with judicial restraint. And it is only his acceptance of precedent and some of those decisions which he has criticized which would support judicial restraint in the present context.

Let me just add a word, because it has come up here about Judge Bork's performance as a judge and as Solicitor General. In my view—and I have not read all of his decisions—he has performed very well as a judge. Accepting the precedent that he testified in his confirmation hearings would indeed control a judge of a lower court.

In hearings earlier, when he was confirmed as Solicitor General, he testified that he would present as Solicitor General the views of the administration, not his own. That bothers me. My experience with Solicitors General, Archibald Cox and Thurgood Marshall, was that they did not make that distinction, and that they believed that the administration's constitutional views were made almost exclusively in their office—and indeed, they were.

Neither of those gentlemen, in my judgment, would have presented a view of the Constitution that he could not personally and professionally endorse.

I raise that question only because I think Judge Bork as Solicitor General took positions on behalf of the administration on most issues quite consistent with those that I would espouse, and indeed those of the Lawyers' Committee on Civil Rights.

And the problem I have is that I now do not know, as a result of his statements, whose views they were. They were the administration's views. Did he, or did he not formulate those views, and were they his views, unconstrained by the political considerations of the administration? I do not know.

So let me conclude by saying simply this. I do respect Judge Bork enormously, and I want that made clear. No man who described *U.S.* v. *IBM* as the Antitrust Division's Vietnam can be all bad.

You have a difficult and an important decision to make. I oppose Judge Bork's confirmation because, while I believe that a negative vote may—and I emphasize "may"—do him a personal injustice, confirmation may—and again, I emphasize "may"—result in far greater injustice to many citizens, particularly minorities.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Thurmond?

Senator THURMOND. Mr. Attorney General, I am glad to see you again. I have not seen you in a number of years.

Mr. **Katzenbach**. Has it been an awfully long time? It has, has it not, Senator Thurmond?

Senator **Thurmond**. I remember when you were Deputy Attorney General——

Mr. **Katzenbach**. I get older and you do not.

Senator **Thurmond**. I remember when you were Deputy Attorney General and Attorney General. It was back then.

Mr. **Katzenbach**. Thank you, Senator.

Senator **Thurmond**. You are opposed to Judge Bork, are you not?

Mr. **Katzenbach**. Yes, I am.

Senator **Thurmond**. Is there any question I could ask you that would cause you to change your mind?

Mr. **Katzenbach**. I suppose it would depend on my answer, but I am persuadable. I am persuadable, Senator, and it is not really a question, but if there is something that—there are people, Senator, that I respect enormously, Ed Levy, for example.

Senator **Thurmond**. You have definitely made up your mind?

Mr. **Katzenbach**. Sir?

Senator **Thurmond**. I say you have definitely made up your mind to oppose him? Is there anything we can say to change your mind?

Mr. **Katzenbach**. I cannot answer that question, sir. I hope my mind is not such a closed mind that I cannot be persuaded on most issues, and I would certainly think this was one of them. Surely, I could be persuaded.

Senator **Thurmond**. I doubt if I could change your mind. I do not think I have any questions. Thank you very much. [Laughter.]

The **Chairman**. He gets right to the point, does he not?

Senator Leahy?

Senator **Leahy**. Thank you. I will be brief. I might say, Mr. Chairman, the extraordinary nature of these hearings still come back to me. One, Judge Bork answering questions at far greater length than any time since in the thirties when we started questioning justices or justice nominees, at enormous length, on and on, whether repetitious or not. I was most impressed by that. I think everybody was.

I am impressed by people here. Mr. Attorney General, you would not remember this, but when I was a law student at Georgetown Law School and you were Deputy Attorney General, you were good enough to come and talk with some of us or have some of us in your office and talk with us, and even took the time to chat with a couple like myself afterward.

And to see former Secretary of State William Rogers in the audience, former Attorney General Saxbe, Attorney General Levy here, it stresses the importance of these hearings.

There have been a lot of statistics that have been bandied about on Judge Bork's record on the court of appeals, the one majority opinion that has gone up on cert to the Supreme Court, but are those statistics anywhere near as important for somebody who is being nominated for the U.S. Supreme Court, that is anywhere near as important as the things he has written consistently over 20 years, the things he has said here under oath, which is more important, in your opinion?

Mr. KATZENBACH. I would think the latter would be clearly so. Judge Bork is a very competent lawyer. He can write a good judicial opinion and he can write opinions not likely to be reversed.

Senator LEAHY. Thank you very much.

The CHAIRMAN. The Senator from Utah.

Senator HATCH. Welcome, Nick. It is nice to have you here.

Mr. KATZENBACH. Thank you, Senator.

Senator HATCH. It is nice to listen to you. I will say that you are a signatory to the report on Judge Bork's nomination prepared by the Lawyers Committee on Civil Rights. I have read that report and that report to me is marginally a little better or more balanced than other criticisms of Judge Bork's record. Some of them that have been filed have been just terrible. Still, that report fails to consider his record as Solicitor General, for instance 17 out of 19 briefs favoring minorities; or his record on the circuit court. All but two of his cases, civil rights cases, he was for the minority and on the two where he was not, the Court sustained his position in both of those cases.

And the report by the Lawyers Committee on Civil Rights focused on his speculative academic writings which, of course, we have had a lot of fuss about, not his record in public service, which I think is pretty important. That is not my main point, though, at this time.

The report itself objects to Judge Bork's criticism of the *Oregon* v. *Mitchell* case which, of course, is the Court's reaffirmation of congressional power to change the Constitution by statute relative in this particular case to literacy tests.

Judge Bork's criticism of that case was based on his reluctance to allow Congress to take over the Court's role defining the Constitution by a simple majority vote and, of course, using the case named after you to be able to do so.

As I recall, you signed the letter, along with a number of other former Attorneys General, I think five AGs in this case, Richardson, Brownell, Saxbe, Clark and Civiletti; with a similar position to his on the human rights bill that was brought forward here, a bill that would have used the Katzenbach doctrine to be able to overrule a Supreme Court case by a simple majority vote of the Congress. Is that correct?

Mr. KATZENBACH. I do not believe so, Senator.

Senator HATCH. I think it is correct, that what happened was that——

Mr. KATZENBACH. If I signed it, I signed it. I just do not have any recollection we put it that way.

Senator HATCH. Well, you did sign it. The point I am making is that—yes, I think you will find that you did sign it, at least that is what my recollection is, having sat through that particular problem, and I was on your side on that. As much as I have been a prolife Senator, I still was on your side. I do not believe you should change a Supreme Court decision, a landmark case at that, by a simple majority vote in both Houses of Congress, even though I might disagree with that particular case.

So, what I am pointing out is that you signed that letter, and I believe you did, the only principle that Judge Bork addressed in the *Oregon* v. *Mitchell* case was precisely that principle. It really was not a fight for literacy tests or in any way against civil rights, and so that is why I bring that up. That letter was solicited by Larry Tribe of Harvard.

If I have articulated this correctly, than his particular position in *Oregon* v. *Mitchell* would not have been all that different from your position in the human life bill.

So, I might just in conclusion state this, that I would note that Judge Bork clearly applied his *Oregon* v. *Mitchell* reasoning neutrally. For instance, he refused to use the notion that you can overrule the Supreme Court decisions by simple majority rule, following the Katzenbach doctrine with regard to an opportunity to outlaw forced busing, which he may or may not agree with, and, of course, he himself testified against the human life bill, as did the various Attorneys General.

I just want to point that out to show that in our zeal to—and I am not blaming you for this, you did not prepare the document, the report—that in our zeal to defeat somebody like Judge Bork, sometimes there is a lot of distortion in the process, and I think General William French Smith's comments are more than adequate here.

Mr. KATZENBACH. I hope that I have not indicated a zeal to defeat Judge Bork.

Senator HATCH. No, I don't think you have.

Mr. KATZENBACH. I am troubled by it because of some of his obvious qualifications.

Senator HATCH. Surely.

Mr. KATZENBACH. I have come to a conclusion on that. I might also add simply as a footnote to that that the issue of voting in *Katzenbach* v. *Morgan* was the one part of the civil rights bill that I had serious doubts about.

Senator HATCH. I understand. Well, I appreciate the way you have come here and I appreciate the way you have testified. You have raised it sincerely from your point of view and I admire you for that. I just want you to know that our friendship is intact and I have a great deal of respect for you. I appreciate it.

Mr. KATZENBACH. Thank you, Senator.

The CHAIRMAN. Senator Heflin?

Senator HEFLIN. What year were you Attorney General?

Mr. KATZENBACH. What year, Senator?

Senator HEFLIN. Yes.

Mr. KATZENBACH. I became Acting Attorney General in October of 1964 and was Attorney General until October I guess of 1966.

Senator HEFLIN. During that period of time, was any appointment made by the then President to the Supreme Court?

Mr. KATZENBACH. Yes, there was one before I became Deputy Attorney General. There was one that I worked on, which was Byron White, and I did not work on that simply to succeed him in his job, which is what actually happened after he was put on the Supreme Court.

Following that, there was the appointment of Arthur Goldberg while I was still in the Justice Department, and the appoint of Abe Fortas while I was in the Justice Department, and the appointment after I left the Justice Department, I was talked to by the President on the appointment of Thurgood Marshall.

Senator HEFLIN. And you have had a good deal of experience in checking the backgrounds of potential members of the Supreme Court?

Mr. KATZENBACH. Yes, sir, I think so.

Senator HEFLIN. You have had responsibilities in that connection?

Mr. KATZENBACH. Yes, I certainly did. I did on all four of the appointments that I described.

Senator HEFLIN. And you dealt with the American Bar Association's committee that was working on those?

Mr. KATZENBACH. Hundreds of time, yes, sir.

Senator HEFLIN. Not only on the Supreme Court but on the court of appeals and District courts?

Mr. KATZENBACH. Yes, Senator, I have.

Senator HEFLIN. Just from a point of curiosity, has the American Bar Association evaluations of Supreme Court nominees changed from the time that you—well, I reckon what I am directing at is has it changed from a criteria of ideology? They say now that they do not look at ideology in their evaluation.

Mr. KATZENBACH. No, and I do not believe they did then and——

Senator HEFLIN. They did not do it?

Mr. KATZENBACH [continuing]. To the best of my knowledge, they do not today, but I cannot speak to that with the same knowledge.

Senator HEFLIN. I believe that is all.

Mr. KATZENBACH. Thank you, Senator.

Senator HEFLIN [presiding]. Now, I am Chairman. Boy, they are getting down to the lower end of the ladder.

Simpson, I do not know whether I am going to recognize you. [Laughter.]

Senator SIMPSON. Judge, you have always been most courteous.

Senator HEFLIN. I am delighted now to yield 1 minute to you.

Senator SIMPSON. Well, if you want to do that, I will never listen to any Notai Hawkins stories again. I have heard all of those. [Laughter.]

Well, busy people are waiting to testify. I had several questions and I am going to limit them because I know General Rogers and General Saxbe are there and we are going to finish.

It is good to see you, sir. I used to read about you when I was practicing law in Cody, Wyoming, and you were a very extraordinary Attorney General, and I say that in reality. You had courage and guts to do what you had to do, even if I would not agree.

Mr. KATZENBACH. Thank you very much, Senator. I appreciate that.

Senator SIMPSON. You said something and you said it with some feeling. All of it was said with feeling, but you said something about the fact of how anyone could be so totally unaware as to the world around him in 1963.

Mr. KATZENBACH. Yes, sir.

Senator SIMPSON. You said that?

Mr. KATZENBACH. Yes, sir.

Senator SIMPSON. Then I do not see how you can overlook that in the Senate there were people who felt exactly as he did, people like William Fulbright, who voted against the civil rights bill, three sitting members of the U.S. Senate who voted against the civil rights bill and brought up the same questions, nothing more, nothing less, the vice presidential candidate of the United States of America on the Democratic ticket, John Sparkman, all of those people and many more embraced exactly the position of the nominee.

How do you possibly then equate their status in your judgment of their lives? Are they lesser or more.

Mr. KATZENBACH. Many of those gentlemen, Senator, indeed all of the ones that you have named, are people that I greatly admire. They were acting at that time, I believed and I believe now, largely for political reasons, because of their constituents at home, because of the intense feeling at that time, and indeed many of them have told me so.

Senator SIMPSON. Nevertheless, they voted while the nominee wrote, so is there not some—I do not see the distinction there, if——

Mr. KATZENBACH. Well, let me see if I can explain it a little more clearly. They were Senators, they had constituents, those constituents were white, because they did not have very many black constituents who were permitted to vote, those constituents were against the public accommodations law and against the other provisions of equality in that Act, and I think those Senators felt compelled by their politics to vote as they did much more than by their conscience. Professor Bork did not have that problem.

Senator SIMPSON. No, but the others voted. They voted against the civil rights bill in its totality, not just public accommodations, which was part of the national debate and the only part that the nominee spoke on, was the issue of owning your own shop or your own store and did you not have a right to do this. That was the issue of the day. The other things were pretty heavy in the civil rights bill to the others that I think, you know, when you try to isolate him from these other fine Americans on some sophistry of election and pressure and so on, I do not think that is quite open and candid.

Mr. KATZENBACH. I appreciate your disagreement. I do not think that is sophistry and I think I am being open and candid, and I had a hell of a lot to do with that law and I understood it.

Senator SIMPSON. Good. I know you did. I know you did. And you said that Judge Bork had performed well as a judge. That was your quote.

Mr. KATZENBACH. Yes, sir, I think he has.

Senator SIMPSON. And you are aware, too, that when he was Solicitor General, he often submitted his own views time after time under amicus briefs, and I thought you said that he did not do anything but just follow the government line. I thought that is what you said.

Mr. KATZENBACH. I said I had—no, perhaps I did not make that clear, Senator.

Senator SIMPSON. How did that go?

Mr. KATZENBACH. What I attempted to say was that in his confirmation hearings he said that he would espouse in his briefs as Solicitor General the views of the administration, act as a lawyer espousing those views. I said that makes it difficult to know, whether it is in his amicus briefs or in his briefs on appeal, whichever side he is on on the appeal, to what extent the Solicitor General's briefs reflected his own views, rather than those of the Attorney General, rather than those of the President, and so forth.

I am not trying to take anything away from those briefs. I thought I indicated I thought they were good briefs. They were good on civil rights. By and large, they were good on civil rights. I do not mean to take that away. I just do not know how to weight it.

Senator SIMPSON. How what?

Mr. KATZENBACH. How to weigh it.

Senator SIMPSON. How to weigh it?

Mr. KATZENBACH. Yes.

Senator SIMPSON. Well, he testified before us that he did those things on his own. He said certainly he had the official position of Solicitor General but that he often filed these briefs on his own, and no one has challenged his record, oddly enough, as a member of the Circuit Court, the District of Columbia Court of Appeals, how odd that it seems not to be commented upon by his detractors. Not one person I have heard yet has said that he was out of the mainstream with his decisions—they are all printed—that the Solicitor General's briefs were off the wall. None of that has come up at all and does not.

Mr. KATZENBACH. I took up both, Senator.

Senator SIMPSON. You took what?

Mr. KATZENBACH. I took up both of those issues. I tried to deal with it openly and candidly.

Senator SIMPSON. Now, I wanted to ask you, you have former Chief Justice Burger, Justice John Paul Stevens, and now the appointee of your own President, Justice Byron White, according to a transcript of John McLaughlin's "One on One," on page 7, September 17, 1987, saying that this man should be confirmed. Do you not find that rather impressive, or do you think that these individuals would endorse a person of erratic temperament, as you describe?

Mr. KATZENBACH. I think, Senator, that there are many people whose views I greatly respect who have endorsed Judge Bork. I do not on this particular issue happen to agree with their judgment, although I agree—if they saw it as I saw it, then they probably would not do it. They see it differently, they see him differently than I see him, and for that reason they support him and that is one of the reasons that I find it a difficult decision.

Senator SIMPSON. You indicated, though, that you are persuadable. I had hoped you had looked at his civil rights decisions which were included in the record this morning and some of the remarkable things he did for minorities, women, blacks, what he did in his own law firm to help the Jewish associate who was excluded, some of those things I would hope that a persuadable man, you might look at, and I know you will and I appreciate it.

I have no further questions.

The CHAIRMAN. Thank you, Senator.

Senator Grassley?

Senator GRASSLEY. Mr. Katzenbach, one of the things that came up when Judge Bork was before us was the issue of whether or not the courts ought to step in and iron out a decision between the President and the Congress, and I want to ask you to take yourself back to the period of time when you were Under Secretary of State and you testified before the Committee on Foreign Relations on something called S.Res. 151 and, as I understand it, that resolution was really a predecessor of the current War Powers Resolution. Generally, it would have forbidden any decision to use or promise the use of armed forces of the United States to a foreign state without some kind of affirmative act by Congress, specifically intended to give rise to such a commitment. Do you recall that testimony?

Mr. **Katzenbach**. I do, at least generally.

Senator **Grassley**. Okay. The reason that I ask this is that I was struck by the similarities between your view of the resolution and Judge Bork's view on the War Powers Act. And as I understand your position, you argued that S. Res. 151 should not be enacted for two reasons: First, because our history informally counsels against treating disputes between the Congress and the President, such as on the subject of their respective powers in foreign affairs, as legal questions; and, second, because Senate Resolution 151 created a real risk that Congress might intrude into the President's prerogatives to make tactical decisions, as Chief Executive and Commander in Chief. Specifically, you stated "when Congress has authorized the use of the armed forces of the United States, I do not believe that the Congress can then proceed to tell the President when he shall bomb, when he shall not bomb, where he shall deploy his troops and where he shall not"—and that is from pages 85–89 of your testimony.

Now, I find that view strikingly similar to Judge Bork's view on the subject: that courts should not resolve such disputes and that Congress cannot take over the actual decisions regarding how hostilities are to be conducted. I hope that you are familiar with Judge Bork's views. But, even if you are not familiar with them, and assuming that I described them accurately, do you agree that the similarity is striking?

Mr. **Katzenbach**. Yes, sir, I do.

Senator **Grassley**. Okay. Do you still adhere to your 1967 views on the subject?

Mr. **Katzenbach**. Yes, I do.

Senator **Grassley**. Well, presumably then, to the extent that Judge Bork agrees with you on this, you do not believe that he should be disqualified from serving as Associate Justice, at least on those grounds?

Mr. **Katzenbach**. Not unless I am also.

Senator **Grassley**. Thank you.

Mr. Chairman, that is my only question.

The **Chairman**. Senator Specter?

Senator **Specter**. Thank you very much, Mr. Chairman.

Attorney General Katzenbach, did you know Judge Bork from his work on the faculty of Yale Law School?

Mr. **Katzenbach**. No, I did not.

Senator **Specter**. That was after———

Mr. **Katzenbach**. I may have met him on occasion, but he is not somebody that I really know.

Senator **Specter**. Do you base your opposition to Judge Bork at all on his legal writings in the Indiana Law Review?

Mr. **Katzenbach**. Almost entirely, yes, sir.

Senator **Specter**. What judgment do you formulate from his shift in position where he says that he is prepared to accept the doctrine of clear and present danger for the first amendment and that he accepts the application of the Equal Protection Clause on broader grounds than he wrote about in 1971 and that he had spoken about more recently?

Mr. KATZENBACH. I get very troubled by that, Senator. What troubles me about that is that in my judgment, sir, this committee should not be trying to get commitments from potential Supreme Court Justices as to what they will do or what they will not do in particular situations. I think that has occurred, or very nearly occurred, too much occurred in the case of Judge Bork, and it has occurred because, unhappily, of the things that he testified and the moderating of the position that he was engaged in before this Committee, work done before that, work done in a way where they could be cited as representing a genuine change of position.

I said in my statement and I am really troubled by it, I do not know. He says "I continue to believe what I believed in the past, but I will accept this precedent," and when I try to put that mix together, I do not know what it is. I do not know what he really believes.

Senator SPECTER. But, Attorney General Katzenbach, how about the issue of law professors writing Law Review articles to advance ideas? He said the ideas were tentative and speculative. You have had some experience with the law journals yourself——

Mr. KATZENBACH. Yes, sir.

Senator SPECTER [continuing]. As Editor in Chief a few years ago of the Yale Law Journal, quite a few, but that is the style of the law journal.

Mr. KATZENBACH. I do not think so, Senator. I disagree very strongly with that. I do not believe that is scholarly writing. Occasionally, there is a speculative case that is put out and it is put out as speculative, but it is not put out with the language—that is unusual language for a scholar, it really is, and if it is put out as speculative, you wait to see what other people say and write about it and then you write about it again, changing your views or modifying your views. That has not occurred. He has modified his views slightly. He modified his views before the testimony to a degree, certainly on free speech.

Senator SPECTER. Well, he has on free speech and he has on equal protection, but——

Mr. KATZENBACH. Equal protection, only very slightly before his testimony before the committee.

Senator SPECTER. Well, before the committee very substantially.

Mr. KATZENBACH. Before the committee, very substantially, but where did that revelation come from?

Senator SPECTER. Well, it comes from a position of being a Supreme Court nominee, and that is a significant shift, beyond any question. But what reason do we have to doubt him, and if you have a reason, I would be interested to know it.

Mr. KATZENBACH. I do not for 1 minute, Senator, want to doubt his honesty or his integrity. He has certainly got those and he has got those in spades, no question about that.

Again, I do not know what it means. He said he accepts that now, even though he does not accept the basis of it. Now, you get up on the Supreme Court and you have got eight colleagues there and you are discussing things with them, should he feel committed to that view? Suppose he changes it? He has changed his views in the past. Should he feel committed by that? I would not and I do not think you want him to feel committed by that.

You want the free and honest ideas of the man that you confirm as appointed to the Supreme Court. You do not want to confirm him—I do not think you want to confirm him because he is committed to some particular line of cases or some particular law here. You want the man on the Supreme Court, not this idea or that idea.

Senator SPECTER. Well, did we go too far in asking him about judicial philosophy? If we are looking just to the man, the tradition in the past has been that we did not ask questions about judicial philosophy. When Justice O'Connor was before this committee, she would not answer any questions. Judge Scalia, now Justice Scalia, would answer none at all. Justice Rehnquist answered a few questions on the corporation doctrine, on *Marbury* v. *Madison*. Judge Scalia would not even answer those questions. Did the committee do Judge Bork wrong by pushing him on judicial philosophy?

Mr. KATZENBACH. I do not think the committee did wrong, but I am not sure he should have answered the questions. I think if he had not answered the questions, he would be in more serious difficulty with the committee, but I do not mean by that for one minute that he did not give honest answers. I want that just as clear as I can make it. I think he is a man of integrity and he certainly gave the answers he believed at the time he gave them to be honest.

Senator SPECTER. Well, Attorney General Katzenbach, I too am troubled by the answers which he has given, which I have stated for the record I have a question about, what I would call our ability to rely or predictability when he accepts a legal doctrine but disagrees with the philosophy. But at the same time my thought has been that professors do advance ideas and it is hard for professors to get their ideas across without being emphatic. It is hyperbole——

Mr. KATZENBACH. I do not believe that. That is not my experience, let me put it that way. It may be your experience, but it has not been mine, and I did teach for 8 years and I have taught as a visiting professor at places for another four, and that is not my experience.

Senator SPECTER. Well, I do believe that professors have substantial latitude.

One or two questions on the civil rights issue. I understand the point you are making about his position in 1963, and I find it troubling, too, but the question is a question of growth and a question of change. As I recollect it, back in June of 1963, you were Deputy Attorney General and confronted Governor Wallace——

Mr. KATZENBACH. Yes, sir.

Senator SPECTER [continuing]. In a rather dramatic confrontation.

Mr. KATZENBACH. It was his idea, not mine.

Senator SPECTER. Well, it took two to tango, and you were there and I understand where you were coming from on that. When you talked about the Senators who voted against the Civil Rights Act, Senator Simpson asked those questions, we have had Senators vote to deny the Supreme Court jurisdiction—I did not think I would see a day when the U.S. Senate would pass a bill to remove a remedy, a constitutional remedy from the jurisdiction of the Supreme Court of the United States, but we did that in 1982. You were not for that one, were you, Attorney General Katzenbach?

Mr. KATZENBACH. No, I was not. It is easy to get mad at the Supreme Court at times. It is easy.

Senator SPECTER. Well, I have gotten mad at them a few times myself when I was District Attorney and they came down with *Miranda* v. *Arizona* and invalidated a lot of evidence which was perfectly legal the day before the decision came down and was illegal the day after and a lot of murderers went free.

Mr. KATZENBACH. I bet you were annoyed. I would have been.

Senator SPECTER. It was very annoying. I had a defendant named Hickey who robbed a cab and the police questioned him in May of 1966 and they went to his apartment and they found the gun and they found the victim's clothing and they had all the evidence and the Supreme Court came down on June 13th with *Miranda* v. *Arizona* and said none of that evidence was admissible, and how they could declare it retroactively inadmissible confounded me in 1966 and it confounds me today.

The point that I was coming to on the issue of jurisdiction of the Court, Judge Bork has condemned that, has consistently been opposed to court stripping and consistently stood up in the civil rights area on the busing issue, so that at times—and more recent than 1964, when the Senators were voting to limit court jurisdiction, there was a different point of view expressed by Judge Bork, and that was not in a context of confirmation.

Mr. KATZENBACH. No.

Senator SPECTER. Well, I appreciate what you have testified here today. I have a lot of reservations, as I have expressed them, but I believe this is a very complex matter, to really make a judgment as to how much of Judge Bork we accept from what he testified here last week and how much weight we give to his writings and how we evaluate the whole picture.

Mr. KATZENBACH. I hope I made it clear that I do, too, Senator.

Senator SPECTER. Well, I appreciate your being here.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey?

Senator HUMPHREY. In the interest of the patience and endurance of our witnesses who are to follow, I will not ask any questions at this point.

The CHAIRMAN. Thank you.

General, thank you very much for your testimony. We appreciate it very much.

Mr. KATZENBACH. Thank you.

The CHAIRMAN. You are excused.

Now, at long last, Attorney General Saxbe and Attorney General Rogers.

Apparently, Attorney General Saxbe could not wait, but we will accommodate his schedule when he can.

Attorney General Rogers, welcome. Would you please be sworn. Do you swear to tell the truth, the whole truth, and nothing but the truth?

Mr. ROGERS. I do.

The CHAIRMAN. Please proceed, General, and thank you for your forbearance.

TESTIMONY OF HON. WILLIAM ROGERS

Mr. ROGERS. Thank you very much. I have been here since 10:30 and, if you do not mind, I would like to take just a moment to tell you an experience I had when I was here with then Governor Earl Warren. I was in charge of presenting the evidence in his behalf, and we had about 3 or 4 days of testimony, and there were a great many people opposed to him and there was one particularly troublesome fellow who insisted on testifying first. He turned out to be the last one and he had a large sheaf of papers, yellow papers, and he had a plug in his ear, so they finally said okay—he tried for 3 days, and they finally said now it is your turn. He came up and they tried to swear him in and he would not respond. After the third time, the Chairman sort of yelled at him, "What is the matter, why don't you answer the oath?" And he said, "Senator, I have been here 3 days, my batteries are dead." [Laughter.]

I think my batteries are a little dead, but I appreciate this opportunity at this late hour, and I appreciate, too, the fact that there are several Senators remaining.

Mr. Chairman and members of the committee, it is an honor for me to appear here before this committee in support of the nomination of Judge Bork as an Associate Justice of the United States Supreme Court.

My first job in Washington was here in the Senate as Chief Counsel for what was then called the War Investigating Committee, the Senate War Investigating Committee. Later, between 1953 and 1961, I worked in the Justice Department, first as Deputy Attorney General and later as Attorney General under President Eisenhower.

Because of my experience as an employee of the Senate, I was given a major role in the selection and confirmation of federal judges, about 200 in all, and I was particularly interested when Mayor Andrew Young pointed out today that three of the judges that he thought were particularly important because of civil rights, they were all judges that I recommended, Albert Tuttle, John Minor Wisdom, and Frank Johnson, and he was right, they were leaders in that time and did a great deal to promote the cause of civil rights.

I also sat through the hearings of Harlan, Warren, Brennan, Whitaker and Stewart. I sat through the confirmation hearings of the first four and had charge of presenting the witnesses, and I commiserated with Potter Stewart when unfair attacks were made against him during the hearings and during the delay before he was confirmed.

As to these hearings, I believe these hearings have been the most thorough, enlightening, provocative, and interesting in recent memory. The questions have been thoughtful and relevant. The answers have been responsive and of high intellectual and professional quality. For lawyers and scholars, it has been a constitutional adult education course of the highest order; and for law students, with appropriate editing, it should be required reading.

Having listened with care to these hearings and, unlike some of the previous witnesses, I actually have listened to them, and after looking at Judge Bork's record of accomplishments, I do not believe that President Reagan could have found a more qualified man or woman to nominate for this job.

Certainly, I can think of no nominee during my professional life who has been better qualified. As has been stated here, Robert Bork has had four distinguished careers, first as a lawyer in private practice, where he was very successful, as a holder of two endowed chairs at one of the nation's most prestigious law schools, as the government's chief advocate before the Supreme Court for 4 years—and I have talked to a lot of people about the quality of his advocacy and it was superb—and he served for 5 years as a respected federal judge in what is probably the second most important court in the country.

During these years, Judge Bork has compiled a record that is both impeccable and unparalleled. That is some record. When I agreed to testify, I was concerned, mistakenly as it turned out, about some of the things his opponents said about him and about some of the things he had said, because I had not met him.

Now, having studied this record as Solicitor General—and I do not minimize his record as Solicitor General, he testified, contrary to what a preceding witness said, he testified that if he disagreed with the requirement to appear before the Supreme Court in behalf of the Department of Justice, that he would not appear. So I think it is unfair not to give him credit for the excellent work he did as Solicitor General.

Now, having studied this record as Solicitor General, his opinions as a judge, and as a judge, although the fact was that only a few of the cases were appealed to the Supreme Court successfully, that does not detract from the record. If his opinions had been wrong in 100 cases, the lawyers certainly would have appealed, so the fact that there were few applications for cert, few appeals, to me is a credit to his record.

I believe he will be an excellent Justice of the Supreme Court, but I do agree with Senator Specter and some of the other members of the committee that these hearings may have been useful in helping him formulate and express his views, with a better appreciation of the views of Congress.

So, I think this has been a useful exercise. Now, Senator Specter asked a couple of questions this morning of some of the other witnesses about *Brandenburg* v. *Ohio*, and would I believe Judge Bork would keep his word when he said he supports that opinion now, and of course I do, there is no doubt about it.

Furthermore, Senator, I think that—if I am correct, I believe that was a unanimous opinion, nine to nothing. So, the idea somehow that he would go back on his word, with a nine to nothing opinion, makes no sense at all. I wondered what was the reluctance to say yes, he will keep his word. I do not think there is any doubt about Judge Bork's integrity and, when he told you that he supported that decision now, I am sure he did.

I must say also that the fact that his views changed over the years on that subject does not surprise me at all. Mine certainly did, and a lot of lawyers that I know did, because in those days—well, I was even in the DA's office when Fritz Kuhn was advocating the overthrow of the government by force and violence, there was no doubt about that from the standpoint of most lawyers, that that should not have been permitted, and later on, during the—from 1954 to 1960, that was sort of the prevailing view.

Now, I think the fact that *Brandenburg* v. *Ohio* has been decided and the fact that Judge Bork explained his rationale is a very good idea, and I think it is helpful to this committee to know that he feels that way, and I do not believe he has changed his mind at all.

Furthermore, he was asked about a lot of the decisions he made on the court of appeals, would he reach the same result on the same set of facts and he said he would, and I believe him. On equal protection, you may want to talk a little about that later. I would like to talk about it later, if we have time.

Of course, on the questions of integrity, I do not know how some of these witnesses could say "I think he is a man of the highest integrity, and I believe him," and then say he may renege on his word. No one who knows Judge Bork could or would question him on that score. The chairman of the committee graciously and appropriately said that Judge Bork is a principled man. That certainly is true. He is a man of integrity and high moral principles.

The thought that he would go to the Supreme Court with some sinister agenda and renege on what he has told this committee to me is outrageous. I cannot believe it.

Several members of the committee on both sides of the aisle have stated that there is not the slightest suggestion of racism in Judge Bork's life or in his record, and that is certainly true.

I spent a lot of years of my life in matters involving civil rights and I have no doubt about his commitment to civil rights. He certainly has a wonderful judicial temperament. No one could have answered those questions that were asked of him for so long in such an unruffled and polite fashion without having good judicial temperament.

In 1953, when we started in the Justice Department—I am talking of the beginning of the Eisenhower administration—the nation was in the middle of a civil rights crisis. At first, the first thing we had to do was to brief and reargue the case of *Brown* v. *Board of Education.* Thereafter, we had to implement that decision, the decision in that case.

As Judge Bork testified, he supported that decision because he believed it to be right constitutionally and he believed it to be right morally. And there were a lot of people at that time who did not support *Brown* v. *Board of Education.*

We established the Civil Rights Division to implement that decision. Two civil rights statutes were passed in 1957 and 1960. We drafted them and lobbied for them in Congress and as a result of those recommendations, in cooperation with Congress, we had those bills passed.

I argued the constitutionality of the 1957 Act and I helped draft and testified before Congress in support of it. As the events of the 1960s were to demonstrate, our work at that time began to have an important tradition of government leadership in the battle to promote and secure the civil rights of all Americans.

Later, as Solicitor General—and I do not see how people can disregard his excellent record—he built on that tradition and on the accomplishments of the Kennedy administration. It has been too little noticed that, as Solicitor General, Judge Bork often advanced positions on behalf of minorities that went beyond those ultimately adopted by the Supreme Court.

Let me say, too, I have spent a lot of my life in support of civil rights cases, and if I thought for a moment that he was going to turn the clock back, I would not be here today. I do not think that is a possibility.

I might say in that connection that I represented Dr. King, Dr. Martin Luther King in the Supreme Court in the case of *Sullivan* v. *New York Times.* There were five black ministers in the southern civil rights movement who were defendants, and Dr. King asked me to represent them and I did, and we were successful.

I was sorry to see this morning some of the people who testified against him, because I did not think that they proved their case. I mean, if he had been an idealogue or he had been opposed to progress in the field of civil rights, he would have voted—he would not have testified to strip the Supreme Court of jurisdiction. He would not have testified against the human life bill if he was an idealogue. Those were very important matters and he took a strong stand in behalf of the right causes.

Another matter which is of great importance to the public and which has received insufficient public attention, I believe, is the role which is played by the Supreme Court in the administration of criminal justice, both at the State and the federal level. About 50 of the 170 cases decided during the last term, 1985-86, were criminal cases. Judge Bork's stellar record of law enforcement should be a source of satisfaction to this committee and, I must say, to all Americans.

Several Senators on this committee have been prosecutors or judges and know from personal experience the importance of vigorous law enforcement. Judge Bork understands that, too.

He also understands some of the problems which have handicapped law enforcement officials in recent years. Judge Bork has opposed the application of—he understands some of the problems which have handicapped law enforcement officials in recent years.

He has opposed the application of artificial rules which keep the truth out of the courtroom and which fail to serve any other purpose. As a judge, Robert Bork has handed down tough but fair decisions that have protected the rights of victims and of society as well as the rights of the accused. That is why organizations representing nearly 350,000 professionals associated with law enforcement have endorsed his nomination.

As I have said, I believe Judge Bork, if confirmed, will make an excellent Supreme Court Justice. I strongly urge favorable consideration by this committee, and I sincerely hope he will be confirmed by the Senate.

Let me add, too, Mr. Chairman, if I may, that Senator Saxbe, former Attorney General Saxbe, said he would be glad to come back before this committee, if you so desired. Mr. Brownell, who is in Europe, supports the nomination, I think has submitted a statement, he too has said he will be glad to come back and testify. It happens that he is in Europe at the time.

And I understand that Judge Griffin Bell and Elliot Richardson support his nomination and will be available to the Committee if it so desires.

Thank you very much for your time and attention.

[Prepared statement follows:]

STATEMENT OF WILLIAM P. ROGERS
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF
THE NOMINATION OF JUDGE ROBERT H. BORK
AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Mr. Chairman and Members of the Committee.

It is an honor for me to appear here before this Committee in support of the nomination of Judge Bork as an Associate Justice of the United States Supreme Court.

My first job in Washington was here in the Senate - as Chief Counsel of what was then called the Senate War Investigating Committee.

Later - between 1953 and 1961 I worked in the Justice Department - first as Deputy Attorney General and later as Attorney General under President Eisenhower. Because of my experience as an employee of the Senate I was given a major role in the selection and confirmation of federal judges - about 200 in all - including Harlan, Warren, Brennan, Whitaker and Stewart. Part of this job included the care and feeding of the nominees. So, I sat through the confirmation hearings of the first four and commiserated with Potter Stewart when unfair attacks were made against him during the hearings and during the long delay before he was confirmed.

I believe these hearings have been the most thorough, enlightening, provocative and interesting in recent memory. The questions have been thoughtful and relevant; the answers have been responsive and of high intellectual and professional quality. For lawyers and scholars it has been a constitutional adult education course of the highest order and for law students it should be required reading.

Having listened with care to these hearings, and after looking at Judge Bork's record of accomplishments, I do not believe President Reagan could have found a more qualified man or woman to nominate for this job. Certainly I can think of no nominee during my professional life who was better qualified.

Robert Bork has had four distinguished careers in the law - as a lawyer in private practice, as a holder of two endowed Chairs at one of the nation's most prestigious law schools, as the Government's chief advocate before the Supreme Court for four years, and as a respected federal judge on what is probably the second most important court in the country for five years. During these years Judge Bork has compiled a record that is both impeccable and unparalled.

That is some record. When I agreed to testify - I was concerned - mistakenly as it turned out - about some of the things his opponents said about him and about some of the things he had said. Now, having studied his record as Solicitor General, his opinions as a Judge, and particularly his testimony before this Committee, I support him enthusiastically and without reservation. I believe he will be an excellent Justice of the Supreme Court. But I do agree with Senator Spector and some of the other members of the Committee that these hearings may have been useful to him in helping him formulate and express his views, with a better appreciation of the views of Congress.

Of course a Supreme Court Justice must be a person of highest integrity. No one who knows Judge Bork could, or would, question him on that score. At the conclusion of his testimony the Chairman of this Committee graciously and appropriately said that "Judge Bork is a principled man". That certainly is true. Judge Bork is a man of integrity and of high moral principles.

Several members of the Committee - on both sides of the aisle - have stated that there is not the slightest suggestion of racism in Judge Bork's life, or in his record. And that is certainly true.

Judicial Temperment is an important qualification for a Justice of the Supreme Court. Justice Stewart once said - in a First Amendment case - that he could not define pornography - but he knew it when he saw it. I have never been able to define "Judicial Temperment" - but after watching Judge Bork's thoughtful, cogent and unruffled answers to a host of tough questions for almost five days - I believe he set a new standard for judicial temperment. I still can't define it but Judge Bork has it. I am sure that the members of this Committee knew it when they saw it.

In 1953 when we started in the Justice Department, the nation was in the middle of a civil rights crisis. At first we had to brief and reargue the case of Brown v. The Board of Education. Thereafter, we had to implement the decision in that case. As Judge Bork has testified, he supported that decision because he believed it to be right constitutionally, and he believed it to be right morally.

We established a Civil Rights Division to implement it.Two Civil Rights statutes were passed in 1957 and 1960 as a result of Justice Department recommendations - and in cooperation with Congress. As events of the 1960s were to demonstrate, our work at that time began an important tradition of government leadership in the battle to promote and secure the civil rights for all Americans. Later, as Solicitor General, Robert Bork built on that tradition, and on the accomplishments of the Kennedy administration. It has been too little noticed that as Solicitor General, Judge Bork often advanced those positions on behalf of minorities that went beyond those ultimately adopted by the Supreme Court.

Another matter which is of great importance to the public, and which has received insufficient public attention, is the role which is played by the Supreme Court in the administration of criminal justice - at both the state and federal level. About 50 of the 170 cases decided during the 1985-86 Supreme Court term were criminal cases. Judge Bork's stellar record of law enforcement should be a source of satisfaction to this Committee and, I must say, substantial comfort for all Americans.

Several Senators on this Committee have been prosecutors or judges, and know, from personal experience, the importance of vigorous law enforcement. Judge Bork understands that too. He also understands some of the problems which have handicapped law enforcement officials in recent years. Judge Bork has opposed the application of artificial rules which keep the truth out of courtrooms and which fail to serve any other purpose. As a judge, Robert Bork has handed down tough but fair decisions that have protected the rights of victims and of society, as well as the rights of the accused. That is why organizations representing nearly 350,000 professionals associated with law enforcement have endorsed his nomination.

As I have said, I believe Judge Bork, if confirmed, will make an excellent Supreme Court Justice. I strongly urge favorable consideration by this Committee, and sincerely hope he will be confirmed by the Senate.

The CHAIRMAN. Thank you for your time and your thoughtful statement.

Senator Thurmond?

Senator THURMOND. Thank you very much.

Mr. Attorney General, I believe Judge Bork said that he had written 150 decisions while he has been on the circuit bench. If those decisions are not out of line with the rest of the court, they were in line with them, it is strange to see why people would accuse him of being an extreme right-winger when his decisions are right in line with the Court, but yet that was done.

He participated in 400 decisions during that time. That is a lot of decisions, a lot of work, and you did not hear any criticism from anybody. You did not hear any criticism from anybody opposing him now at that time against any decision he wrote that I know of. Do you feel that Judge Bork is a sound man, would make a sound judge, or does he have the integrity and does he have the character and the judicial temperament and competence to be a good Supreme Court Judge?

Mr. ROGERS. I certainly do, Senator. I think he would be an excellent Supreme Court Judge, and I think that his record shows—I notice the American Bar Association is one of the criterions who said a man should be industrious. Well, I do not know of any judge who is more industrious, who has been more successful. And I agree with you that he has been in the mainstream of all of the decisions of that Court, and there are—I hate the terms—but there are a lot of so-called liberals on that Court, a lot of very intelligent, high-class judges, but he has been in the mainstream of those decisions for five years. It is really difficult for me to understand how anybody can just brush aside those decisions as if they did not exist.

This Senate confirmed him for that job. Now, it is true that the criteria are different to some extent when you are considering a Supreme Court nominee, there is no doubt about that.

Senator THURMOND. But not very much.

Mr. ROGERS. But whatever it is, by all the standards I know, he would be a natural selection. I cannot think of any court of appeals judge during the time I was in the Justice Department who had as outstanding a record as he has. So, how anyone can just disregard his record, as if it did not exist, and go back to something he wrote in 1971, which he said at the time was exploratory and it did not improve it and he was trying to see what it would bring forth, how anyone can disqualify for that reason—and I have listened to some of the testimony and they say, "How would I know what he is going to do?" Well, I do not think there is any nominee who has even given the committee as much assurance about what he would do.

He supports all the Common Cause cases, he said so. He supports *Brandenburg* v. *Ohio*. He supports the Bill of Rights being incorporated in State law enforcement. I hope that Senator Specter has not left, because I think that he has taken the right position on equal protection of the law.

So, some of the things that were said here this morning just were not true, just factually untrue. For example, one was that Dr. King—one of the witnesses said that Judge Bork said that if Dr.

King had challenged laws by disobedience that he, Judge Bork, would say that he was not protected by the Constitution. On the contrary, Judge Bork said just the opposite. He said under those cases, if Dr. King wanted to test the constitutionality of a law by violating, he thought he was protected by the Constitution.

I was particularly struck, having represented Dr. King in the Supreme Court, I noticed that. I noticed that statement was made.

I also noticed a statement was made that Judge Bork said that the Equal Protection Clause would not apply to women. He never said anything like that, quite the contrary. He said just the opposite. He said in almost every case he could think of, it applied to women. In the case of blacks and minorities, he said he could not think of any exception, so you did not need a reasonable test or any other kind of a test. He said he could not think of a case where an exception should be made, where a difference could be made in the law between a black and another member of the minority and anybody else, because he said, "I think equal protection applies to everybody." And he said as far as women are concerned, he only thought of a couple possibilities. One was serving in combat in the armed forces, and the Congress has approved of that and so has the Supreme Court.

So, I read his testimony that he thinks equal protection law should apply to everybody and he said that in the case possibly of women, if there was some reasonable argument that could be made, it would have to be considered, but he could not think of any except the ones he mentioned. So to me he said the equal protection laws apply, without exception to blacks and minorities, and almost without exception to women and all other persons.

Senator THURMOND. Now, Judge Bork has got a lot of unfavorable publicity, but as former Attorney General William French Smith said, it is the distortions and misrepresentations and the untruths that have been told about him that is responsible for it. Is that your opinion, too?

Mr. ROGERS. Well, it is hard for me to analyze why. I think certainly there have been a lot of distortions, and I think when some nomination of this kind gets in the political arena and you have a lot of special interest groups who believe, honestly believe that some of these things that have been said about Judge Bork are true, it is easy to become emotional about it and I can understand it. But I think there are an awful lot of distortions.

For example, the idea that he does not think the Equal Protection Clause applies to women, how can they say that? There are two major cases in the State Department and he has decided in favor of women.

Insofar as the *Northwest Airlines* case is concerned he said that trying to make a distinction between men and women by calling one a person and the other a flight attendant was unconstitutional. He said they should be treated the same because they had basically the same assignments, and therefore it was unconstitutional to make that distinction. And he has a whole lot of other decisions of that kind.

So when I hear people say it, I don't know what they are talking about. Now are they still talking about the 1971 Indiana Law School Review? Maybe that is what they are talking about, but that has long been supplanted by a record that is quite an outstanding record.

Senator **THURMOND**. From what you say, I assume that you recommend his confirmation highly to this committee?

Mr. **ROGERS**. Yes, I do.

The **CHAIRMAN**. Senator from Alabama?

Senator **HEFLIN**. I don't believe I have any questions.

The **CHAIRMAN**. The Senator from Utah?

Senator **HATCH**. I just want to welcome you, Mr. Attorney General, Mr. Secretary, having meant so much to this country for so many years. I think you have really laid it out. It makes you wonder why anybody would be against Judge Bork after listening to you, and it also I think points out how political this process has become.

Mr. **ROGERS**. Senator, you know Bill Coleman is a fine man. I like him, and we have been on the same side. The civil rights people over here this morning, I talked to Andy Young afterwards. He remembers when I represented Dr. Martin Luther King. Incidentally, I thought he was the most reserved in what he said. He didn't sound as if he was too much against Judge Bork. He pointed out—everything he said I certainly could agree, and I think Judge Bork would agree with it. I mean, the progress that has been made in the South, how wonderful it has been that the rules of the Court have been accepted and that the crisis situation that we had in the late 1950's and early 1960's has been calmed down.

I do think it is rather sad, some of this opposition, which I think is quite unfair. I think it may add, it may stimulate more feeling of that kind which I hope doesn't occur.

Senator **HATCH**. Well, I appreciate those comments. I will make just one other comment. You have mentioned seven former Attorneys General of the United States who support Robert Bork: the four of you who testified today, except for Mr. Saxbe, who, of course, had to leave, but he was certainly here to testify for Judge Bork; General Levi; General Smith; yourself; Bill Saxbe; you have got Eliot Richardson, Herb Brownell, and Griffin Bell. And even Mr. Katzenbach, who was against Judge Bork here this evening, said that he had some questions and qualms but he might be persuaded. And all I can say is that is quite a number, a large number of Attorneys General of the United States.

Mr. **ROGERS**. And not to say, Senator, not to mention the two Supreme Court, sitting Supreme Court Justices who have supported him.

Senator **HATCH**. Well, that is correct.

Mr. **ROGERS**. I can't remember—maybe there have been. I can't remember any situation that is similar where Supreme Court Justices publicly have endorsed a candidate who was controversial.

Senator **HATCH**. Well, I want to thank you for your testimony, and it is great to see you before this committee again and we appreciate you being here.

Mr. **ROGERS**. Thank you.

The **CHAIRMAN**. Before I go to my next colleague, I want it to be clear, my recollection is that Mr. Katzenbach said he had an open mind, not that he might be persuaded, when the Senator——

Senator **Hatch**. No, he said he might be persuaded. He said he was persuadable.

Senator **Simpson**. Persuadable is what he said.

Senator **Hatch**. I think I cited it carefully and clearly.

Mr. **Rogers**. That is why lawyers argue about words.

The **Chairman** The Senator from Ohio?

Senator **Metzenbaum**. Mr. Rogers, although I wasn't here, I was listening to you on the radio, and I just have one question. I sort of heard your wrap-up that you don't know why anybody is against him, and I wonder—you are a brilliant man and you have had a great record, and it is a very decent record and a commendable one.

Do you think it is all make believe that women and blacks, consumer groups, other groups are so frightened of this man? How do you think it all came to pass? You think somebody could just whip them up, and all of those women are not intelligent enough to understand? Some of them are lawyers. Some of them are professors. A large group come from or are very active in the business world. How do you think it came to pass that all of those groups are opposed to this man, if, as you say, he really is very much in their corner on issues of discrimination?

Mr. **Rogers**. Well, Senator, I will be glad to take a shot at that. I think that you are probably overstating it when you say all women.

Senator **Metzenbaum**. I don't mean all women. I don't mean 100 percent of the women. If I said that, I don't mean that, of course.

Mr. **Rogers**. Well, what did you mean then?

Senator **Metzenbaum**. Well, I said all of these groups.

Mr. **Rogers**. Oh, the ones you have met.

Senator **Metzenbaum**. No. What I am saying is that all of the groups that represent women, and I could just go through a whole list of them, but there is no need to do that, all of the groups that speak for blacks in this country and minorities have indicated great concern. The American Civil Liberties Union doesn't normally take a position with respect to the confirmation of Supreme Court Justices. Hasn't done so, if my recollection serves me right, I think I read in the paper not in the last 50 years. I may be wrong about that.

Mr. **Rogers**. I think they have done it once or twice before, but you are essentially correct.

Senator **Metzenbaum**. Yes, that is right. The point is they don't normally do it. And a number of other organizations that haven't in the past taken a position, and what I am really saying is, if his record is as good as you would suggest, and I don't question your sincerity at all, then how does it come about that so many are so uniform and so strong in their opposition?

Mr. **Rogers**. Well, that is a good question, and I think certainly those women or others that you have mentioned have not gone through the record as members of this committee or as I have, so they to some extent have relied on what they have been told. And so many of the special interest groups made a decision that they would oppose him because they had a feeling I believe that somehow he was going to be a swing vote and therefore his confirmation became of vital importance; and because they had been misled about what he stood for, they were able to generate a great deal of political opposition.

I don't doubt that some of these organizations believe what they have been saying, although I do think that it has been pointed out here many of the ads are extremely untrue, false.

Also, it is based on the premise—I think this fear is based on the premise that it is a single Justice because there is a division in the Court is going to be the controlling vote. Well, of course, if you think that through, you realize what a terrible insult that is to everybody else on the Court. They don't vote that way all the time. You don't have a split on everything that way.

Furthermore, they respect the institution. They, I mean the Supreme Court Justices, respect the institution. And if, as someone suggested here earlier in the proceedings, that maybe Judge Bork had a sinister agenda and that he was lying to this committee, his peers on the Supreme Court would not let him get away with it. They are responsible people. They would know that right away, and they would have a lot of peer pressure.

So the idea somehow that he automatically is going to control that Supreme Court is just unfair. It is unfair to Judge O'Connor. It is unfair to Judge Stevens. If Judge Stevens thought for a minute that the nomination and confirmation of Judge Bork was going to make his vote of no value, do you think he would publicly support him.

Senator **Metzenbaum**. Let me ask you about one group. You have seen the ads in the papers, Planned Parenthood. Now nobody would call them a liberal group or nobody would say that these are unintelligent people. I have a personal recollection of a situation with them where I had been particularly helpful in connection with a piece of legislation some years ago, going back to, maybe, 1981. And I remember that the man who was I think the national president had said he wanted to help me, and he was going to help me in Ohio, and I thought that was very good. I was a political candidate.

I said to him, Mr. X—I won't use his name, but I would be very glad to share it with you privately—you were going to help me and you indicated that the women in Planned Parenthood were going to be extremely supportive, and I just wanted to ask you what are they prepared to do. How will they help? Will they go out precincts? Will they raise money? Whatever one does in politics.

And I remember his saying to me, and I remember it so clearly. He said, Senator, I am embarrassed. They are all Republicans. When I went to them, I said to them that we had to help you, and they said: We can't help him. He is a Democrat. We are all Republicans.

Now I find no fault with that all and I am not making a point of it, except this group is frightened. They are frightened that if he comes into office the efforts they make in making information available with respect to birth control will no longer be possible. The information they make available with respect to the whole problem of having a child, the whole question of planned parenthood. A very well-respected organization. I wouldn't be the least bit surprised if you or your wife were a member of it.

And how do you explain the fact that they have gone further out in this instance than they have ever done before in my recollection as a United States Senator?

Mr. ROGERS. Well, I think there is an explanation for that. I think they have been worried about *Griswold* v. *Connecticut,* and because Judge Bork disagreed with the reasoning in that case and, of course, he didn't vote on it, he was just a professor at the time. But he disagreed with the reasoning in that case, so it is very easy to draw the conclusion, therefore, he is against contraception.

Senator METZENBAUM. Contraception in connection with married couples in the privacy of their own bedroom, which was the *Griswold* case.

Mr. ROGERS. Well, yes, whatever. I mean, it is still—the principle thrust of that was not against married couples in their bedroom. The thrust of that case was because of birth control clinics around that felt that their work was being hampered by this law and they were the ones that brought the action.

But there are two aspects of that I think that the women's groups have forgotten. One was, he did not—he, Judge Bork, did not disagree with the result. In fact, he said in his writing that—what were the words he used?

Senator SIMPSON. He said it was "nutty."

Mr. ROGERS. Nutty. He said the law was nutty. And Justice Stewart, who agreed with his view on that, said it was absolutely law. And Archibald Cox, who has just written a book which was reviewed yesterday in the New York Times, supported the view of Judge Bork.

Now I think that it is difficult for people to disassociate constitutional values and views on how the Constitution should be implemented from the results, so I think he has been tarred with the idea that he supports snooping around bedrooms and he is against contraception, and so forth. I don't think he is.

I have—I will tell you this. I don't know how he would vote. I have no idea how he will vote on these cases. He thought, and a lot of prominent scholars and judges thought, that the reasoning in that case that was decided, as I remember, by Judge Douglas and Goldberg, was subject to criticism, and you had Douglas and Goldberg on one side and you had men like Potter Stewart and Black on the other.

Now I can't see how you can get too excited about that. Why would that alienate all the women because of it?

And of course, obviously, *Roe* v. *Wade,* he has never taken a position on it. I noticed Bill Wade said he—he, Bill Wade, didn't agree with the decision. I don't know how I stand, and I sure don't know how Judge Bork stands on it. I think anybody that can make a prediction on that is——

The CHAIRMAN. Would the Senator yield for a second?

General, I believe he did not—I believe you are correct he did not say how he would vote on *Roe,* but he did, I think the record will show, say how he would have voted on *Griswold* based on the arguments brought to the Court.

Mr. ROGERS. That is right, I think he did. But he also said——

The CHAIRMAN. I am not splitting hairs. I think you are representing the position well.

Mr. Rogers. I think he also said that he didn't feel that that law ever would have been enforced.

The Chairman. That is correct.

The Senator's time is up, but take a couple more minutes. But just a couple, because the ABA has been waiting all day.

Senator Metzenbaum. My respected Attorney General is taking the time, and I didn't want to cut him off on a question.

I do want to point out that he has never offered any alternative reasoning to reach the result, the same result in connection with the *Griswold* case, and I also want to point out that he said that there was no constitutional right of privacy as recently as this summer.

Now having said that, let me come back to the Planned Parenthood group because you mentioned that you thought that their position came about by reason of their concern in the *Griswold* case. You did not mention *Roe* v. *Wade.*

Mr. Rogers. I just did.

Senator Metzenbaum. Oh, you just did. Put that package all together and I think we understand why they are concerned.

Mr. Rogers. I think so, too.

Senator, could I just make one observation on your comments?

Senator Metzenbaum. Please do.

Mr. Rogers. I think there has been an awful lot of confusion about what Judge Bork stands for in the privacy field. His objection to that was that they had developed a new different theory of privacy which he said had not existed before, and I believe most scholars accept that. And he didn't think it was desirable to develop a new theory of privacy.

He supports all the privacy laws and all the constitutional interpretations of the privacy laws that existed, and his position is that you didn't need to create a new one which would be ambiguous, you wouldn't know whether it would apply to everything or what, why it was different. And he said in the case of *Griswold* he would seek to find other constitutional basis to overrule that.

Senator Metzenbaum. But that is my point, Mr. General, and that is that he is a learned scholar. He took the position that he did with respect to *Griswold,* and then he talks about he would seek to find a basis for overriding it. Where is he? We haven't heard from him? When are we going to hear from him, 19——

Mr. Rogers. He wasn't a judge at the time. He was doing what professors do all the time, and I have heard some discussions about professors. They try to figure out things they can write that are critical of courts or Congress or somebody, and they get a controversy going. And he and others, like Archibald Cox, they both decided that the reasoning in that case was not sound, and that doesn't prove anything except they didn't think the reasoning in that case was sound.

Senator Metzenbaum. But we deal with results, and if you are a married couple concerned about privacy, if you are concerned about the results of the *Roe* v. *Wade* matter, if you are concerned about free speech, if you are concerned about the impact of antitrust laws against consumers, if you have any of these concerns Judge Bork would say, well, we will find new lines of reasoning, we will find a new concept. And when you get all done, you become apprehensive and, as I have said a couple of times, you actually become frightened.

Mr. ROGERS. Well, I think anybody who is frightened about Judge Bork I think is making a serious mistake. I think he will be a splendid judge. I don't believe you are going to be able to predict where he is going to stand.

You can predict the line of reasoning he will follow, but you are not going to find that he is going to fail to appreciate the results of his reasoning. I mean, I think in the *Griswold* case, as I say, he started out saying this law is—whatever it was—nutty, and Potter Stewart said it was absolutely silly. So he had no trouble with the law. It was how the Constitution is applied to that set of facts. But I have taken too much time, Senator.

The CHAIRMAN. No, you haven't, General, and I just will interject one thing. Far be it from me to be argumentative with a man of your stature and I think your testimony has been very insightful, but quite frankly I think you are right on what the Judge has said about speech and equal protection. I think the record will show, and I will just send you a portion of it, that I think you misunderstand his position as he stated it on privacy. He has been very straightforward about that. He didn't say he would seek to find. He said that he could find none, and he talked about a generalized right of privacy not existing.

And again, I don't mean to be argumentative because I think you are accurate in the way you are portraying him, particularly when you said you cannot predict how he will rule but you can predict his line of reasoning.

The one line of reasoning that has stayed consistent—I do not mean to be smart when I say that—the one line of reasoning that has stayed consistent is the line of reasoning relative to a general right of privacy in the Constitution. He has written about it. He spoke about it here, even though he acknowledges the law in *Griswold* was nutty.

I am not suggesting—nor is anybody else—that he thinks the law is a good idea. But I believe you are correct when you say his line of reasoning is predictable, and I may be mistaken, but we will have plenty of time to discuss that.

I will not speak any longer. I yield to my friend from Wyoming, and then on down the line, and you will be able to get yourself some dinner, hopefully, Mr. Secretary.

Mr. ROGERS. Thank you.

Senator SIMPSON. You have been here since 10:30 this morning, haven't you?

Mr. ROGERS. Yes.

Senator SIMPSON. You are a very patient man. This is, however, typical of the fairness of the Chairman. He is going to see that it is done this way, and he does not just say it, he does it, even though we are all getting bags under our eyes and some distressing personal continuation.

The *Griswold* case, you cannot believe how much time we have spent on that nutty case, and how much mileage the opponents of Bork got out of it. This was the key. This must have been the one that kept them up late. This was the green eyeshade special here. The *Griswold* case. A goofy kind of a thing. An 80-year old law.

Nobody had ever brought a case under it. Unless you go into the bedroom and find out if they are using a contraceptive, which is rather difficult in most circumstances, I think.

And so the law professors cooked it up and they said, let's run a test on this, so they found the doctor who was peddling contraceptive devices, and thus this case, a nutty case. And Judge Hugo Black referred to it as offensive. He referred to the statute as offensive.

Nobody likes to quote Black on the *Griswold* case, but I think it is important and I will just insert it in the record. He said—he added, the law is every bit as offensive to me as it is to my brethren of the majority, and my brothers Harlan, White and Goldberg. He said, the Court talks about constitutional right of privacy. This could come right out of Bork's mouth. It does not even have to be reinterpreted in any way. You do not have to do anything with it. You do not have to distill it:

"The Court talks about a constitutional right of privacy"—this is Black talking—"as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the, quote, 'privacy' of, quote, 'individuals,' but there is not," unquote.

That is what he said. That is what Black said, and that is what gets so remarkably distorted. And Judge Bork also said, and if I recall, Mr. Chairman, he said he would continue to inquire into and seek to find some, quote, "right of privacy" that would fit. He did not lock himself away, but he said, there are other provisions in the Constitution that would take care of this case very nicely. Would you not agree?

Mr. ROGERS. I certainly would.

Senator SIMPSON. Of course.

Mr. ROGERS. That is exactly what he said. He also said that spending so much time on discussion about condoms when state governments all over the nation are urging people to use them, that any law maker or legislative body that attempted to outlaw them would be crazy. So that it is a totally hypothetical situation.

Senator SIMPSON. Well, he said it could be found, indeed, under other protections in the law and under the Constitution and that is what he said.

Well, of course, I had not known until just recently that my friend Justice White had indicated on a public forum of the 17th that he favored Judge Bork, a nominee of President Kennedy, and a very thoughtful man; a friend I have known for many years, a westerner and a very, very bright and thoughtful member of the U.S. Supreme Court.

But somehow they will play that down. That will get lost back on page 17 with the truss ads. And that is the way this works around here, any endorsement like that. I believe Justice Stevens' endorsement appeared on page 17 somewhere back in that area.

So we all have been there before. And the reason, why are these groups doing this, the Senator from Ohio asks? It is very simple. All of these groups benefit from judicial activism instead of judicial restraint. That is the real reason. They hope to wing it and not stick with a strict interpretation of the Constitution. They want to use emotion and fear and guilt and racism. That is the way that works.

The ACLU has a particular interest here. They have got six cases that have come up from the lower court where they won the day, and if there is a four-four split in that Court for a long enough period of time, it is very likely they will assure that they will prevail. They have got real stakes in this one.

We will visit with the ACLU when they come in and find out some of the reasons for that. But with the packets and the kits and the galvanizing of the troops and students bodies all over the United States, it is just, you know, if you want to join us today, we want to talk about Bork; he is a racist, he is a sterilizer, he will be in your bedroom, he will do this.

You know, people are alarmed and stunned and appalled. So that is our job to try to see if we cannot see the real Robert Bork, and the people of America certainly saw him.

I just want to say to you, it has been a distinct pleasure to get to know you. This country continues to draw upon you. We draw upon your resources often, so many ways, the Challenger, these other things. I hope you are always there where we can do that, because you are superb.

Mr. ROGERS. Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Attorney General or Mr. Secretary, I join my colleague, Senator Simpson, in those words of high praise. And again today we have kept you here for almost 10 hours and I am going to be relatively brief.

You commented earlier about the case of *Brandenburg* v. *Ohio* which deals with the free speech issue, clear and present danger, and you said that, of course, Judge Bork would keep his word, and as we had commented earlier, Judge Bork disagreed with the principle, with the philosophy, of the clear and present danger test. You addressed it, but I want to pursue it for just a moment.

It was a nine to nothing opinion. It involved a case of a Ku Klux Klan gathering and there were racial comments, and it involved an Ohio statute which the Supreme Court said was unconstitutional on its face and unconstitutional as applied. I think everyone concedes Judge Bork's integrity and his intent to carry out his word, but the critical question which troubles me is, if he disagrees with the underlying philosophy of clear-and-present-danger test, even though he has accepted the principle, when the next case comes up it is going to be slightly different than the facts of the *Brandenburg* case.

Where is the predictability that he really can follow the principle if he philosophically disagrees with it?

Mr. ROGERS. Well, I think that is a good question. Of course, in that case, as I say, I suppose it is academic in the sense that there are nine judges in the Court who have already decided that. But I think his view is, as I heard him, that he would accept it as is and would not attempt to change it.

I do not think there would be any reason to change it. He pointed out that the reason that a lot of us, including myself, supported the previous doctrine of trying to overthrow the Government of the

United States by force and violence, the advocacy of that was not protected. And this was true of a great many lawyers and judges. Judge Bork pointed out that the situation has changed. People have found out that that kind of speech really does not do any harm in this country. No one pays any attention to it.

If you had a situation where—suppose we were dealing with terrorists instead of communist groups or fascist groups or Ku Klux Klan groups, attitudes might change back again. I would hope not, but I suppose—for example, I am not sure—this committee has not discussed, what is the protection when you get on an airplane and you say, I have a bomb? I mean, I do not think the Constitution protects that.

Now, move away from that a little bit. Suppose you do not say you have a bomb, but you tell the flight attendant, watch out for that suitcase, there may be a bomb in it, sort of by way of a joke. Is that protected? That is a pretty close case.

I think in terms of overthrowing the Government, I think that the *Brandenburg* case is a very sound, solid case and I think you can be absolutely sure that that standard in that case will continue to be the constitutional standard in our lifetime.

Senator SPECTER. Attorney General Rogers, long after the *Brandenburg* case, Judge Bork was still disagreeing with it. It came down in 1969. He flatly disagreed with it in his famous law review article in Indiana Law Review. He spoke later at the University of Michigan and he flatly disagreed with it.

When you talk about the prosecutions when you were in the Justice Department in the Eisenhower administration, when the Smith Act cases were being carried on, there was agreement with the principle of clear and present danger, that you could not convict somebody from advocacy unless there was a imminent risk of violence. That has been an established principle of law of the United States at least since *De Jonge* v. *Oregon,* Chief Justice Hughes in the 1930s.

So that there has been a significant variance from well established law that Judge Bork has articulated, and now he accepts the settled doctrine but he disagrees with the principle, and when we draw these wavy lines, as he testified, it is just a concern as to his ability, notwithstanding the best of intentions to faithfully apply doctrine, that is philosophically disagreed with.

Mr. ROGERS. Well, I know you believe that. I do not think he would have any problem. I think that you can carry out a law that you philosophically degree with, depending on what your duty is. I mean, I was a DA in New York, as you were, for many years, and there were several matters that I prosecuted that were law that I did not agree with. But I still did it. I did not have any hesitation. I did not fail to do my duty just because I did not agree with it, and I think in his case, he disagreed 20 years ago with the reasoning of it, and I think he has given this committee all the possible assurance—as a matter of fact, he probably has gone farther than any other nominee has ever gone to give you assurance that he fully supports it.

Senator SPECTER. Well, there are some other similar issues on equal protection of the law, but I am going to defer to the hour, and thank you very much, Mr. Attorney General.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey.

Senator HUMPHREY. General Rogers, you were in at the outset of the civil rights movement—the modern civil rights movement—that began in the 1950s and blossomed and flowered in the 1960s and 1970s. Surely you must be highly credible among the civil rights leaders of those days and the leaders of today as someone who has stood with them in bringing about a fuller participation, fuller equality for the law.

No one can question where Bill Rogers comes from in the area of civil rights by virtue of the long years of consistent work in behalf of equality for everyone before the law. So with that background I should think that you would have a great deal of credibility.

Let me ask you this. Some have repeatedly tried to dismiss the importance of the efforts of Robert Bork as Solicitor General in the cases that he argued, in the briefs that he filed. They have tried to discount, dismiss the importance of—ironically and incredibly—the importance of the many decisions he has participated in or written on the DC Circuit Court of Appeals, some of which—to be sure, not a great number, I think about eight—eight of which 400 some-odd cases dealt with substantive civil rights issues, and in seven of eight of those cases as you know he came down on the side of the minority person or the woman.

What do you say to those who insist on dismissing the importance of Robert Bork's efforts as Solicitor General and DC Circuit Court of Appeals Judge?

Mr. ROGERS. Well, I guess what I have said here today, I do not think you can. But I am not sure that he changed many minds, particularly so many people were committed before the hearing started and having taken public positions. It is very difficult to change their minds.

I mean, you know, you asked Nick Katzenbach, are you persuadable. Well, he says yes. But how could he change his mind? He is way out on the limb with all of his peers and all of his friends and everything.

I have great respect for Bill Coleman and I know that he has some doubts about Judge Bork which I think are unfounded. But I can understand it. I do not think, probably, that when you are dealing with people that are fully committed against him, that you can change their minds.

Senator HUMPHREY. Yes.

Mr. ROGERS. All I can say is that I have read, I think, most of the cases he has written, most of the things he has written in the field of civil rights, and if I thought for a moment that he had an ounce of prejudice or any racism or was out to do any harm to the civil rights movement, I would not be here.

Senator HUMPHREY. Yes. Well, you are quite right. It is difficult to change minds of those who are way, way out on a limb. But after all, the American people, I hope, will still have something to say about how their Senators vote on this issue, and many of them are tuned in and listening by various means.

So with your credibility—and I especially want black Americans to hear you say this in whatever way you choose to say it—but is it relevant to take into consideration and how much weight do we give to those actions of Robert Bork as Solicitor General and DC Circuit Court of Appeals Judge? Are they irrelevant or do they offer some important information and evidence about Robert Bork's commitment to equality?

Mr. Rogers. Well, I think, of course, they are the key to what Judge Bork thinks. People talk about who is he and what does he think. I think the best evidence is not something you wrote 20 years ago or whenever it was—16 years ago; it is what he has done. It is what he has done in public life. And what he has done as Solicitor General, what he did as Solicitor General, was he was a strong supporter of civil rights.

Senator Humphrey. Yes. But they argue that he was only following orders and therefore whatever he did is irrelevant; is that true?

Mr. Rogers. No. Of course that is not true.

Senator Humphrey. Does the Solicitor General have a good deal of latitude? No latitude? How much latitude does one have?

Mr. Rogers. Well, of course, that varies with administrations, but the Solicitor General has a great deal of latitude and if he felt for a moment that he was doing something that was unconscionable he did not agree with, he would not do it. And while I was in the Department of Justice for 8 years, the Solicitor General had great latitude to decide these things, and I am sure that Judge Bork did. He said so.

So I do not think you can dismiss what he did. He had a great record as the Solicitor General.

Senator Humphrey. So it ought to be taken into consideration by this committee?

Mr. Rogers. Of course.

Senator Humphrey. And not dismissed on the excuse that he was simply working for a client.

Mr. Rogers. Of course. I mean, a man like Judge Bork could not do that. He could not consistently go into court and argue things he did not believe in.

Senator Humphrey. Fine. Now, what about his decisions, his participation in decisions on the D.C. Circuit Court of Appeals? There are those here—I think we have refuted this charge a number of times; I would like to hear what you have to say on this subject—there are those who say that his decisions in civil rights or elsewhere, any of his decisions, do not matter, because lower court judges are bound by Supreme Court precedent.

To be sure, that is true, but the key question is to what extent are they bound. The key question is to what extent do they have latitude; to what extent did Robert Bork have latitude. Did he have sufficient latitude such that his decisions are an important evidence to us in determining this man's commitment to equality before the law?

Mr. Rogers. Well, of course, they are important. It is true that a circuit court judge is normally expected to and does, as a rule, agree with Supreme Court decisions. On the other hand, a lot of the Supreme Court decisions are not too clearcut. And he could decide things, or write his opinions in a way that may vary a little bit from the opinions of the Supreme Court.

But furthermore, if he disputes the decision of the Supreme Court, he can write in his opinion that he does not agree with it.

He can say, "I support this in view of such-and-such a case in the Supreme Court, but my own view is that that was wrong," and he can express his views.

So not only his decisions but his opinions as a district court judge are vitally important.

Senator **Humphrey**. Vitally important.

Mr. **Rogers**. I have looked them over, and I do not see anything there that should cause anybody any concern. And to brush them aside as if they did not exist, I think is unfair.

Senator **Humphrey**. To say the least.

The last question, or the last focus, at least—are you a member of the ABA?

Mr. **Rogers**. Yes.

Senator **Humphrey**. A lifelong or career-long member?

Mr. **Rogers**. Too long.

Senator **Humphrey**. I can understand that. What are your thoughts as a lawyer and a member of the ABA on this seeming change of opinion, referring, of course, to the fact that ABA gave Judge Bork its highest qualification, highest rating, in 1982 by unanimous vote, and in this case, gives Judge Bork its highest rating for Supreme Court by a vote of ten in favor, highest rating, ten in favor; one, not opposed; and four, opposed to his confirmation?

Mr. **Rogers**. Well, maybe I should wait and hear what they say. I will say that as far as I am concerned, based on my experience—well, let me go back a bit and say, we in the Eisenhower administration started the procedure with the American Bar Association, because President Eisenhower wanted to be sure we had highly-qualified judges, and he asked us, and me in particular, to set up the procedure. So I set up this procedure, and in over 200 cases, we worked with the ABA.

Now, at that time, the rule was that the ABA would not deal with the political or social or judicial views of any candidate; that they would confine themselves to other matters of his qualifications, including his scholarship, his experience, his regard in the community, judicial temperament, and things of that kind. And it was clearly defined that they would not get into how he stood on particular matters, particular judicial matters.

And as far as I know, all the 8 years I was there, they never varied from that. If they have changed the rules, well, that is something else again. So I guess I had better wait and see what they say.

Senator **Humphrey**. That is certainly an example that I wish others would follow, waiting to hear the arguments before making up their minds—even though I tempted you to make up your mind in advance of the arguments.

Thank you.

The **Chairman**. General, thank you so much. You have been very, very gracious.

Mr. **Rogers**. Thank you, Mr. Chairman. I appreciate this opportunity. I always enjoy it. Thank you.

Senator **Leahy**. Mr. Chairman, I might say, with Mr. Rogers here, we often have comments made about distinguished people, and certainly, it would be very, very rare for this committee or any other committee to have anybody with a more distinguished record than William Rogers. I am also glad to see you here, sir.

Mr. **Rogers**. Thank you very much.

The **Chairman**. Thank you, Mr. Secretary.

Now, our last witness, and I apologize for his being brought on so late.

Judge Tyler, are you and Mr. Fiske both going to be testifying?

Judge **Tyler**. Mr. Chairman, yes.

The **Chairman**. Would you both stand and be sworn?

Do you swear the testimony you are about to give will be the whole truth and nothing but the truth, so help you, God?

Judge **Tyler**. Yes.

Mr. **Fiske**. Yes.

The **Chairman**. Gentlemen, welcome.

Judge Harold R. Tyler, Jr., of New York; and Mr. Robert Fiske, we welcome you both, and appreciate your being willing to be here so late.

I want to say at the outset that I would give you the option of going tomorrow morning, but I understand tomorrow morning is not a good time for you, and so we will continue to proceed tonight.

I thank you very, very much, and will you please proceed?

STATEMENT OF HON. HAROLD R. TYLER, JR., ACCOMPANIED BY ROBERT FISKE

Judge TYLER. Thank you, Mr. Chairman.

You are quite correct. We are grateful to the committee for allowing us to appear this evening.

As indicated, my name is Harold Tyler. I am the new Chairman of the ABA Select Committee on the Federal Judiciary. With me is Robert Fiske, also of New York, who was my leader, except that recently I took over in the middle of the Bork investigation, and he is gracious enough to let me do most of the heavy lifting tonight. But he is the one who started us on our work, and of course, it is very helpful that he is here to fill in any gaps that might be in my knowledge or information.

As you know, the committee commenced its investigations on July 2; we concluded on or about September 8. Shortly thereafter, I notified Chairman Biden in writing and orally, as well as the administration in a very brief letter, where we came out——

Senator METZENBAUM. I did not want to interrupt you, but you said you started on July 2nd and finished on July 8th?

Judge TYLER. If I said that, Senator Metzenbaum, I am mistaken—September 8th. I beg your pardon if I misspoke.

Senator METZENBAUM. I did not mean to interrupt you, but I thought the document said September 8th.

Judge TYLER. I am glad you did.

As you know, we delivered yesterday evening copies of our longer letter or report in which we indicated that a majority of the committee voted Judge Bork "well qualified," the highest rating for a Supreme Court Justice candidate, a rating which is somewhat different than the rating system we use for lower court judges.

One member voted not opposed, and four members voted not qualified. To summarize, ten members voted well-qualified; one, not opposed; and four, not qualified.

As you will see from the letter, we endeavored to summarize the grounds, at least in general terms, of the position of the minority. I think, in some respects, the apparent reasoning of the minority shows up a little bit, at least, in some of the findings we summarize in our letter.

Briefly stated, we interviewed over 400 members of the profession, both judges, lawyers, and people in academic life. We received a number of submissions from groups, almost all of which, I am sure, have made submissions already to this committee.

We looked at the opinions of the nominee and his career in the DC circuit. We consulted others on those opinions. We met three times, not over the telephone, but once in San Francisco on August 7th, once in New York City on or about August 28th, and then our final meeting took place—and I am sorry to say I cannot remember if it was just before or just after Labor Day. This was an investigation which as far as I can tell, at least, from the records of the committee, was much more extensive, perhaps, than any other in the history of this committee's work—if only because, of course, we had a good deal of time, and we were thus able to receive much more information, and that is what happened.

Now, one other note on how we proceeded. We are not, and never should be thought of as professional pollsters. As a matter of fact, I would think any professional pollster or statistician would probably understandably and correctly be appalled at our methodology.

Our people, who come from all corners of this Republic, one or more members, as you know, from each of our judicial circuits, talk to people, and then they report the results of their interviews.

The interviewees do not always talk in the same language. I assume that many of the interviewers do not always talk in the same language. Therefore, we do not get results which are in response to written questions; we do not get check sheets from each interviewee as to what he or she thought about a particular nominee.

Therefore, Mr. Chairman, I am content to stop here. I know you have all read our report which we delivered yesterday, and we will endeavor, of course, to answer any questions.

I am here, I must say, acting as the principal spokesperson. I intend to carry water on both shoulders, I guess, to the extent that I am prepared to do the best I can to explain how the majority and the minority came to their conclusions without, of course, being able to get in their minds, and indeed, without being able to remember everything they said.

These meetings, which went a total of at least 13 hours all-told, were typical discussions of lawyers, give-and-take. Frankly, like all lawyers in groups, we interrupted each other; several people would, I am afraid, talk at once sometimes. But in the inevitable discussion, I think we came to our final views, and that is about it, for the moment, subject to your questions.

The CHAIRMAN. Let me begin, Judge, and we will impose a 10-minute rule—and would the clerk keep the clock, please?

Are the procedures you outline in your statement essentially the same as those you followed last year for the Rehnquist and Scalia nominations; and if they were not, were there any significant differences? For example, you indicated in your letter to this committee that Judge Bork was interviewed at length on two separate occasions. Is it usual for the committee to interview the nominee twice?

Judge TYLER. I cannot say that this has always been done. In fact, I assume it has not always been done. Is that——

The CHAIRMAN. Mr. Fiske, you were there before. Can you tell us if this is——

Mr. FISKE. Yes. Well, Senator, I think the basic procedures that were followed in this investigation were exactly the same as the ones that were followed with Justice Rehnquist and Judge Scalia. Each of those, Justice Rehnquist and Judge Scalia, were interviewed once. Judge Bork was interviewed twice. And I think the explanation for that in part evolves from what Judge Tyler said a moment ago, about how this process worked.

We had the committee start the investigation on July 2nd. We did not know at that time what the timetable was going to be for this committee, so it was sort of a full-court press right from the beginning.

At the time we met at the ABA Annual Meeting in San Francisco, at which time my term as Chairman expired, and Judge Tyler took over, on August 7th, we had a meeting of the full committee which lasted approximately 3 hours, at which time it was decided that, particularly in view of the fact that this committee at that point had made it clear your hearings were not going to start until September 15th, we knew there were going to be submissions coming in from a number of interested groups, the committee decided that it would be intelligent to wait, receive those submissions so they could be thoroughly reviewed and evaluated, which was then done. The next meeting was held on August 28th.

In the meantime, Judge Tyler and I and another member of the committee had interviewed Judge Bork in July. But what happened between that interview in July and August 28th was that some additional questions were presented by some of the submissions and by some of the discussions at the meetings, and the committee concluded that it would be desirable to have a second interview with Judge Bork to follow up and explore some of the questions that had been raised.

The CHAIRMAN. Can you tell us what any of those additional questions raised were?

Mr. FISKE. Well, I think that one of them centered on questions that were raised with respect to the Saturday Night Massacre. I would say that was the principal focus of the second interview.

The CHAIRMAN. Was there a record or a transcript or a memorandum kept of any of these interviews?

Mr. FISKE. Yes.

The CHAIRMAN. Would you be prepared to submit that transcript to the committee?

Mr. FISKE. I think I should defer to the current chairman.

The CHAIRMAN. Excuse me, Mr. Chairman. Would you?

Judge TYLER. We did, as you say, keep memoranda of the two interviews of Judge Bork that this committee did, because there were only three of us who did the interviewing. And I have not focused on that. I have not got those copies with me. And there were a number of issues other than the Saturday Night Massacre and its aftermath.

One of the matters which I am here tonight prepared to turn over goes back to the earlier interview, as you know, Mr. Chairman, and frankly, I have not got those current interviews with me. And if we could just defer on that——

The CHAIRMAN. I would be happy to defer on that. Do you have the interviews—when you say "the earlier interview", for the circuit court of appeals, I assume you are referring.

Judge TYLER. That is correct.

The CHAIRMAN. And that is the memorandum that was written by Secretary Coleman?

Judge TYLER. Yes. What had happened was, oh, a week or two ago, I had had a conversation with a man named Mr. Corriea, who I believe is on the staff of Senator Metzenbaum. At that time, I understood the focus was on a particular segment. In the meantime, I had been told by both representatives of the nominee and also by you, Mr. Chairman, in a letter which I received this past Saturday, of the transcript of the colloquy between Senator Metzenbaum and Judge Bork. And it seemed to me, as a result of that, since the nominee has waived on that, I am going to hand up a segment.

Unfortunately, I did not have help over the weekend, and I only made two copies, one of which I would like to keep for myself, and one of which I am going to deliver, since they have asked for it, to the administration, or those in the administration who are assisting Judge Bork.

The CHAIRMAN. And the third copy is the one you have handed me?

Judge TYLER. Yes, sir.

And I don't have enough copies for all members.

The CHAIRMAN. Well, I suppose they could all read it. That's a joke, Allan.

I would ask the staff to prepare copies for the entire committee.

Let me move on in the meantime with what little time I may have left.

What is the process by which your committee comes to vote on a Supreme Court nomination? You said you met as a whole, as I understand it, on four occasions——

Judge TYLER. Three occasions.

The CHAIRMAN. Three occasions.

Judge TYLER. Yes, sir.

The CHAIRMAN. And is there a draft report circulated? Is that how you do it? Maybe you could explain to me how you do it, not who voted how, but how do you do it?

Judge TYLER. Yes, sir. A draft was circulated several times. I confess to being the initial draftsman, and I got plenty of advice not only from my former chairman and colleague here this evening, Robert Fiske, but other members of the committee.

I particularly discussed with those persons who were in the minority the language which was being placed in there endeavoring to summarize as accurately as possible, not only the majority views but the minority views.

As a result of that process, the drafting went on for quite a time. It started—I think I did my first draft on or about September 9th or 10th, and frankly, it didn't stop until we delivered it to the committee yesterday afternoon.

But to answer your main thrust, as I understand it, it went through a number of drafts and, in substance, it was circularized or circulated twice.

The CHAIRMAN. Judge, what do the categories mean? As I understand it, there are three categories, only three, for the Supreme Court that can be voted on.

Judge TYLER. That is correct.

The CHAIRMAN. One is "well qualified", the other is "not opposed", and the other is "not qualified"; is that correct?

Judge TYLER. That is correct, sir.

The CHAIRMAN. What does "not opposed" mean?

Judge TYLER. The not opposed is described to some extent on page 8, for anyone who has our present rules, or I should better say guidelines. It doesn't say very much, frankly, with respect to that category.

It says, "The second category consists of those persons who are not opposed by the committee. Such a person, while minimally qualified, is not among the best available for the appointment and is not endorsed by the committee."

As you know, we had one member who voted that particular rating. As I understood him, he was not prepared to say that the nominee was not qualified, but for substantially the same reasons as we attempted to summarize at the end, as to the minority's views, he chose to cast his vote for this particular rating.

The CHAIRMAN. Judge, let me ask you another question, because my time is almost up. I have received the two-minute warning here.

With the exception of your addition as the chairman, has the membership of the ABA Standing Committee on the Judiciary changed since Rehnquist and Scalia?

Judge TYLER. Well, I was one change——

The CHAIRMAN. I said other than you.

Judge TYLER. No, but not as chairman, sir.

The CHAIRMAN. I'm sorry.

Judge TYLER. I came in last year as a representative of the second circuit, and thus I had a year before I came chairperson.

I don't recall any other new members. Robert Fiske will have to help me there. Were there any new members other than me last year after Chief Justice Rehnquist and Justice Scalia?

The CHAIRMAN. It is my understanding there was not, based on my looking at and my staff looking at the membership of the committee.

The reason I asked, while you're checking, Mr. Fiske, if that's true, my understanding was that essentially the same committee, with the exception of you—because you were not on that committee, as I understand it, with Rehnquist and Scalia—voted unanimously for "well qualified" for each of the other two Justices. As a matter of fact, we know they did, at least that's how it was reported to us.

What I am trying to discern here is that, in the case of the ABA committee, the only other time that we're aware of where the ABA committee ended up not being unanimous was during the nomination of Clement Haynsworth in 1969. The ABA committee in that case it offered a unanimous recommendation that Judge Haynsworth was well qualified when it first reported, and only later revised its recommendation to 8-4, when new evidence of financial conflicts were brought to light. In the Haynsworth case, of course, the Senate went on to reject the nomination. Even Judge Carswell, whose comments was later made an issue, received unanimous approval.

Now, as far as I know, this is the first time in a Supreme Court nomination where there has ever been a dissent at the time the ABA issued its initial evaluation. Is that correct, to the best of your knowledge?

Judge TYLER. Let me start out. I believe there were—I'm not sure that I understand that they were full-blown dissents—in the first nomination of Justice Rehnquist as a Justice—is that correct?

Mr. **Fiske**. I wasn't on the committee, either, at that time, but my understanding is there were certain members who did not agree that Justice Rehnquist should receive the highest rating. But there was no one that voted "not qualified".

The **Chairman**. Well, my time is up.

My understanding is—and I'm sure my colleagues will correct me if I'm wrong, and I would like to be corrected if I am—is that never before has there been, on the first recommendation made by the ABA, a vote cast that said "not qualified".

But my time is up. I will yield to my colleague from South Carolina. We are going to enforce the 10-minute rule.

Senator **Thurmond**. Thank you, Mr. Chairman.

Judge, I am glad to see you again. We are pleased to have you with us, and congratulations on your appointment as chairman of this committee.

Judge **Tyler**. There are some, Senator, who question my sense of timing, frankly.

Senator **Thurmond**. And I'm glad to see you too, Mr. Fiske.

Mr. **Fiske**. Thank you, Senator.

Senator **Thurmond**. Now, the ABA standards of professional competence, personal integrity and judicial temperament, I'm not going to take the time now to ask you to define them, but if you would do that for the record, I would appreciate it. I believe your manual here contains that, if you could excerpt that.

In your opinion, can each member of the ABA committee decide for himself or herself how to define those terms?

Judge **Tyler**. Well, I can assure you that each member has a copy of the book or manual of the ABA last redrafted in 1982 or 1983 to give as much content as possible to those terms. In this connection, by date of September 28, Senator Metzenbaum wrote me a letter about—raising a fair question or two about this, which I will confess to Senator Metzenbaum I welcomed, not only as a legitimate inquiry from a member of this committee but a chance to remind us all, every member of the ABA committee, just what we were talking about when we dealt with these criteria.

I suppose there has to be some acceptance that different people think differently about these criteria. But I will defend the minority as well as the majority on the committee by what I observed, that they tried their best to recognize what those criteria mean.

Senator **Thurmond**. Judge, is there anything to prevent a member of the ABA committee from using ideological issues under the guise of temperament?

Judge **Tyler**. We tell ourselves and our guidelines say that we should not—and that was part of the thrust of Senator Metzenbaum's letter to me, in which I answered him just as I'm answering you, sir—that we should not consider ideological matters, with one exception, and that is where there is a pattern of such extreme ideology, if you will, as to then make an impact on appropriate judicial temperament of a particular candidate. My understanding is that that applies not only to a Supreme Court Justice but to judges on the lower federal courts.

Senator **Thurmond**. Judge, are there committee rules concerning the type of individuals to be contacted for information about the nominee, and how much discretion does the committee member have as to who he or she contacts?

Judge TYLER. I would say a fair amount of discretion, in my experience. When we started out, unlike what goes on in the investigation, Senator, with a lower court judge in the federal system, there was not one person who assumed the primary role in the investigation. Rather, we divided up tasks. Obviously, there was an attempt to talk to people who knew Judge Bork—for example, at Yale Law School and, for example, on his present court—and then there was an attempt to get around the country in each circuit and talk to judges, academicians, and practicing lawyers.

In that latter area, sir, I think there is no doubt that there was considerable discretion to the interviewer. For example, one of my assignments was to call judges and academicians and lawyers in my home circuit, the second circuit. I guess I was influenced by whom I know, whom I considered to be active lawyers, academicians, who would know something about Judge Bork, and judges particularly on the appellate courts in the three States in my circuit to the extent I could reach them and, of course, federal appellate judges and, to some extent, district judges.

That, therefore, indicates, I think, in fairness to your answer, that there is some latitude and discretion with each member.

Senator THURMOND. Judge, in your report you mention various groups commenting on Judge Bork's nomination, such as the American Civil Liberties Union, the Lawyers Committee for Civil Rights Under Law, and People for the American Way.

Now, I'm just wondering if there was an imbalance favoring groups opposed to Judge Bork's nomination and whether the views of these groups were solicited or unsolicited.

Judge TYLER. Well, it varied. By that I mean most of these submissions—in fact, all of them—whether they were for or against the candidate, were not solicited by us, although I do think that it's fair to say that we anticipated that they would be forthcoming. From what specific groups, I cannot say that we knew in advance—but as time went on submissions came in without request or solicitation by us.

They began at or about the time of the first meeting we had in San Francisco. They started to come in in volume then. As I recall it, several people called me after I became chairman and asked whether we would object, and I simply said no. So to that extent, I guess you could say that we considered whatever was submitted for whatever it was worth.

Senator THURMOND. Well, was there an imbalance?

Judge TYLER. Well, I'm sure that various members of the committee were well aware, as we said in this letter, that on a numerical basis, there was an imbalance. I'm sure there is no doubt in any of our minds that we at least looked at this material—I suppose each member looked differently than others for all I know, in terms of how deep they went.

But they were submitted and circularized to everybody. In other words, if they came in, one copy, there was care made to see that every member saw these and he could give such value to those, or she could, as they saw fit.

Senator THURMOND. Judge, in your report you state that the committee restricts its views to only a nominee's professional qualifications; that is, his professional competence, judicial temperament, and integrity. Yet in your report, of the various and many classes of those interviewed, for example, judges, law professors and lawyers, you referred to a minority of those classes who are opposed to Judge Bork's nomination on the basis of political or ideological grounds.

Would you tell the committee why this is included in your report if, in fact, you don't consider these issues?

Judge TYLER. The reason for that, Mr. Chairman, is very simple; that in the interviewing process, even though if you looked at the responses, it was quite clear—and in many instances, for example, in the interviews I conducted, lawyers, whether they be judges, academicians or practicing lawyers, would say to me, "Listen, you know me and I know you. I cannot say that this man is lacking in professional competence, intelligence, temperament, and certainly there is no reason to doubt his integrity at all, but I have to tell you that, for reasons that don't fit any of that, I am opposed to him." Some said, "I know that your rules or your guidelines do not supposedly permit you to base your conclusions on ideological grounds, but I have known you for many years and I'm not going to be dishonest and I'm going to tell you that's how I feel."

That happened to a number of people.

Senator THURMOND. Judge, in your letter you discount ideology, but almost without fail, every criticism indicated by your letter is really based on ideology. On page 6 you indicate a minority view opposed to Judge Bork based on judicial temperament, which you described as "his compassion, open mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting constitutional principles or their application, particularly within the ambit of the 14th amendment."

That quite clearly sounds like ideology. Can you give us a specific example to support any of these charges? For example, when did Judge Bork evidence a lack of judicial temperament, by showing a lack of compassion, open-mindedness, toward any party or to any before him?

Judge TYLER. Well, that is a question that I fully understand, but let me point out that on page 4 it is stated in the committee's guidelines that the committee looks to a prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice.

Now, those are supposed to come under the heading of "Judicial Temperament". I will confess to you, Senator, that in my days as a lawyer and as a federal judge, I always thought temperament meant when the judge bawled you out without any reason and you were sore as a boil when you went home and told everybody that judge has no temperament. But the committee has always, for many years, as I understand it, operated under this understanding or this definition I just purported to read to you.

It is my further understanding that each of these persons on our committee, who ended up voting "not qualified", believed that they were dealing with judicial temperament not under that old-fashioned understanding I always used to have, but under the definition that I just read to you rather swiftly.

Senator THURMOND. Then if they cannot point to a specific example, it seems they are again basing their criticism on ideology, which you are not supposed to do under the ABA guidelines.

Judge TYLER. Well, all I can say is, they read everything that the rest of the committee read; they knew about the interviews; they purported to know our rules, and they said these were the reasons which they headed under "judicial temperament".

I think one could say fairly that their doubts or concerns about Judge Bork's views within the ambit of the 14th amendment had to do with his writings. I remember that several of the minority did indicate in my hearing that that seemed to be on their minds.

Now, of course, once again, it is very difficult to say much more than that. The word "compassion", in my opinion, might better be "passion". Some of the members felt that there was some debate or issue as to whether or not Judge Bork approached certain legal issues with sufficient passion, recognizing our historical roots and aspirations. To some degree or another, my sense is that all four who determined to vote the candidate "not qualified" in one way or other shared these views that we attempted to summarize in our report.

There is no doubt, as I heard the give and take, particularly in the three face-to-face meetings, that perhaps two of the persons who voted not qualified might have been more concerned about the point we describe here as the nominees sensitivity or lack thereof to the rights of women and minorities.

But I think it is fair to say that everybody among that group seem to be concerned about that. They assured me and anybody who would listen in the debate that they considered that, particularly given this definition on page 4 of our so-called blue book, or guideline book, part of judicial temperament and not ideology.

Senator THURMOND. Judge, I just have one more question. In a September 9, 1987, Washington Post article, it was reported that Senator Biden had sent the ABA Standing Committee on the Federal Judiciary a letter he had received from Judge James F. Gordon. In his letter Judge Gordon alleged an improper attempt by Judge Bork to substitute his own views for the reasoning agreed on by the other judges on the panel.

Judge Bork has clarified the record on this matter. I wonder, however, if the ABA Committee considered the Gordon letter during its deliberations on Judge Bork's nomination? And if so, was Judge Bork given an opportunity to respond to the Gordon letter?

The CHAIRMAN. Before you answer that question, Judge, I want the record to show, and I would like you to speak to it, that letter was forwarded without any recommendation or inquiry, just forwarded like I, do—like any chairman would when any complaint that would come in about a prospective nominee would be forwarded to the committee without any comment as to what you should or should not do with it, is that not correct?

Judge TYLER. That is correct.

Senator THURMOND. I am sure that is correct.

Judge Tyler. That letter was received by me on behalf of the ABA Committee from Chairman Biden in time for our last meeting. Indeed, I promptly circularized it. But my firm recollection is, though, that it was in the possession of all of the committee.

We did not talk to Judge Bork about that, because all of the committee without any exception felt that this matter, accepting Judge Gordon's recollection as true, was something that did not weigh in the mix as we saw it. So we did not think it was appropriate to factor the episode for or against Judge Bork.

Senator Thurmond. So they did not consider it then in their deliberations?

Judge Tyler. Basically, there were several reasons for this. One, there were a number of us on the committee who are aware of how these things can happen in 3-judge courts, particularly where, as in the senior judge Judge Robb, who was the presiding judge, unfortunately died right in the middle of this when Judge Gordon—and Judge Gordon noted this, by the way, quite fairly.

The second point is that these things sometimes happen unwittingly, and therefore enough lawyers on our committee are familiar at least with these kinds of things to not feel, whatever their other views may be on the candidate, that it was something that should weigh for or against him at all.

Senator Thurmond. Thank you very much, Judge. Thank you, Mr. Chairman.

The Chairman. I want the record to show that for former chairs of this committee 15 minutes was allowed, but really I am going to keep to the 10-minute rule now. Okay? Ten minutes.

Senator Thurmond. Well, I guess that is because I have asked so few questions during this entire hearing.

The Chairman. That is true. That is true. It is for many, many good reasons, but that is the end.

The Senator from Vermont?

Senator Leahy. I would tell the Senator from South Carolina he is going to let me have only 10 minutes as compared to Senator Thurmond's 15 minutes because I speak faster. I think that is what we are going to do.

Senator Heflin. At least you can understand him.

Senator Leahy. Which one of us? [Laughter.]

I went down with Senator Thurmond to his alma mater——

The Chairman. Using your time, Senator.

Senator Leahy. I understand. I went down with Senator Thurmond to his alma mater once to speak at Senator Thurmond's invitation, and he brought along a simultaneous translator for me.

Let me ask—it is good to see you again, sir.

Judge Tyler. Thank you.

Senator Leahy. Last year, when your committee reported on the nomination of Chief Justice Rehnquist, the report indicated that the committee had interviewed all of Justice Rehnquist's brethren on the Supreme Court. Did you interview all of Judge Bork's colleagues on the circuit court?

Judge Tyler. We certainly made an effort. One or two members of our committee endeavored to interview them all. My recollection is that not all eight justices could be reached; most, however, were reached, and their interviews were reported; yes, sir.

Senator LEAHY. Well, the reason I asked, last year's report on Justice Rehnquist, in fact the subsequent testimony of the ABA, applauded now Chief Justice Rehnquist for his collegiality. I see no reference to that in this report on Judge Bork. Why is that?

Judge TYLER. It may be my fault as the draftsman, the initial draftsman. I didn't put the word in there. It may be that simple.

Senator LEAHY. Well, the reason I ask is, you know Judge Bork wrote a dissent this summer from the circuit court decision not to rehear three cases en banc.

Judge TYLER. Yes.

Senator LEAHY. And he and his fellow dissenters felt that the cases deserved that treatment because, and I quote: "Each involves an issue of exceptional importance and each received a panel resolution that we think is clearly wrong and is at the very least highly dubious." Now a majority of the other judges disagreed.

In fact, five of them joined in an opinion that harshly criticized Judge Bork's position as follows: "The dissent's clearly wrong and highly dubious test not only serves no useful purpose in this intermediate appellate judicial context, it does substantial violence to the collegiality that is indispensable to judicial decision-making. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge's position. Politicking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues."

That is pretty strong language. And as one who was a practicing attorney for a number of years and still reads a lot of cases, I can't think of very many cases where I have seen language that strong in a circuit court of appeals court where they are referring to another member of that same court, somebody that they are going to see every single day.

So that is why I asked the question, was there consideration of this question of collegiality? And if not, why not?

Judge TYLER. Well, I think there was. First of all, let me—it came up that there was publicity here in Washington to some extent in the public domain about this very matter that you just alluded to, and my recollection is that the men who did the interviewing of the judges of that court did get into that.

My recollection further is that there wasn't quite the sharpness or unusual tone to those interviews thereafter. There was mention of it, however, but they didn't seem to complain, as I recall, much about collegiality as such in the general sense.

There was some criticism which we took pains to ask Judge Bork about later at our second interview. One of the judges, as I recall, on the DC Circuit mentioned a problem of some lateness in filing of opinions. We looked into that. We questioned Judge Bork about it, and he said that he had never failed to comply with their particular lateness rule, and indeed independent investigation indicated that where there were delays it was because he was waiting for other opinions.

Senator LEAHY. Well, let me ask you just a little bit about that, if I might, now that you raised it. There were some statistics published in the Legal Times of Washington for the period May 1986 to June 1987 and they said that Judge Bork was the second slowest judge on the circuit court in rendering opinions he was assigned to write, second only to Judge Robinson, who had been very, very ill.

So at least you had the questions raised of collegiality, which is very important on the Supreme Court. I am not suggesting every judge has to agree with every other one; obviously, they don't. The question of collegiality is important.

With an increasing workload in the Supreme Court, the ability to get decisions done, time is a problem. And here we have had this question raised of collegiality in a published, printed public opinion, and then you have the Legal Times statistics which show that he is the second slowest in getting opinions written. How satisfied were you with the answers to the questions in those two areas?

Judge **TYLER**. As to the Legal Times report, my sense was that we were not satisfied that the conclusion reached therein were entirely justified.

Senator **LEAHY**. That the report was accurate?

Judge **TYLER**. We were not satisfied that its conclusions were totally justified.

Senator **LEAHY**. Thank you.

Judge **TYLER**. As to the collegiality point, you are certainly right that collegiality, as far as I know, has always been a consideration or a concern, if you will, of this committee. But my understanding of the reports of the men who did the interviewing, that the collegiality point didn't seem to measure up in the interviews to the level of intensity or harshness that that opinion, which you actually paraphrase as I understand it, did.

Therefore, we decided that within the confessional that maybe these things sort of worked themselves out and were not quite such a great problem as it did seem.

Senator **LEAHY**. Mr. Fiske, was that your opinion, too?

Mr. **FISKE**. Well, I think essentially yes, Senator.

Senator **LEAHY**. Did your committee consider a question of backlog? Did your committee look into the case of *Franz* v. *United States* in which Judge Bork's concurring opinion was filed over a month after the majority opinion in the case? I note that one only because it was so late it was filed in a different volume of the Federal Reporter. Did you look at specific cases?

Judge **TYLER**. I missed—somebody v. *The United States*.

Senator **LEAHY**. *Franz*—F-r-a-n-z.

Judge **TYLER**. *Franz* was a case which we were looking at for quite different reasons, and I don't recall that anybody ever raised that as a particular example of lateness. We were focusing just in the normal sense of approaching opinions from clarity, covering all the issues, legal analysis, and so on.

Senator **LEAHY**. Thank you. And, Mr. Chairman, thank you. I have an awful lot more questions. The report, of course, is as sparse as it can possibly get, and as the one who has to chair most of the hearings around here, other than this one, of course, for judicial nominees, or have had to this year, I wish there was some way to have those a lot more detailed.

Judge **TYLER**. This is not, of course, in the same format, Senator Leahy.

Senator **LEAHY**. No, I am talking about the ones I normally have to deal with, and, of course, this one. I understand we are going to have a second go-round and I will have some more questions I think.

Thank you.

Judge TYLER. Well, I just want to pick up, if I may, because I am a little confused. This is not in the same format as the one used by the committee for the lower courts.

Senator LEAHY. I understand. In fact, maybe I didn't say it quite well enough, I much prefer this as far more detailed. What I am contrasting it with, I wish there was some way we could do the same thing on the lower court ones.

The CHAIRMAN. He likes what you did. Right?

We have 60 more minutes, if we were disciplined enough to do it, and already members are asking about a second round.

Senator LEAHY. I will waive my second round. Sorry.

The CHAIRMAN. No, no. I am not asking you to waive a second round. What I am suggesting is that we will go through a first round and we will make an assessment then whether we are going to finish this tonight—under no circumstance will we call you back tomorrow, gentlemen. We will try our best to finish it all tonight, but I have been sitting in this chair since ten o'clock, with a 50-minute break, and I am prepared to go till 10:30, but I am not sure I am prepared to go to 1:30.

But having said that, having wasted 2 minutes, let me now yield to the Senator from Utah for his 10 minutes.

Senator HATCH. Well, thank you, Mr. Chairman.

First of all, I want to compliment you. I know that this is a thankless task, it is a lot of work, and, by and large, I think the American Bar Association does a very good job.

With that said, I would like to ask you some questions about this job. Now, Judge Tyler, I think that you would agree with me that any individual who violates the confidentiality strictures of your committee and leaks information on your private deliberations is himself lacking the integrity to sit on the committee. Is that right?

Judge TYLER. Well, I certainly think it is a significant problem to have any member of the committee leak——

Senator HATCH. Well, such person is in no position to evaluate the integrity of others I would say. Now, see, the problem here is that the day after the ABA vote we not only found out through the press the vote totals, but who voted for and against and why, which I thought was an enormous breach of confidentiality.

Add to that the leak about Secretary Coleman's notes of the 1982 inquiry which were in the possession of the ABA panel. So you can see why I am a little bit upset about that, and I think you must be, too.

Judge TYLER. There is no doubt it, and it is one of the things that we have got to do, as soon as our time permits, is to go into this. It is remarkable but true that during the summer Bob Fiske, when he was chairman, reminded us at least thrice that I can recall about the importance of confidentiality. It was then repeated by me almost immediately, because I was then the chairman and we were having a meeting which was taking place in my office in New York. And this is a very distressing problem.

Senator HATCH. Well, it was to me when I saw that show up in the New York Times and other newspapers. Now what I am asking is, if you locate and identify the individual, will that person stay on the committee?

Judge TYLER. Well, if we ever can really be sure who did it, I think that we are going to have to discuss, not only among ourselves but with the hierarchy of the ABA, as to just what should be done. Because, as you say, this is a very uncomfortable position. Certainly I feel this way. I know Bob Fiske well enough to know he feels this way. I can't imagine anybody else doesn't.

Senator HATCH. I know you both feel that way, and I think anybody thinking about it feels that way. And you have to wonder why do we have people like this judging the integrity of others.

Judge Tyler, one of the members of your committee, Mr. Jerry Shestack, was quoted on two occasions as being publicly critical of the judicial selection process of this administration. At the annual conference of the National Judges Association, he criticized the caliber of this administration's nominees, and, of course, I was on this program doing a television series entitled "The Constitution, That Delicate Balance," produced by Fred Friendly.

He discussed the number of not-qualified appointments that he felt has come from this administration. Now my question is, can an individual who has been publicly quoted to this effect be expected to bring a neutral and disinterested approach to his evaluation of this administration's candidates?

Judge TYLER. Well, I must say this is the first time I have heard that he or anyone else has been quoted as saying that on the committee publicly, and I understand that is what——

Senator HATCH. It is a serious problem. If those allegations are true, that is serious, isn't it?

Judge TYLER. And I would find it particularly puzzling because my recollection is that recently in response to reports of his, for example, this committee has found a number of candidates of this administration well qualified.

Senator HATCH. That is right. Well, keep in mind Bob Bork was found to be by your committee exceptionally well qualified just 5 years before, and unanimously found to be so.

Judge TYLER. Well, actually it is close to 6 years ago that the committee did the work. Yes.

Senator HATCH. And most people would agree that there is nothing in his judicial record that would cause anybody to change that. But all of a sudden you show up with four people voting not qualified.

For example, did you consider conflicts of interest to be serving on the election committee of a Senator who is publicly opposed to this nomination who serves on your committee?

Judge TYLER. That came out in the press.

Senator HATCH. Yes, it did.

Judge TYLER. And I had occasion to ask the member about that. He told me that he is a member of a lawyers committee, which in fact is presided over, as I understand it—the chairperson is a member of one of our large firms in New York City.

Senator HATCH. I understand that. But did he disclose that to you prior to voting as a member of this committee?

Judge TYLER. No.

Senator HATCH. Well, do you not think that is a problem?

Judge TYLER. No, I really do not, unless there are some overt signs that he is pushing some political agenda. The reason, if I may be permitted to finish, Senator, is this——

Senator HATCH. Surely.

Judge TYLER [continuing]. First of all, as I am sure you know, private lawyers do many political things, support different political candidates. And this has been true of members, as I understand it, of this committee for many years. Therefore, I do not think, subject to overt evidence that somebody is using this in some way or trying to influence the deliberations of the committee, that such activity is a disqualification I assume same ABA committee members occasionally might——

Senator HATCH. Sure.

Judge TYLER [continuing]. Would support candidates. Therefore, there has never, as far as I know, been any rule that you cannot do this.

Basically, what the ABA has been doing, as I understand it, is leaving it up to the sound good sense and decency of each member to put aside this kind of activity in his committee work.

Senator HATCH. Well, you can see why I am upset because if these comments were made and then he also is a member of some committee supporting somebody who is opposed to the nomination and then add to that another conflict of interest by having a law partner who was hired by the American Civil Liberties Union to lobby against the Bork nomination. Now those are things that kind of bother me. I think they would bother most anybody.

Let me give you some——

Judge TYLER. Well, I think in these large firms, that is something that is quite likely to happen. I do not, for example, in my firm know—and I never would normally find out or ask—but I assume there may be people in my firm who are interested in the political campaigns of one or more Senators or whatever. And I do not think that is a problem unless I somehow use that to influence or attempt to influence myself or fellow committee members on any particular candidate.

Senator HATCH. Judge, my time is running out. So I will just make statements with regard to the rest of this, rather than try and ask questions, or I will have to have a second round.

In looking at the credentials of individual members of your committee, I see at least three members who have been pretty active in parts of the political process and on behalf of politically liberal causes.

I see one individual who was offered an appointment to the California Supreme Court by Governor Jerry Brown, a number of whose candidates of course were recalled by the State electorate last year; Sam Williams of the ninth circuit.

I see another individual who belongs to the Lawyers Committee for Civil Rights under Laws and the Chicago Council of Lawyers that opposed Judge Manion; that is Joan Hall of the seventh circuit, and another who belongs to the American Civil Liberties Union, Mr. Shestack.

And all of these organizations have bitterly opposed Judge Bork, as you know. And what bothers a lot of people is are there any conservative organizations or is there a balance in this area?

Now let me just go a little bit further. The fourth member, of course, is John Lane. And, as I recall, he was removed from the committee before and then got back on to the committee. And one of the reasons he was removed was because of using ideology in the judgment of—am I wrong on that, Mr. Fiske, on using ideology on the judgment?

Judge FISKE. Yes. I think that is wrong, Senator.

Senator HATCH. That is my understanding. Why was he removed? Just tell me and I will accept it.

Judge FISKE. Well, the decision was not mine. The decision was made by President Thomas. And he was not removed. Mr. Lane, John Lane had served a 3-year term. That term has expired, and the question was whether he would be reappointed for another 3-year term, and Eugene Thomas decided not to do that.

But I know from having worked with John Lane as Chairman that John Lane is one of the most conscientious and a very strong member of this committee and, working closely with him on every one of his investigations, I saw no instance in which he had let matters of ideology affect his judgment. So I think that is really, with all due respect, not a proper characterization of the situation.

Senator HATCH. Well, I am glad to be corrected. We were told otherwise by others.

Judge TYLER. By the way, Senator Hatch, I better confess, if you do not already know it, that until July I was the cochair of the Lawyers Committee for Civil Rights under Law, which rendered a report to us, as you know.

I specifically, anticipating my becoming involved in all of this, had nothing whatsoever of course to do with their submission. But I certainly did not hide this information from my fellow committee members. I did not hide from them—they all laughed at me because they knew it already—that I served for two years in the Justice Department at the time when Robert H. Bork was Solicitor General.

I think what this indicates is—and as Mr. Robert Fiske has said—that Presidents of the ABA makes these appointments in part on the basis that the lawyers are active in community and public affairs. I suppose they do consult with the existing chairperson. I do not know that because I have never been the chairperson for that long. But usually there are men and women who are very active in affairs, including political affairs in their home cities, states or even on the federal level.

I remember when I was the Deputy Attorney General of the United States, the chairman of this committee was a distinguished lawyer from San Francisco, whom many of you know, Warren Christopher. Warren Christopher I had reason to believe then and now was in a different political party than I, and I always had the utmost confidence in him, and everything that he said or did was his bond.

It seems to me that that is the tradition that this committee ought to follow even when they are active in various matters, as many lawyers are.

Senator HATCH. I agree. My time is up.

Let me just say, Mr. Chairman, in closing, that I have a lot of other questions, but I think I will just waive those. I think that others like you should have resigned from these committees that are actively opposing this Judge. I think others like you should not be affiliated with committees that may be questionable with regard to their high fidelity to doing this job.

And I have to say that, even though maybe close to six years has expired since Judge Robert Bork was given—or then Mr. Robert Bork was given an exceptionally well-qualified, that when it comes down to the ratings by five of them in this matter, at least four, it looks to me—and I do not see how anybody can draw another conclusion—that at least four of them decided this basically for political reasons.

I think that is wrong. And I find a lot of problems with that, and I know that you have had some trouble handling the questions here this evening with regard to some of the reasoning that was used to all of a sudden find this man, who is eminently well-qualified, to be not qualified.

Judge TYLER. Well, I can assure you, Senator Hatch, that the majority did not find——

Senator HATCH. I agree with that.

Judge TYLER [continuing]. Their position reasonable. That I know. But, on the other hand, I want to defend those four because, as far as I could see, they struggled along in the discussions with us. I believe them when they assured us that they were proceeding in good faith in voting their conscience.

It may well be that I have to concede, as I assume everybody in this room has to concede, that you cannot reach inside a person's mind and know exactly or calibrate exactly what he was thinking when he voted. But I do want to defend the minority—and I am sincere about this. And I really believe that whoever was on the majority would probably agree that this is so, that they did try their very best to evaluate all of this evidence.

And there was a great deal more, I believe, from everything I have been able to learn that has happened before in modern times in terms of any candidate, partly because of the long lead time. Back in the years past there has not been that much lead time for this committee to do their work. There were many differences.

I heard Bill Coleman, whom I happen to regard as a very careful lawyer, say this morning that standards and considerations for a Supreme Court nominee differ from those for lower court judges. That is fair comment. There are distinctions, I think, as to what happened, and probably should happen in terms of working on a potential nominee to the Supreme Court of the United States, as opposed to U.S. circuit judge.

So I really do not agree with you in all respect that these people surely did nothing more than exercise some sort of political or ideological judgment. They struggled very hard.

I think it is important to note that no one of these people with the one exception noted in our footnote had any question as to Judge Bork's intellectual capacity, the magnificent public service he has rendered, and his integrity never was questioned.

It was stressed by two of the minority members, if I may call them that, or the dissenters or the persons who voted not qualified, they insisted that it be understood that at no point had they ever seen any evidence that Judge Bork was a racist or anything like that.

Senator **HATCH**. That is right.

Judge **TYLER**. They stressed that.

Senator **HATCH**. I am glad to hear that, I will tell you.

Judge **TYLER**. I have to insist on their behalf.

Senator **HATCH**. What about the other two?

Judge **TYLER**. They agreed. It is just a matter that two people insisted in the discussions, as I recall them, that this was so, and the other two agreed. I do not think there was any doubt on that.

The **CHAIRMAN**. We are now over 15 minutes.

Let me ask you one question. Do you doubt the integrity of any one of the members of your committee, any one?

Judge **TYLER**. I cannot say that there was any basis for me to doubt their good faith or integrity in coming to the vote they did. Whether or not I agreed with them is beside the point.

The **CHAIRMAN**. That is really not the question, and I think you acknowledged that.

Mr. Fiske, do you have any doubt about——

Mr. **FISKE**. No.

The **CHAIRMAN** [continuing]. The integrity with which the way any of the five people who did not vote well qualified, including the one not opposed and the four apparently you tell us who voted not qualified? Do you doubt at all the integrity with which they arrived at their decision?

Mr. **FISKE**. No. I think as Judge Tyler said, they were conscientious and acted in good faith.

The **CHAIRMAN**. Thank you.

Senator from Ohio.

Senator **METZENBAUM**. Judge Tyler and Mr. Fiske, let me first tell you that it is with a deep sense of embarrassment that I heard my colleague impugn the integrity of members of your committee. I am sure the hour is late; he may be tired, and maybe for that reason he saw fit to do so.

How he would know which members of the committee voted which way is beyond my comprehension. This Senator does not know, and I certainly would not impugn the integrity of those who voted in the majority, even though I may not have arrived at that same conclusion myself.

To me it is overwhelmingly evident that there was something different about Judge Bork. Justice Rehnquist twice, Justice Scalia, Justice O'Connor, Justice Stevens, Justice Blackmun, Justice Powell, Justice Marshall, Justice Brennan, Justice Stewart, Justice Goldberg, Justice White, Justice Burger, Justice Fortas, Justice Harlan, every one a unanimous well-qualified.

Now nobody questioned the integrity of the people who voted well-qualified for those people. And I must say to you that I take a slow burn when I hear the integrity of some who came to the conclusion to vote against him.

Let me point out to my colleague that, if you read the report, you will find that the ABA had interviews with judges and one group rated him only qualified because of express concerns about his judicial temperament, in other words, his compassion, his sensitivity to concerns of women and minority groups, and possible lack of open-mindedness.

A few considered the nominee unqualified, despite recognition of his high professional capabilities and intellect, because of their perception that his political and ideological views disqualified him.

And then the report talks about the typical views of that group, that he would split the country on many critical issues, does not have a well-rounded view of the critical constitutional issues. And my concern is that he would vote to reverse important precedent on first amendment church, State and abortion issues.

Those were judges that interviewed, not members of the committee. Then they interviewed deans and professors of law. Of these, the smaller group that deemed him only qualified expressed concerns about either his philosophical or political views or his judicial temperament, in other words, compassion, open-mindedness, sensitivity to concerns of women and minority groups.

The remainder opposed to his nomination said they had concerns about his judicial temperament or ideology or were opposed on unspecified grounds. And then they talked with 150 lawyers, and the minority of that group considered his integrity and intellectual attainment sufficient to view Bork as qualified, but concluded that he should not be confirmed because of their concerns about his perceived ideological or political views.

Another group objected to his nomination because of concerns about his legal analysis or his regard for precedents. Still another small group objected to his nomination without expressing specific grounds.

Then they interviewed a survey of Judge Bork's opinions. And several of the professors, while sharing a positive assessment of his opinions overall, expressed concerns that he sometimes reached out to decide issues beyond what the facts of the particular case called for, and that he sometimes displayed an unwillingness to see the full complexity of an opposing position.

One professor also found a tendency to substitute political arguments for legal scholarship in several of Judge Bork's opinions. That professor felt these problems were of sufficient magnitude to compel withholding a positive evaluation. And it goes on.

When someone suggests that four politically-minded members of the committee arrived at that conclusion, or five, I must tell you it just does not do this committee well. It does not speak well for us.

Now Judge Tyler, your letter includes a statement that one member of the committee expressed concern that there have been inconsistent and possibly misleading recollections of the chronology of the Saturday Night Massacre expressed by the nominee in earlier testimony before the Senate Judiciary Committee and to members of our committee in 1982 and recently.

Would you tell us as fully as possible the concerns expressed by that member of the committee?

Judge TYLER. Yes, Senator, let me try. First of all, it was this member's submission that the sentence, which in substance in the 1981 report of this committee uses the word "immediately" in the context——

Senator LEAHY. I am sorry. Which uses the word what?

Judge **Tyler**. "Immediately" in the context of when Judge Bork sought to obtain a special prosecutor, who as we all know turned out to be Leon Jaworski, the member felt that this was not quite true because it was later than that weekend when the search for the special prosecutor started.

Second——

Senator **Metzenbaum**. That member was right according to Mr. Coleman's statement. Mr. Coleman reports that, based on Mr. Bork's conversation with him when he was up for circuit court of appeals, "He also said that he immediately started the search for a new special prosecutor."

Judge **Tyler**. That is the sentence.

Senator **Metzenbaum**. That is the sentence.

Judge **Tyler**. That is the sentence. Now, of course, we do not know—and we have no reason to believe—that that is an exact quote. But this bothered this member.

Second of all, he was concerned, as I recall, about the decision of Judge Bork as Acting Attorney General to rescind what in somewhat simplistic terms I will refer to the Special Prosecutor regulation of the Department of Justice.

Now he also—and here I must say I have difficulty in reporting to you with precision what he really meant—but he had the view apparently—and he produced copies of contemporaneous newspaper articles having to do with what was going on at the time, and I believe he felt that Judge Bork's remarks to William Coleman, for example, and the latter's investigation were not quite correct.

Senator **Metzenbaum**. As a matter of fact, Judge Bork in answer to my question confirms that it was not correct, because I asked Judge Bork "As a matter of fact, you actually ordered that the Justice Department itself take over the investigation, as I think you have just indicated, and the decision to appoint a new special prosecutor was made by the President several days later only after widespread public criticism. Is that not correct?" Judge Bork said, "Senator, it is entirely correct, but let me tell you how that happened."

So that Judge Bork himself said it was not immediate.

Judge **Tyler**. That is right. And, of course, going back to the Chairman's questions initially of Mr. Fiske and me and, as Mr. Fiske says, this was one of the issues that led us to the second interview.

As I recall Judge Bork's response to us in that second interview, meaning by "us" Mr. Fiske, another member of our committee, a man named Bierbauer, and myself was just essentially as you described it in your colloquy recently with the candidate.

Senator **Metzenbaum**. Last week, in fact, I asked Judge Bork the following:

> You had no guarantee from President Nixon at the time he fired Mr. Cox that there would even be another special prosecutor. Is it not a fact that the decision to appoint a new special prosecutor was not made until several days later, after the President had provoked a fire storm of controversy across the country?

And Bork answered:

> That is right. Initially, we intended to leave the special prosecution force intact, but not to appoint a new special prosecutor, and they would go under Mr. Ruth and Mr. Lacovara as before, but we did not initially contemplate a new special prosecu-

tor until we saw that it was necessary because the American people would not be mollified without one.

In other words, Judge Bork is saying at the time Mr. Cox was fired, the assumption was that there would not be a new special prosecutor. And yet the fact is he did say to Mr. Coleman something to the contrary.

Now there is another area that I would like to inquire of you. First of all, I would like to ask you. You have stated that you have notes of your recent interviews with Judge Bork on this issue. Could you furnish us those interview notes that were more recently made?

Judge Tyler. Excuse me, Senator, 1 minute.

Senator, as I started with the colloquy with the Chairman at the beginning, I would be glad—we would be glad—forgive me for using the word "I". We would be glad to do this, but I do think it would be helpful if we could get Judge Bork's waiver, which I assume he will——

Senator Metzenbaum. The Chairman will obtain that on behalf of the committee, I am certain.

Judge Tyler. And there are portions of these interviews which deal with this subject, which we will then be glad to turn over.

Senator Metzenbaum. Thank you. I assume the Chair will be able to do that. I think Judge Bork has been cooperative along that line.

Judge Tyler. Yes.

Senator Metzenbaum. Let me go into one other subject. I have others, but I think my time will run out.

Another issue concerns whether Judge Bork assured the Watergate investigators that they would have the right to continue to go after President Nixon's tape recordings even though Mr. Cox had been fired for doing precisely that.

Last week I asked Judge Bork the following:

> In your interview with the ABA in connection with your nomination in 1982, did you tell Mr. Coleman that you guaranteed Mr. Cox' Deputies they would have access to the tapes?

He answered:

> I do not know. All I told them—and I suppose what I told Mr. Coleman—is that I guaranteed they would have a chance to go for the tapes in court or the evidence in court, including the tapes.

Do you have any notes or memorandum reflecting Judge Bork's statements to the ABA on this issue? And if you do, would they be furnished to us if we had Judge Bork's waiver?

Judge Tyler. There is nothing other than what we have already furnished.

Senator Metzenbaum. I see.

Judge Tyler. Notes to me, Senator Metzenbaum, mean handwritten notes of the interviewer. We do not have any such thing. We looked for those.

Senator Metzenbaum. Mr. Chairman, I have additional questions but I think my time has expired.

The Chairman. Let me say to everyone, the hour is getting late. I hope we will be very careful about how we use people's names and speak about anyone from Judge Bork to members of the committee because, as I said, it is late, and I think we should be careful.

Senator Simpson.

Senator SIMPSON. Were you worried about me, Mr. Chairman?

The CHAIRMAN. No, no. I was worried about all of us.

Senator SIMPSON. Gentlemen, it is good to have you here. I met many members of the bar. I was a member of the American Bar for many years. We count on you here. When our people do not get confirmed, we raise a lot of hack about you, and when our people do, we think you are the most noble outfit in America.

You know, just quickly, I just do not know how we can milk any more plasma out of the twitching corpse of firing Archibald Cox. I mean that has got to be the driest cadaver left in the whole city of Washington, DC.

Twice you hammered him flat and had every opportunity when he was up for Solicitor General and then again in 1982 and it all went a glimmering. Now to think it has anything now—this issue is the quintessential irrelevancy of our time. That is my comment on the Watergate caper. It all came out the way the American people wanted it, and it showed the strength of our Constitution and our country.

What concerns me in reading your letter, in talking about integrity—and that is all attorneys have; that is all we have here. That is the currency of this place. If you lose that, you are gone. We all, we are left or right or whatever we are, but all we have is our integrity.

So here you are with your rules of how you select, and here you have when you pick a district court judge, you say that "we do not investigate the prospective nominee's political or ideology philosophy except to the extent that extreme views"—that is the word—"on such matters might bear upon judicial temperament or integrity", unquote.

Then when you are doing the Supreme Court, all it says is "Highest standards of professional competence, judicial temperament, and integrity", and that other part is left off. It is not even there. That is a stunning little difference there. You leave off the exclusion.

Then in your letter to us of September 21st, after you have said almost really haughtily on the first page, "Consistent with its longstanding tradition, the committee's investigation did not cover—did not cover—Judge Bork's political or ideological philosophy except to the extent that such matters might bear on judicial temperament or integrity."

You had no ability to go to that exception, number one, under your rules. But worse, then on page 4—on page 3 of your letter, what do you happen to talk about in your interviews with judges? You talk about "Some who said that his political and ideological views disqualified him in their minds."

Well, if that first part means anything, who cares? Then going down further in that letter, you talk again about—this is page 3—"Their perception that his political and ideological views disqualified him." Who cares? It should not be any part of this procedure. You say that. I do not say it.

Down at the bottom is a footnote, "Not qualified solely because of political views or ideology", which are not considered by the committee but another lick you got in there.

Then go to page 4 and you get another lick in in the second paragraph, "The remainder opposed to his nomination cited concerns about his judicial temperament or ideology or were opposed on unspecified grounds." That is the third lick.

Then you take a fourth lick on page 4 one more time, "Still another group objected to him, but another group objected on ideological or political views."

Now really, gentlemen of the bar and fellows, if what you said on the first page is true, you did not even have to mention that. It had nothing to do with this selection process.

And then you talk about what a remarkable man he is and so on. Then you come over to that—that is a real statement on page 6, "Submissions to the Committee on Judge Bork from other groups." You have got the ACLU, the National Women's Bar Association. I do not know who is a member of that, except I assume it is women.

I can tell you that they had an interesting trial with the Judiciary Committee. They were objecting to one of the nominees on the basis that he was a master Mason. How about that one? Everybody dropped that like a hotcake. We approved that guy 98 to zip about 2 months after that.

I noticed on the letterhead there are no men in the National Women's Bar Association. So I assume it must be a sexist organization of some type. There are no men on it whatsoever, and their total contribution to the effort before our committee in the last few weeks has been that Judge Sentelle was a master Mason and thus unqualified to serve as a federal district court judge.

I am not going to put much credibility there, but I am sure they furnished you the whole load, along with the other groups that are listed here, the AFL–CIO Executive Council, Lawyers Committee for Civil Rights, the NAACP Defense Educational Fund, Public Citizens Litigation Group, and People for the American Way.

I do not think I see any other group from the, quote, "other side" there, and I will leave it at that. But I am sure that you got your information about the other side from some source.

But when we are talking about integrity and when I talk about it as a member of the bar, I wonder about that. That puzzles me.

But here is my question, because I do not have much time, and I hope if you come back later, we can discuss these things further.

I have been trying to determine how you could do this in 1982 and give the man a rating of exceptionally well-qualified, and then this time, go through this posturing at least on behalf of some of the members of the your committee.

And I noticed one of the members of your committee on the letterhead, Mr. John Elam, was the subject of some kind of an examination on a judge who was from Ohio, at one time a judicial nominee James L. Graham. He was given a bad rating, about the lowest you can get from your group. He went on the bench. He is a respected member of the bench. And it was found in the examination later, because nobody could figure how that happened, but there were allegations that your committee examined this man's beliefs and, in fact, a Mr. John Elam, who is now a member of your committee, questions Judge Graham about his fundamental, his Christian beliefs. That is a documented thing from the legal publication, and I will furnish you that.

If that is true, that is certainly disturbing. But, in any event, I am trying to determine why the difference between Judge Scalia and Judge Bork. It seems to me we could get really close to the meat here on the bone.

Both were, quote, "exceptionally well-qualified" when they went to the circuit court. Is there any question about that? Both have similar government academic ties and backgrounds. Your decision as to "exceptionally well-qualified" on Bork was unanimous. Both are conservatives without any question. Both have written and spoken on legal issues.

Yet Judge Scalia received a positive and unanimous ABA report for the United States Supreme Court, but Bork has not. My question or questions are two. What did Scalia do since 1982 that was better? And what did Bork do since 1982 that was worse?

Judge TYLER. You realize, Senator, that you are putting this question to a gentleman who also served with Scalia, Justice Scalia in the Department of Justice. You realize also, I assume, that you have raised really some other questions, but you say there are only two, and let me try to cope with them.

You realize that there are a number of members of the majority of this committee who undoubtedly went through the same reasoning process you swiftly but fairly articulated.

The only thing I can say is that maybe timing has a lot to do with this. Maybe it has to do with the change in the committee. Maybe it has to do with changes in the process which we followed here because of the time, et cetera, that we had to investigate, as well as the timing in this year of our Lord 1987 as opposed to 1986.

I cannot begin to be sure of exact answers to those, but I pose those as perhaps explaining in part. I listened to part of William Coleman this morning. I accept pretty much what he said as being a fair attempt to answer essentially that question you posed.

But I have no doubt that a good many of the majority here had such questions as you have just posed here this evening on their minds when they arrived at the determination they did.

That is about all I can say, frankly, from what I know.

Senator SIMPSON. But you did say, did you not, when you were speaking—and my time has expired—that, as you visited, as we do lawyer with lawyer and so on—did I hear you say in your earlier testimony that someone of the committee said to you or something about the fact that they would have to really—could not avoid looking at him upon ideological or political grounds? Did you say that?

Judge TYLER. I do not think I said that. And if I did, I should not have.

Senator SIMPSON. No. I thought I heard something said in the give and take in the discussion that somebody said, "Well, I cannot get that out of the discussion", or something. Was that not correct?

Judge TYLER. No. I assure you though that it should be said that fourteen people did not agree with the one person who raised questions as to his integrity. They flatly did not agree at all.

Senator SIMPSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator from Alabama.

Senator HEFLIN. We are delighted to see you here, Judge Fiske. I might say that you two gentlemen are both distinguished. Judge Tyler is a former District Court Judge in the Southern District of New York, and I believe you served also as Deputy Attorney General with President Ford.

I believe Mr. Fiske was also a U.S. Attorney for the Southern District of New York. When the Iran Contra Committee—they talked to him very seriously about being the chief counsel for the committee, but he was unable to consider it on the basis of the fact he had a lawsuit. And now I see that that lawsuit got settled.

Mr. FISKE. The lawsuit got settled 2 weeks after that, Senator.

Senator HEFLIN. Two weeks after that. Well, we are delighted to see such two distinguished members of the New York Bar, and I might say you have a very distinguished member of the bar of Alabama, Mr. Roland Nachman, on your committee, who I have great admiration for.

Judge TYLER. He and Fiske went to school together, Judge. You may know that too.

Senator HEFLIN. Well, I tried a lawsuit one time against him and I won it. Of course, he was a Harvard graduate. But the jury—I had a country jury at that time. He kids me about that still.

But looking at your various criteria, certainly the one that goes into temperament as to the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, commitment to equal justice, among other factors, and I believe Judge Coleman quoted a portion of the evaluation criteria, saying "The significant range of complexities of the issues considered by the Supreme Court, the importance of the underlying societal problems, and the need to mediate between tradition and change".

So you have got some rather broad language that a person could interpret in this ideology, I suppose, if he wanted to within that language and within the rules.

I want to ask you: Was any inquiry made about whether or not Judge Bork as an attorney did any pro bono work? And if so, what were the findings pertaining to that?

Judge TYLER. Judge, I cannot say that I recall that anybody focused specifically—in other words, somebody had the assigned task. I think though that we learned in the course of the work, that he had done almost none or very little when he was at the Yale Law School.

I do not recall that this was particularly a big issue with the committee as a whole or any of its parts, particularly since we all felt, that is all shading of our opinions felt that here was a man that had indulged in distinguished public service for so many years that it would be a little bit peculiar to suddenly say that if he did not do a pro bono job, as so many professors do, as you know, at a place like Yale Law School, it would look kind of silly.

I think that was about the way we came out.

Senator HEFLIN. He, of course, says that he did none in regards to his law school or his law practice. I am not sure whether or not that is an item that goes to sensitivity as to temperament or not. I suppose it is up to every individual lawyer as to whether or not he does that type of work.

Some law firms encourage it and some do not. So I am not sure. I am just interested to see whether the committee did go into that.

Judge TYLER. That raises a good question. I have been telling my wife that service on this committee is pro bono, and she is not convinced. I do not know why, but——

Senator HEFLIN. Well, I would say that what you are doing here is pro bono work, certainly in a sense.

I am a little concerned about Judge Gordon and the fact that you did not look into it. I suppose that maybe it came at a time when you had three meetings and you came to the last meeting.

But in one of the paragraphs of his letter, he says, "In sum, I now recall Judge Bork's action by way of changing his original position unknown to Judge Robb and me. Bork's delay in preparing his so-called majority opinion until late in 1982; (c) Bork's failure to dispatch his opinion with some explanatory cover letter; (d) my absence as a junior judge in Kentucky. Judge Robb's illness from cancer from which he subsequently died, and a creation of a time of essence situation.

I can understand certainly that these things happen. But I happen to know Judge Gordon and I know he is a very fine individual, and obviously they thought well of him on the court of appeals, and requested him a number of times to come and sit on panels of three.

I am a little bit surprised that your committee did not get into that.

Judge TYLER. Well, as I said, we did not question Judge Bork. We accepted Judge Gordon's recollection, of course. I do not think—we got into it but what I tried to convey was that we did not think that because of the possibilities of what could happen, particularly with the untimely death of the senior judge on the panel and with this, one of the first of the cases of Judge Bork when he went on the bench, that in the totality of things that it weighed that much. Now perhaps we are wrong.

Senator HEFLIN. Well, I gather you did not talk to Judge Gordon either.

Judge TYLER. No, because I know Judge Gordon slightly, for example, and I am like you. I do not mean to say I am a friend of his or anything, but I remember at the Federal Judicial Center when I was on the board there, I think he came in and he is a fine person. We did not see any reason to question what he told us, as I understood it. It was just that we did not think that on balance this was serious, particularly since it happens once in a while in any event with the best of circumstances.

Senator HEFLIN. Well, that is a matter of record and I suppose an interpretation of the tenor of the charge of how you interpret it.

I also understand that the entirety of Judge Bork's non-judicial writings, both scholarly and informal, were collected and summarized and reviewed by the committee members. Did the committee have an outside group to summarize the material or did the committee do it itself?

Judge **Tyler**. Yes. The articles, they were circularized very early in the work. Our chairman at the time, my colleague Robert Fiske saw to it that the articles in toto were circularized.

Of course, a number of us have already seen those articles in other connections. I have no doubt that the committee familiarized themselves once again even if they had read them before, but to answer your question we did not go to any professors or anybody like that to go into them.

Senator **Heflin**. Well, did any of the individuals reviewing Judge Bork's writings raise any concerns that his views had fluctuated over the years?

Judge **Tyler**. What we started out with, Judge, was in July we kept getting information to the effect that his problem was inflexibility or rigidity. And we never got into this changing so much as your committee has in your last 10 days or so in your work; our focus was because of what we were hearing from time to time was quite the other way.

The question was: Was he too rigid? Did he have an a priori theory of an approach to particularly constitutional law problems, which he would try to take each case and fit into this somewhat inflexible formula or a priori approach?

It seems to me that your committee now has heard more on the other side, that there have been changes. Now, of course, we were all aware that he had apparently in the ensuing years recanted in some substantial part, at least, with respect to the Public Accommodations article of 1963, the Indiana Law Review on First Amendment Problems of 1961 and so on.

We were aware of that and, indeed, we asked him about that in our early interview, particularly, as I recall it. And more or less, what happened is what I recall his testimony was before your committee here in these important hearings.

Mr. **Fiske**. I think, Senator, there was one member of the committee also that raised the question of why Judge Bork had not expressed a recantation of those two views prior to the time that he was up for confirmation as Solicitor General.

Senator **Heflin**. Well, his writings do not reflect much change. It is, of course, his overall testimony at the committee hearings and the Solicitor Generalship hearings, the committee hearings of the confirmation process for the court of appeals and here. Well, that is just an observation that I make as to your review, and what you stated about the writings.

Judge **Tyler**. No, I understand what you are saying. It may well be that we did not air this as thoroughly as you already have in your deliberations and your hearings to date simply because of the start that we made on the other end. But I do not think that there is any doubt that people thought about this and perhaps were concerned about it.

It certainly was part of what we thought we should look at and did look at.

Senator **Heflin**. That is all.

The **Chairman**. Senator from Iowa, Senator Grassley.

Senator **Grassley**. Thank you, Mr. Chairman.

I note on page 2 of the ABA's letter to our committee, that the ABA had a law professor review Judge Bork's nonjudicial antitrust writings. Could you tell me who that professor was, what his or her background is, and their history with the ABA?

Judge **Tyler**. If I may defer, Senator Grassley, to my predecessor, that was started, as I recall, very early.

Mr. **Fiske**. Well, there were two reviews, Senator Grassley. All of Judge Bork's judicial opinions were reviewed by a group of professors at the University of Michigan Law School.

Senator **Grassley**. I read that in your letter as well.

Mr. **Fiske**. Yes.

Senator **Grassley**. I do not question that. But is not the professor mentioned in number five on page 2 still a different person?

Mr. **Fiske**. I think that may refer actually to one professor, I believe, at the University of Connecticut Law School that Judge Tyler spoke to.

Judge **Tyler**. I am sorry. That is my fault. That is true. There was a professor at the University of Connecticut Law School in West Hartford, Senator Grassley, who did do an analysis as described there.

Senator **Grassley**. Can you give me the name of that person, or can you supply it for the record?

Judge **Tyler**. Yes.

Senator **Grassley**. Okay. Give me a little bit about their background, their qualifications to review the Judge's writings, and their history with the ABA?

Judge **Tyler**. Wait a minute. Now wait a minute. I lost you on that. The qualifications of whom?

Senator **Grassley**. Of this law professor at the University of Connecticut Law School that did the reviewing of Judge Bork's antitrust writings.

Judge **Tyler**. This is a man named Leonard Orlin, who as far as I know never had any particular connection with the ABA, this committee at all. He has taught a great deal at both Connecticut Law School and at Yale Law School as a visitor in among other fields, antitrust law.

I happen to know him, and he asked me if we would mind if he submitted something, and he submitted this.

Senator **Grassley**. Has he published in that area, written books in that area?

Judge **Tyler**. Yes. I cannot give you the titles.

Senator **Grassley**. But he has published in that area?

Judge **Tyler**. Yes.

Senator **Grassley**. He has published books on antitrust?

Judge **Tyler**. Yes.

Senator **Grassley**. Okay.

The same letter states that three members of the ABA Committee interviewed Judge Bork. Is that correct?

Judge **Tyler**. Correct.

Senator **Grassley**. Concerning the fact that our committee spent 30 hours interviewing Judge Bork, how much time did the ABA Committee spend interviewing Judge Bork?

Judge **Tyler**. I would say approximately 6 hours, sir.

Senator **Grassley**. Okay. Did any one of those three that served on the ABA Committee end up being one of the four members who voted that Judge Bork was not well-qualified to serve on the Supreme Court.

Judge TYLER. At the time those interviews were conducted, we did not know whether there was going to be any minority, majority or any——

Senator GRASSLEY. I know that. I am asking after the fact. Did any of the three people that served on this committee end up voting against Judge Bork in the sense of being one of the four that voted that he should not receive the approval of the ABA?

Judge TYLER. I am sorry, but to answer that would start us down the road as to who voted how, which I am trying my best to avoid.

Senator GRASSLEY. I did not know that was any big secret. We read that in the paper, did we not?

Judge TYLER. You did, but I am trying to avoid that because of two things—not because of any personal preference, obviously, because it seems to me that once you do that, we go down the slippery road of getting into who did what and why, and I would like to avoid that because we are reporting as a——

Senator GRASSLEY. I thought that is what we were doing to Judge Bork here?

Judge TYLER. Fine, but he is the nominee. We were acting as the committee.

Senator GRASSLEY. Well, pardon me. I am not a lawyer, but it seems to me—at least the perception I have had as a nonlawyer member of this committee, and this is the fourth Supreme Court nominee I have had an opportunity to participate in—that we have put great weight on the ABA's opinion of Supreme Court nominees. At least, we have given great weight to it in our past deliberations.

So why should we not freely discuss who is for and who is against? That makes people responsible for their actions, if they serve a kind of a quasi-public function, which I think the ABA does in this particular instance.

Judge TYLER. No doubt of that, sir. But I am addressing a different problem. It seems to me that once you find out who votes how, then we become not a committee but just a group of people who will be questioned, well, how did you decide this and why did you say that. And that, it seems to me, in the long run does a disservice not only to our committee but as well to this committee.

Senator GRASSLEY. Has it always been that way?

Judge TYLER. I never know of any situation where I ever heard of the ABA Committee coming in and saying, "Well, you know, we voted this way and so and so voted this way and so on and so on." I never heard that being done.

Senator GRASSLEY. Well, maybe I am naive about how things ought to be done. But it would seem to me that you are serving a very public function in your review of these nominees. However, there is no sense in my spending my time on this issue. But, you do at least have my point of view to consider, not that you will give it a lot of weight.

The CHAIRMAN. Ten minutes, Senator. We are all under a 10-minute rule. I do not know how much time you have left.

Senator GRASSLEY. Okay. Let me go on then. You spent about 6 hours interviewing Judge Bork. I would like to know if you believe that considering the weight our committee gave to this—30 hours of interviewing—whether or not you consider 6 hours sufficient enough time?

Judge TYLER. Oh, yes, because it seems to us that in the totality of things that what the Senate Judiciary Committee does in time, it is infinitely important that you take all the time that you see fit. And, therefore, conversely, we have a role where I do not think it is really necessary for us to spend anywhere near as much time as you might choose to take with a nominee to the Supreme Court of the United States.

It just seems to work out that way. It happens that in the past, I believe that, of course—I remember the nomination of Justice Stevens because I happened to be in the Justice Department, and it was one of my jobs to deal with the Judiciary Committee, and the questioning, say, of Justice Stevens was very, very brief.

I happened to know because the Chairman of the ABA Committee told me, because I was dealing with him to get the views of the ABA committee and, as I recall, their interview was briefer than that of the Senate committee. So there always seems to be that kind of proportion no matter who the candidate is.

The CHAIRMAN. Senator——

Senator GRASSLEY. I thought I had 2 minutes left.

The CHAIRMAN. You do. Go ahead. Let us finish this up tonight.

Senator GRASSLEY. In the letter where it states that some had negative perceptions of his political or ideological views. Was this just a generalized feeling, or were there specific cases or instances cited that led to this conclusion?

Judge TYLER. I can tell you my recollection is the people whom I interviewed frequently would say no more. They would say to me, "Now listen, you know me. I cannot possibly criticize this man's great experience, his integrity, his high intellectual ability and his performance as a lawyer and a judge, but somehow for reasons I cannot articulate even to you, I am opposed to him on what I will call philosophical or ideological grounds." That happened quite a bit

Now we felt that we should report these things because we cannot exercise thought control or word control or speech used by our interviewees. You see, we do not, as I said earlier, Senator, send out a questionnaire or a check list for people to answer.

So we are left with a non-statistician, non-pollster type set of interviews.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey.

Senator HUMPHREY. Well, Judge Tyler, that was lick number six, I guess, wasn't it? Senator Simpson, how many times has it been mentioned now, either in print or orally, that certain of the people whose opinions you solicited found the nominee unfit for political reasons.

You say that is not a legitimate grounds. Could you not just say, instead of saying that some of the respondents objected on political grounds, that some of the respondents objected for reasons which the ABA does not consider legitimate to this evaluation? Couldn't you say that, and won't you do that in the future?

Judge TYLER. No, I am not sure that is really quite appropriate because we were trying——

Senator HUMPHREY. Well, I think it is.

Judge TYLER. It does not——

Senator HUMPHREY. You say, on page one——

Judge TYLER. Oh, I know what we say, but let me answer you.

Senator HUMPHREY [continuing]. That matters, that philosophy, political or theological philosophy are not consequential to this investigation, and yet all through this letter—bang, bang, bang—we get citations of people or groups who said they objected on grounds of political ideology. That is like saying you will never——

Judge TYLER. Let me answer that, if I may, sir.

Senator HUMPHREY. Yes.

Judge TYLER. Two things to say. First, I accept that we were a little pompous in the leadoff. But we had a choice to make, and we made it the way we made it because to withhold this information, after interviewing all these people, it seems to me would be a disservice to your committee.

But it has to be recognized that—speaking for myself at least—one can easily filter out the views of a witness who said that this nominee had great professional qualifications, but then added his doubts because of unspecified ideological considerations.

So though we interviewed people, there was a filtering process, and I assume every member of the committee, whether he voted well-qualified, not opposed, or not qualified, had to filter, and I hope one of the big filters we used was not to make our decision on the basis of philosophy or ideology.

But to withhold this information from this committee seemed to us to be not the way to go. So I hope you will understand that though we report it, that does not mean that I or Mr. Fiske, or some person who voted in whatever way he or she voted, should have fallen for the ideological reasons to the extent they were even expressed.

Senator HUMPHREY. I really cannot buy that, fully. It may well be——

Judge TYLER. Well, perhaps we were wrong, but I am trying to explain to you what our reasoning was in reporting this.

Senator HUMPHREY. Fine. I am just saying that it may well have been unintentional, but you give legitimacy to something that you claim is illegitimate, namely, objection on political grounds.

Judge TYLER. Well, as I said earlier in response to another question along these lines, it is of course true that I certainly do not know how, and I doubt anybody else does, to exactly put calipers on a man's brain or a woman's brain, when she is saying that "I'm not voting on ideological grounds," and maybe inside, he or she is. I cannot answer that.

But I am trying to say that we struggled with this and tried to do our best.

Senator HUMPHREY. I would ask you to—we will just have to differ on that, it may well be you did not intend to—but I——

Judge TYLER. Well, maybe there might not be as much difference between the majority at least, and perhaps even the minority as you think.

Senator HUMPHREY. I am simply making the point that you give the appearance of legitimacy by constantly alluding to it, when you claim at the outset that——

Judge **Tyler**. Well, then, we made the wrong decision.

Senator **Humphrey**. If I may be permitted to finish; that you give legitimacy to something, repeatedly, by your technique, which, at the outset, you pompously claim is illegitimate.

Judge **Tyler**. Well, I have already accepted that—and I have had it said about my judicial writings, by the way, by losers, that I was a pompous writer. I accept that.

Senator **Humphrey**. All right. Would you kindly turn to page 6 of your letter. Do you have a copy there? At the very top paragraph you list a number of organizations that provided submissions to your committee on Judge Bork, and you say "The committee carefully reviewed and considered written submissions obtained from"—and then you list the groups.

Now what does that mean, "obtained from"? Did you solicit these or did these just come out——

Judge **Tyler**. Well, that was a question, sir, that came up earlier. They really, on the whole, were not solicited. It is true that several people called me, or wrote me, and said would you mind—I am sending you—whatever.

Senator **Humphrey**. Yes.

Judge **Tyler**. I did not solicit those, but I did not cut them off.

Senator **Humphrey**. Yes.

Judge **Tyler**. And somebody in my office made copies of all these and circularized them to every committee member.

Mr. **Fiske**. Senator, I think the important point here—and it was raised before—is that this paragraph on page 6 lists all of the submissions that were sent to the committee, and in the interests of completeness we listed all the ones that we received.

We did not go out and solicit these, but if someone sent them in, they were circulated to the committee and reviewed.

Senator **Humphrey**. I see. Well, other groups in the future will know better than to wait to be asked, but I just cannot help but remark that all of these organizations, with the exception of the administration—all of the private organizations you list—the ACLU, the Women's Bar Association, the AFL-CIO Executive Council, People For The American Way—all of these groups can be—there is Nader's outfit there, too. Public Citizen Litigation Group. That is Nader's outfit.

All of these groups that you list can be counted upon, reliably, to oppose almost any important effort on the part of this administration.

So, again, we get the impression that your selectivity is not that objective, at least——

Judge **Tyler**. We are not being selective, Senator. That is the point. We are not so naive as to be able to form a judgment as to who is saying what and why.

I leave that up to the good sense and the integrity of each member, and I am sure Mr. Fiske does.

Senator **Humphrey**. Okay. Last question, last question. Can you believe it?

If you were back in your judicial chambers and a case came to your court in which an organization of which you were a member, are a member, submitted a brief on behalf of one of the two parties to the case, would you hear that case?

Judge TYLER. Of course not, but that is not our problem here.

Senator HUMPHREY. Well, let me continue. I am glad to hear that. I was not sure quite what the canons of ethics are in that kind of a situation.

But you have got three members of your selection committee who belong to one or more of these organizations, which organizations had submitted briefs in opposition to the nomination and your members are sitting there as judges of Robert Bork.

All of these organizations to which three of your members belong have submitted briefs in opposition to Judge Bork.

Judge TYLER. Well, you heard what I had to say, and you do not know how I voted. You might be surprised. But in any case you are right: there are certain people, almost inevitably, who may be members of various groups, who take a position contrary to what a member of this committee thinks is correct, even though he has been a member of that organization.

Senator HUMPHREY. Well, you make the point that we do not know——

Judge TYLER. We are not in an adversary relationship here. We are not performing a judicial function.

Senator HUMPHREY. Well, we are looking for credibility and high ethics, and we do not know how these particular members of the selection committee voted.

But my point is they should never have been in the position to vote in the first place, because they are members of organizations which submitted briefs in opposition to the very man they were judging. See my point?

Judge TYLER. I see your point but I do not accept it.

Senator HUMPHREY. Well, it is the very same thing as if a case came into your court under those circumstances.

Judge TYLER. No, no. I said earlier, that this committee, through its chairman or any group, has nothing to do with the appointments to this committee at all. I had nothing to do with the choice of the members of this committee.

I assume that lawyers being what we are, a number of our members are members of various groups which may or may not have an interest in a particular candidate.

I assume further that many of us—and I assure you I am one of those because I am one of the older ponies in the legal paddock of this country and I know a lot of lawyers. I have been a lot of things, and I get to know a lot of lawyers.

I have worked on reports on those gentlemen to be nominated. I cannot believe that it is a disservice to the ABA or the Senate Judiciary Committee to have a fellow like me working on it.

But it is true that I know lawyers and I like them. But some lawyers, in my view, should not be United States District Judges just because I like them.

The same thing is true with political activity. Lawyers like to get involved in politics. They support people including maybe some members of your committee.

As long as they act with integrity and approach to the problems of this committee without showing their political biases, such as they may be, I do not see that as a problem, because we are not judicial officers in our function.

Senator HUMPHREY. The ABA is taken very seriously, perhaps too seriously by the public, and the Senate, in its evaluation, especially in view of the fact of the matter that I have just reviewed.

Now you do not agree with that, but I do. I think when you are taken that seriously, you have an extra high responsibility to adhere to high standards of ethical conduct.

Judge TYLER. Right. I would agree with that, but remember that we are 15 working, private lawyers.

Senator HUMPHREY. That does not matter.

Judge TYLER. I know, Senator, but we cannot be unrealistic about what we are. I have admitted to this committee, my committee—they all knew it anyhow—my prejudices or biases as best I can. Others have done the same. But we cannot divorce ourselves and be 15 people who live a neutral, sheltered, irrational, nonworldly lives.

Senator HUMPHREY. Well, I am saying that members of the selection committee who are also members of private organizations which publicly oppose the nominee ought to recuse themselves in that circumstance.

Or at least at the very least to announcepublicly that they have what I would regard as a conflict of interest. They might not regard it as such, but that ought to be at least divulged, the membership, if that is the case, in organizations that are opposed to the very man whose qualifications they are judging.

Do you see my point?

Judge TYLER. I see your point. I am not convinced that it carries to its ultimate conclusion as you advocate, with all respect.

The CHAIRMAN. Is the Senator finished?

Senator HUMPHREY. Yes. If I am out of time, I am, I guess.

The CHAIRMAN. Yes. You have been, as we all have been.

Judge TYLER. It is my fault with my long answers.

The CHAIRMAN. Let me enter in the record two things. One is the American Bar Association report dated August the 5th, 1986 addressed to the Chairman Thurmond on Justice Scalia, and the one on Justice Rehnquist.

[Information referred to above follows:]

American Bar Association

CHAIRMAN
and Member at Large
Robert B. Fiske Jr.
1 Chase Manhattan Plaza
New York NY 10005

FIRST CIRCUIT
Ralph I. Lancaster Jr.
One Monument Square
Portland ME 04101

SECOND CIRCUIT
Robert MacCrate
125 Broad Street
30th Floor
New York, NY 10004

THIRD CIRCUIT
Jerome J. Shestack
Suite 3800
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard Jr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus OH 43215

SEVENTH CIRCUIT
John M. Hall
One IBM Plaza
Suite 4300
Chicago IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
John Gavin
P.O. Box 22140
120 N. Naches Avenue
Yakima, WA 98907

Samuel L. Williams
17th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
8 Commerce Street
P.O. Box 668
Montgomery AL 36101

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL CIRCUIT
John D. Lane
1666 K Street NW
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
[illegible]
[illegible]
Fallbrook, CA 92028

STAFF DIRECTOR
[illegible]
750 N. Lake Shore Drive
Chicago IL 60611
312/988-5000

STAFF ASSISTANT
[illegible]
750 N. Lake Shore Drive
Chicago [illegible] 60611
[illegible]

August 5, 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion with respect to the nomination of the Honorable Antonin Scalia to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament and integrity. Consistent with its long standing tradition the Committee's investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity.

The Committee investigation included the following:

(1) Members of the Committee interviewed the Justices of the Supreme Court of the United States and a large number of other federal and state judges throughout the United States.

(2) Committee members interviewed a cross section of practicing lawyers across the country.

(3) Committee members interviewed a number of deans and faculty members of law schools throughout the country.

(4) A team comprised of the Dean and professors of a prominent law school and a separate team of practicing attorneys reviewed Judge Scalia's opinions. They were also reviewed by three summer law students working in the office of one of the Committee members.

(5) Two members of the Committee interviewed Judge Scalia.

Professional Background

The Committee's investigation revealed that Judge Scalia's career has included service as a practicing lawyer, a law school professor, a lawyer in government service, and a federal circuit judge. He received a B.A. degree with highest honors from Georgetown University in 1957, and graduated from Harvard Law School with an LL.B., *magna cum laude*, in 1960. He was admitted to the Bar of the State of Ohio in 1962.

After serving a year as a Sheldon Fellow of Harvard University, Judge Scalia practiced law in Cleveland, Ohio, as an associate of the firm of Jones, Day, Cockley & Reavis. He then served as an associate professor at the University of Virginia Law School from 1967 to 1970, and as a professor from 1970 to 1974 (on leave 1971 to 1974).

He was General Counsel, Office of Telecommunications Policy, Executive Office of the President, from January 1971 to September 1972, at which time he was appointed Chairman of the Administrative Conference of the United States, in Washington, D.C., until August 1974. He was an Assistant Attorney General, Office of Legal Counsel, in the Department of Justice in Washington from August 1974 to January 1977. He was a visiting professor at Georgetown University Law Center from January to June 1977, and later in 1977 he became a Professor at the University of Chicago Law School. He served there until 1982 (on leave 1980 - 1981 as visiting professor, Stanford Law School). In 1982 he was nominated by the President to the United States Court of Appeals for the District of Columbia Circuit, and in that year his nomination was confirmed by the Senate.

Through interviews of those who worked with Judge Scalia during the various stages of his professional career, the Committee has concluded that he has demonstrated outstanding competence, the highest integrity, and excellent judicial temperament.

Interviews with Judges

The Committee interviewed more than 340 persons during its investigation, over 200 of whom are federal and state judges, including the Justices of the Supreme Court of the United States. Most of those who know him spoke enthusiastically of his keen intellect, his careful and thoughtful analysis of legal problems, his excellent writing ability and his congeniality and sense of humor. Almost all who know him, including those who disagree with him philosophically and politically, expressed admiration for his abilities, and for his integrity and judicial temperament. He is described as "learned and studious," "always well prepared," "very congenial," "a person of excellent character and scholarship" and "careful and thoughtful and not inflexible."

Many judges who do not personally know Judge Scalia have a favorable impression of him based on his reputation and their reading of opinions he has written. The judicial community was strong in its praise of Judge Scalia's qualifications.

Interviews with Lawyers

The Committee has also contacted about 80 practicing lawyers throughout the United States. We interviewed a cross section of the legal community, including women and minority lawyers. Having practiced law in Cleveland, taught in law schools in Virginia, the District of Columbia, Chicago and in California, having served as a federal judge and in government service in the District of Columbia, and having chaired the Administrative Conference of the United States, and the Administrative Law Section of the American Bar Association, Judge Scalia has been brought into contact with and worked with lawyers across the country. From the standpoint of his intellect and competence, temperament, and integrity he is very well regarded by almost all of those who know him. Lawyers have commented that "he is always well prepared, he asks the right questions and writes exceedingly well"; that arguing before Judge Scalia is "an exhilarating experience"; that he has "strong intellectual capabilities"; that he is "very fair"; and that he has "a warm and friendly personality." There were isolated expressions of concern, or objections, about ~~a lack~~ of openmindedness or the reasoning in his opinions.

Interviews with Deans and Professors of Law

The Committee interviewed more than 60 deans and faculty members (including specialists in constitutional law and scholars of the Supreme Court) across the country, many of whom know Judge Scalia personally. He is uniformly praised by those who know him for his ability, writing skills and keen intellect. Again, there were isolated expressions of concern about his strong conservatism or a lack of openmindedness.

Survey of Judge Scalia's Opinions

Judge Scalia's opinions were examined for the Committee by the Dean and a group of law school professors at the University of Michigan and by a separate group of practicing attorneys. Both of these groups expressed high praise for his intellectual capacity, his clarity of expression, his ability to analyze complex legal issues, and his organization and articulation of ideas. He is regarded as a splendid legal writer. Three summer law students who also reviewed his opinions expressed concern about his openmindedness.

Interview with Judge Scalia

Judge Scalia was interviewed by two members of the Committee and the discussion covered the adverse comments and objections that had been received by Committee members. This discussion, against the background of our investigation, satisfied our Committee as to any question that had been raised. Judge Scalia impressed the interviewers as a highly intelligent, articulate and congenial person. He appears to be a very hard worker, and highly enthusiastic about his role in making the legal system work properly.

Based on the Committee's investigation, it has unanimously found that Judge Scalia has all of the professional qualifications required of an Associate Justice of the Supreme Court of the United States. Those who know and have worked with Judge Scalia describe him as intelligent, analytical, thorough and hard working. His diversity of experience as a practicing lawyer, a lawyer in government service, an academician and a judge provides a valuable background for service on the Supreme Court.

Furthermore, the Committee's investigation reveals that Judge Scalia's integrity is beyond reproach, and he is well regarded for his judicial temperament. Judge Scalia is among the best available for appointment to the Supreme Court, and he is entitled to the Committee's highest evaluation of a nominee to the Court because of the high standards he meets in terms of professional competence, judicial temperament and integrity. Accordingly, we unanimously find him "Well Qualified".

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will review our report at the conclusion of the hearings, and notify you if any circumstances have developed that require modification of our views.

Respectfully submitted,

Robert B Fiske

ROBERT B. FISKE, JR.
Chairman

101

American Bar Association

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Robert MacCrate
125 Broad Street
39th Floor
New York, NY 10004

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4200
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
John Gavin
P.O. Box 2048
100 N. Naches Avenue
Yakima, WA 98907

Samuel L. Williams
17th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
8 Commerce Street
P.O. Box 668
Montgomery, AL 36101

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL CIRCUIT
John D. Lane
1666 K Street, NW
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2006 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 N. Lake Shore Drive
Chicago, IL 60611
312/988-[illegible]

STAFF ASSISTANT
Diana Livingston
750 N. Lake Shore Drive
Chicago, IL 60611
312/988-5701

July 29, 1986

Honorable Strom Thurmond
  Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion regarding the nomination of the Honorable William Hubbs Rehnquist of Washington, D.C. to be Chief Justice of the United States.

The Committee's investigation of Justice Rehnquist covered his professional competence, judicial temperament and integrity. Because the nominee is a sitting Justice of the Supreme Court and is being nominated for the position of Chief Justice, we were particularly interested in his administrative abilities, leadership qualities and collegiality. Consistent with its long standing tradition, the Committee has not concerned itself with Justice Rehnquist's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament and integrity.

The Committee's investigation of Justice Rehnquist included the following inquiries:

(1) Members of the Committee interviewed all of the Associate Justices of the Supreme Court and a large number of other federal and state judges throughout the United States.

(2) Committee members interviewed a cross section of practicing lawyers throughout the United States.

STANDING COMMITTEE ON FEDERAL JUDICIARY
750 NORTH LAKE SHORE DRIVE • CHICAGO, ILLINOIS 60611 • TELEPHONE (312) 988-5000

(3) Committee members interviewed many deans and facult members of law schools throughout the country, including a numbe of constitutional and Supreme Court scholars.

(4) A group of practicing attorneys reviewed approximately 200 of the written opinions authored by Justice Rehnquist.

(5) Three members of the Committee interviewed Justice Rehnquist.

Professional Background

Justice Rehnquist's career has included service as a practicing lawyer, an Assistant Attorney General with the United States Department of Justice, and as an Associate Justice of the United States Supreme Court. He received A.B. and M.A. degrees from Stanford University in 1948, an M.A. degree from Harvard University in 1949, and an LL.B. from Stanford Law School in 195 He was a distinguished student in the law school, ranking first his class. His military experience includes service as a non-commissioned officer in the U.S. Army Air Force during the perio from 1943 to 1946.

Justice Rehnquist served as a law clerk to Associate Justice Robert H. Jackson of the Supreme Court of the United States from 1952 to 1953. He then commenced the private practice of law in Phoenix, Arizona. From 1953 to 1955 he was an associate in the firm of Evans, Kitchel & Jencks. During 1956 and 1957 he was a partner in the firm of Ragan & Rehnquist and from 1957 to 1960 he was a partner in the firm of Cunningham, Carson & Messenger. In 1960 he formed with James Powers the Phoenix firm of Powers & Rehnquist, where he practiced until 1969. From 1969 to 1971 he was an Assistant Attorney General, Office of Legal Counsel, United States Department of Justice in Washington, D.C. In 1971 he was nominated by President Nixon as Associate Justice of the United States Supreme Court, and this nomination was confirmed by the Senate in that year.

Through interviews of those who worked with Justice Rehnquist during various stages of his professional career, both prior and subsequent to his appointment to the United States Supreme Court, the Committee learned that he has demonstrated a high degree of competence and integrity, and has displayed excellent judicial temperament.

Interviews with Judges

In its investigation, the Committee interviewed over 300 persons, including all of the current Associate Justices of the Supreme Court, and more than 180 federal and state judges. Members of the judiciary who know him describe him as "a true scholar, collegial, genial and low key," "unbelievably brilliant," "a very capable individual in every respect". Generally, judges across the country who have become familiar with Justice Rehnquist have expressed admiration and respect for him as an able, hard working, conscientious individual. On the whole, the judicial community was high in its praise of Justice Rehnquist's abilities and qualifications. Of great importance, he enjoys the respect and esteem of his colleagues on the Court.

Interviews with Lawyers

The Committee contacted approximately 65 practicing lawyers throughout the United States. We interviewed a cross section of the legal community, including women and minority lawyers. Many who know Justice Rehnquist, including many who disagree with him politically and philosophically, speak of warm admiration for him and describe him as "very talented," "a bright and able man," "always well prepared," and one who "brings out the best in people and will facilitate the work of the Court."

Interviews with Deans and Professors of Law

The Committee spoke to more than 50 deans and faculty members of a number of law schools throughout the country. Some of these have known Justice Rehnquist personally. We found that he has visited and delivered speeches at several of the law schools. Many of these individuals spoke highly of his writing and analytical ability. The vast majority had strong praise for his professional qualifications.

Survey of Justice Rehnquist's Opinions

Approximately 200 of Justice Rehnquist's opinions were examined for the Committee by a group of practicing attorneys. From that review it can be concluded that the Justice's legal analysis and writing ability are of the highest quality.

Interview with Justice Rehnquist

Justice Rehnquist was interviewed by three members o the Committee. The Committee members have found him to be extremely intelligent, articulate, friendly, and committed to fair and proper administration of justice. He has demonstrate outstanding qualities as a jurist, and is approaching the posi of Chief Justice with enthusiasm, determination and dedication

Based on the investigation described above, the Commi tee unanimously has found that Justice Rehnquist meets the high standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the Committee' highest evaluation of the nominees to the Supreme Court -- Well Qualified.

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will review our repo at the conclusion of the hearings, and notify you if any circum stances have developed that may require modification of our vie

Respectfully submitted,

Robert B Fiske

ROBERT B. FISKE, JR.
Chairman

The CHAIRMAN. The reason why I do that is to point out that similar language is used in both those, coming to different conclusions, but similar language.

For example. "Almost all who know him, including those who disagree with him philosophically and politically expressed admiration for his ability."

"There are isolated expressions of concern and objection about lack of openmindedness in the reasoning of opinions."

"There were isolated expressions of concern about strong conservatism and the lack of openmindedness."

"People who disagree with him politically and philosophically, although speak warmly about him", et cetera.

So the conclusions reached may be different, but the format of the reports are very similar, but I will ask, without objection they be entered in the record with the ABA report, although it will be a second time it will probably be in the record.

And also that I think we should put into the record, the ABA—if we have not already—the "Standing Committee on the Federal Judiciary, How it Works," and particularly, the page referring to—I believe it is page 4. "In investigating temperament, the committee looks to the prospective nominee's compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice among other factors," quote, unquote.

And that whole page I ask be put in the record.

[Information follows:]

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary,**
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101

Samuel L. Williams
35th Floor
355 South Grand Avenue
Los Angeles, CA 90071

TENTH CIRCUIT
James A. Clark
Suite 1100
303 East 17th Avenue
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101

DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006

FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006

BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABA/NET ABA 461

September 21, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Robert H. Bork

Dear Mr. Chairman:

This letter is in response to the invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion with respect to the nomination of the Honorable Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Bork is based upon its investigation of his professional competence, judicial temperament and integrity. Consistent with its long-standing tradition, the Committee's investigation did not cover Judge Bork's political or ideological philosophy except to the extent that such matters might bear on judicial temperament or integrity.

The Committee investigation included the following:

(1) Members of the Committee interviewed Justices of the Supreme Court of the United States, colleagues of Judge Bork on the District of Columbia Circuit and a large number of other federal and state judges, including female and minority members of the bench throughout the United States.

(2) Committee members interviewed practicing lawyers across the country, including female and minority members of the bar. Also interviewed were former law clerks of Judge Bork and colleagues from the period of his tenure as Solicitor General and Acting Attorney General.

(3) Committee members interviewed a number of deans and faculty members of law schools throughout the country, including those who were associated with Judge Bork at Yale Law School.

(4) A team comprised of the Dean and professors of a prominent law school reviewed and reported on Judge Bork's opinions and those opinions were also reviewed by a number of practicing lawyers who reported directly to the Committee.

(5) Judge Bork's non-judicial antitrust writings were reviewed for the Committee by a law professor expert in the antitrust area and the entirety of Judge Bork's non-judicial writings, both scholarly and informal, were collected, summarized and reviewed by the Committee members. Newspaper and periodical publications on Judge Bork throughout his career were also collected, summarized and reviewed, as were scholarly critiques of Judge Bork's writings both on and off the bench.

(6) The Committee reviewed submissions to or obtained by it regarding Judge Bork from a number of groups or institutions which have taken a position respecting his fitness as a candidate for the Supreme Court (see _infra_, page 06).

(7) Three members of the Committee interviewed Judge Bork at length on two separate occasions.

Professional Background

The Committee's investigation revealed that Judge Bork's career has included service as a practicing lawyer, a law school professor, a lawyer in government service and a federal circuit judge. He received a B.A. degree from the University of Chicago in June 1948 and graduated from the University of Chicago Law School with a J.D. in 1953. He served in the U.S. Marine Corps Reserve from 1945 to 1946 and from 1950 to 1952, receiving an Honorable Discharge as a First Lieutenant in 1952. In 1954 he was admitted to the Bar of the State of Illinois.

After serving as a research associate at the University of Chicago Law School for a year, Judge Bork practiced law first in New York at Willkie, Farr & Gallagher and then in Chicago at Kirkland & Ellis, where he was elected partner.

In 1962 Judge Bork accepted a position as associate professor at Yale Law School, becoming a full professor in 1965. In 1973, he was appointed Solicitor General of the United States, becoming Acting Attorney General for a brief period beginning in 1973 and then continuing as Solicitor General until January 1977.

In 1977, he returned to Yale Law School as Chancellor Kent Professor of Law and was named Alexander M. Bickel Professor of Public Law in 1979.

In 1981 he returned as a partner to Kirkland & Ellis in Washington, D.C. He left that firm in February 1982 after his confirmation as Judge of the United States Court of Appeals for the District of Columbia Circuit.

Interviews with Judges

The Committee obtained the views of some 77 federal Court of Appeals judges, 60 federal district judges and 35 state court judges regarding Judge Bork's qualifications. The Committee also obtained the views of five of the United States Supreme Court Justices. Virtually all of the judges interviewed praised Judge Bork's intellectual and professional attainments, expressing admiration for his keen intellect, experience, and vigorous analytical abilities. A clear majority of the judges rated the nominee highly qualified for the Supreme Court.* Typical of the comments of this group were such as: "On every basis, temperament, background, and experience as a jurist, he is outstanding," "outstanding choice from every aspect" and "professional qualifications are Grade A." A smaller group rated him only qualified, because of expressed concerns about his judicial temperament, e.g., compassion, sensitivity to concerns of women and minority groups, and possible lack of open-mindedness. A few considered the nominee disqualified despite recognition of his high professional capabilities and intellect because of their perception that his political and ideological views disqualified him. Typical comments of this group were "would split the country on many critical issues," "does not have a well-rounded view of the critical constitutional issues" and "my concern is that he would vote to reverse important precedent on First Amendment, church-state, and abortion issues." A very small group opposed the nomination without specifying grounds for their opposition.

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* It should be noted that in summarizing interviews, the "terms of art" used by our Committee for rating Supreme Court nominees have not been used, simply because most of the interviewees did not speak in precisely those terms. Moreover, a number of interviewees concluded that the nominee was in their words "not qualified" solely because of political views or ideology, which are not considered by the Committee.

Interviews with Deans and Professors of Law

Seventy-nine law school academics, deans and professors, were interviewed. Virtually all expressed laudatory views concerning his intellectual capacity. Most rated the nominee as highly qualified or qualified. Of these, the smaller group that deemed him only qualified expressed concerns about either his philosophical or political views or his judicial temperament, e g., compassion, open-mindedness and sensitivity to concerns of women and minority groups. The remainder, opposed to his nomination, cited concerns about his judicial temperament or ideology, or were opposed on unspecified grounds.

Interviews with Lawyers

Over 150 practicing lawyers were interviewed. Virtually no one questioned Judge Bork's intellect or professional attainments. Those persons who considered Bork either highly qualified or qualified made laudatory comments concerning his integrity, scholarship and professional competence. A minority of the lawyers considered his integrity and intellectual attainments sufficient to view Bork as qualified but concluded that he should not be confirmed because of their concerns about his perceived ideological or political views. Another group objected to his nomination because of concerns about his legal analysis or his regard for precedents. Still another smaller group objected to his nomination without expresing specific grounds.

Eleven of Bork's former law clerks were interviewed, all of whom regarded him as highly qualified. They specifically characterized him as extremely hard working, attentive and courteous during oral argument and as having "awesome" intellectual and analytical abilities.

Finally, a number of present or former lawyers in the office of Solicitor General who served under the candidate when he was head of that office was interviewed. All characterized the nominee as flexible, "willing to listen to arguments" and ready to have any one of them express their views in meetings in the Department of Justice where Judge Bork had taken different positions. They also praised the willingness of Bork as Solicitor General to change his position, his high intellectual capacity and his ability to analyze complicated legal problems.

Survey of Judge Bork's Opinions

Judge Bork's opinions were examined for organization, scholarship and clarity for the Committee by the Dean and a group of ten professors at the University of Michigan Law School. The report of the Dean, which disclaimed consideration of political or ideological views,* summarized the professors' views. The dominant view was very positive; the report stated that all but one of the professors, based on the opinions they read, concluded that Judge Bork "readily crossed the threshold of judicial skills." His opinions were characterized as generally well reasoned, balanced in judgment, clearly written, fair in treatment of the arguments of losing parties and dissenters and reflective of impressive technical judicial ability. Some of the professors said they were impressed by his open-mindedness and his readiness to be guided by the law, not his personal philosophy, in his decisions. While praising him for an extraordinary care for detail, a few of the readers said that he occasionally carried this quality to extremes and spent extraordinary time and attention on relatively minor points. Several of the professors, while sharing a positive assessment of his opinions overall, expressed concern that he sometimes reached out to decide issues beyond what the facts of the particular case called for, and that he sometimes displayed an unwillingness to see the full complexity of an opposing position. One professor also found a tendency to substitute political arguments for legal scholarship in several of Judge Bork's opinions. That professor felt these problems were of sufficient magnitude to compel withholding a positive evaluation.

The opinions were also reviewed for the Committee by a group of six lawyers at the firm of Davis Polk & Wardwell. These attorneys concluded that Judge Bork's opinions, in the vast majority of cases, were well written, demonstrating a clarity of expression, keen intellectual capacity, and a fair treatment of opposing arguments and views. Particular mention was made of his ability to organize opinions, and to analyze and clearly articulate his position on complex subject matters and legal issues.

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* The Dean's report did not purport to represent the views of the University or to pass upon the question of whether Judge Bork should be confirmed.

Submissions to Committee on Judge Bork from other Groups

The Committee carefully reviewed and considered written submissions obtained from, among other institutions and groups, the American Civil Liberties Union, the National Women's Bar Association, the Administration, the past Chairmen of the ABA Section of Antitrust Law, the National Women's Law Center, the AFL-CIO Executive Council, The Lawyers Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, The Public Citizen Litigation Group, and People for the American Way. Apart from the Administration and the ABA Antitrust Section Chairmen, each of these groups expressed opposition to the nomination of Judge Bork on a variety of grounds. These views were thoroughly aired by the Committee insofar as they related to the scope of the Committee's investigation.

Conclusion

The Committee commenced its investigations of Judge Bork on July 2 and completed its work on September 8, 1987. This report was prepared after the latter date.

The majority of the Committee concluded that Judge Bork is Well Qualified for appointment to the Supreme Court of the United States, reasoning that his varied experience in virtually all facets of the legal profession, his service as a ranking public official and his high intellect place him among the best available for appointment to the Court. A minority, not ready to express this high degree of qualification, voted Not Opposed. A larger minority concluded that the candidate is Not Qualified, not because of doubts as to his professional competence and integrity,* but because of its concerns as to his judicial temperament, e. g., his compassion, open mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting Constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment.

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* One member of this group, however, also expressed reservations concerning what that member considers to have been inconsistent and possibly misleading recollections of the chronology of the "Saturday Night Massacre" expressed by the nominee in earlier testimony before the Senate Judiciary Committee and to members of our Committee in 1982 and recently.

This report is being filed prior to our appearance at the Senate Judiciary Committee's hearing. We will review our report at the conclusion of the hearings, and notify you if any circumstances have developed that require modification of our views.

Respectfully submitted,

Harold R. Tyler, Jr.

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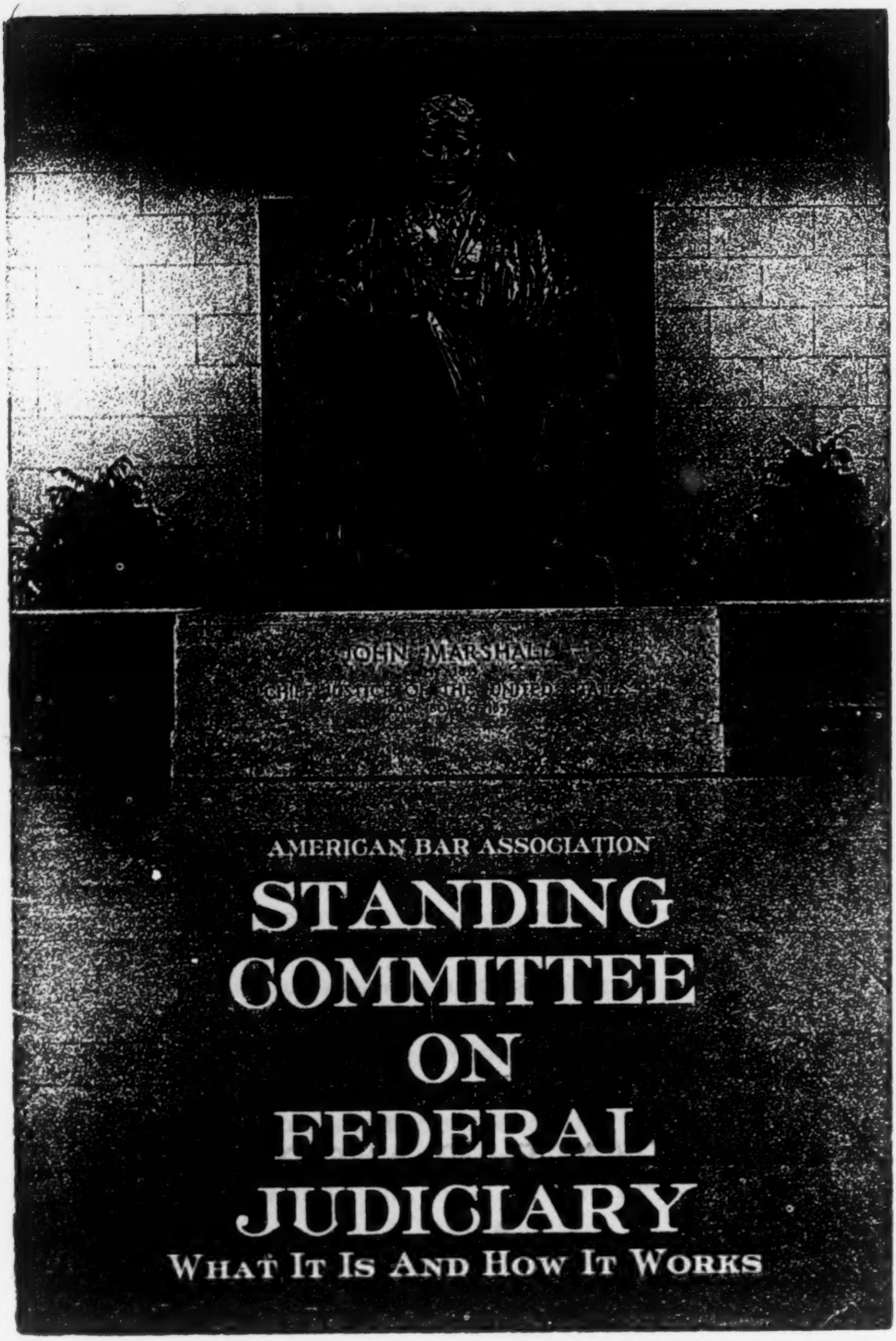
JOHN MARSHALL
CHIEF JUSTICE OF THE UNITED STATES

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON FEDERAL JUDICIARY

WHAT IT IS AND HOW IT WORKS

STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works

AMERICAN BAR ASSOCIATION

THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works

The Standing Committee on Federal Judiciary of the American Bar Association has been consulted by every President with respect to almost every federal judicial appointment since 1952. Moreover, the U.S. Senate through the Senate Judiciary Committee has requested the opinion of the Committee on every federal judicial nomination since 1948.

The Committee never proposes candidates for the federal judiciary, believing that to do so might compromise its evaluative function. Rather, it considers prospective nominees referred to it by the Attorney General. Further, the Committee restricts its review primarily to issues bearing on professional qualifications. Other entities such as nominating commissions, the President, and the Senate may consider other aspects of the prospective nominee's qualifications.

The Committee evaluates the qualifications of persons considered for appointment to the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Court of International Trade. For historical and practical reasons, the Committee's procedures for appointments to the Courts of Appeals, the District Courts, and the other lower federal courts differ from those for Supreme Court nominations and therefore are dealt with separately below.

The Committee consists of fourteen members—two members from the Ninth Circuit, one member from each of the other eleven federal judicial circuits and one member-at-large. The members are appointed for staggered three-year terms by the President of the ABA. No member serves more than two terms. As a condition of appointment to the Committee, each member agrees not to seek or accept federal judicial appointment while on the Committee and for at least one year thereafter.

I. APPOINTMENTS TO THE DISTRICT COURTS, THE COURTS OF APPEALS AND THE OTHER LOWER FEDERAL COURTS

There are approximately forty vacancies on the Courts of Appeals, the District Courts and the other lower federal courts each year. Though not highly publicized outside the legal profession, the Committee's evaluation of prospective nominees for these courts provides its regular work load.

A. Evaluation Criteria

The Committee's evaluation of prospective nominees to these courts is directed primarily to professional qualifications—competence, integrity and judicial temperament.

In assessing a prospective nominee's professional qualifications, the Committee considers circumstances and factors which range so widely that it would be difficult to provide a comprehensive catalogue. Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law and professional experience.

As to experience, the Committee believes that ordinarily a prospective appointee to the federal bench should have been admitted to the bar for at least twelve years. Substantial trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate courts and the trial courts. Additional experience which is similar to court trial work—such as appearing before or serving on administrative agencies or arbitration boards, teaching trial advocacy or other clinical law school courses, etc.—is considered in evaluating a prospective nominee's trial experience qualifications. In exceptional cases, when there is significant evidence of distinguished accomplishment in the field of law, an individual with limited trial experience may be found qualified.

In evaluating experience, the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited.

The Committee believes that political activity and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law.

In investigating temperament, the Committee looks to the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors. The prospective nominee's character, integrity and general reputation in the legal community are investigated, as are his or her industry and diligence. Community and professional contributions are considered relevant. Finally, the prospective nominee's health and age are considered. The Committee believes that the public is entitled to the appointment to the federal judiciary of persons who are able to render long and vigorous service. The Committee does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.

The Committee feels that the same fundamental criteria—professional competence, integrity and temperament—should be applied as a starting point for evaluating prospective nominees for the appellate courts and for the trial courts. However, the Committee also believes that an appellate judge should have an unusual degree of overall excellence that would provide an inspiration and an example to trial judges. Without demeaning the scholarly qualities necessary for the trial courts, the Committee nonetheless looks for an especially high degree of scholarship and academic talent in prospective nominees for the appellate courts. The abilities to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases are matters of great concern in the evaluation of prospective nominees for the appellate courts.

Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom), the Committee may place somewhat less emphasis on the importance of extensive trial experience as a qualification for the appellate courts. This same contrast in day-to-day experience may also cause the Committee to evaluate temperament for the appellate courts in slightly different terms.

B. Ratings

The Committee rates prospective nominees on the following scale:

To be rated *Exceptionally Well Qualified,* the prospective nominee must stand at the top of the legal professsion in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament. In addition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made important community and professional contributions in order to merit the sparingly awarded "Exceptionally Well Qualified" evaluation.

To be *Well Qualified*, the prospective nominee must have the Committee's strong affirmative endorsement and be regarded as one of the best available for the vacancy from the standpoint of competence, integrity and temperament.

The evaluation of *Qualified* indicates that it appears the prospective nominee would be able to perform satisfactorily as a federal judge with respect to competence, integrity and temperament.

When a prospective nominee is found *Not Qualified*, it means that the Committee's investigation indicates that the prospective nominee is not adequate from the standpoint of competence, integrity or temperament.

C. The Investigation

After a judicial vacancy occurs and prior to any nomination to that vacancy, the Chairman of the Committee receives one or more names of prospective nominees for evaluation from the office of the Attorney General. The investigation of the prospective nominee is usually assigned to the circuit member of the Committee in the judicial circuit in which the judicial vacancy exists, although it may be conducted by another member, a former member or a former chairman. (The individual making the investigation is hereinafter referred to as the "circuit member.")

To each prospective nominee the Attorney General's office sends a comprehensive ABA-designed questionnaire (called a Personal Data Questionnaire) that seeks wide-ranging information related to fitness for judicial service. The responses are sent to the U.S. Department of Justice, the ABA Committee Chairman and the circuit member. Receipt of this document is usually the starting point for the investigation. The circuit member makes extensive use of it in his or her investigation. The prompt, thorough and accurate preparation of a response to the Personal Data Questionnaire by the prospective nominee is extremely important to the investigation.

The circuit member examines the available legal writing of the prospective nominee and conducts a large number of confidential interviews with judges, lawyers, law professors and others who are in a position to evaluate the prospective nominee's competence, integrity and temperament. The circuit member interviews a representative sample of the profession in the community, including attorneys from different sized offices, attorneys who practice in different fields of law, law professors and deans, judges of different courts, government attorneys, legal services and public interest attorneys, women attorneys and attorneys who are members of various minority groups. Spokespersons of professional organizations including those representing women and minorities are also contacted. In addition, representatives of groups involved in the selection or evaluation of prospective nominees for the federal judiciary are interviewed.

Sometimes a clear pattern emerges early in the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations as to competence may be received, or questions may arise as to integrity or temperament. In those instances, the circuit member pursues the leads and problems as necessary to reach a fair and accurate assessment of the prospective nominee. This may involve a large number of interviews and other investigations, for example, the examination of trial transcripts and other relevant records.

A meeting of the circuit member, and in appropriate cases one or more other members of the Committee, is held with the prospective nominee. During the interview the circuit member raises any adverse information discovered during the investigation and discusses it with the prospective nominee. The prospective nominee is given a full opportunity to explain the matter and to provide any additional information bearing on it. The circuit member also discusses with the prospective nominee his or her qualifications for a judgeship. The circuit member may need to conduct additional interviews in order to complete this stage of the investigation.

The circuit member then prepares a written informal report to the Chairman containing a description of the prospective nominee's background, summaries of all interviews conducted including the interview with the prospective nominee, an evaluation of the prospective nominee's qualifications and a recommended rating. After receiving the report and discussing it with the circuit member, the Chairman makes an informal report to the Attorney General's office. While protecting the confidentiality of those interviewed, the Chairman passes on the substance of the report and gives a tentative evaluation—indicating that, if a formal report is requested, the prospective nominee will probably be found "Exceptionally Well Qualified," "Well Qualified," "Qualified" or "Not Qualified."

If the office of the Attorney General requests the Committee to prepare a formal or final report, the circuit member completes the investigation as necessary. The circuit member then sends a written formal report to all members of the Committee together with the response to the Personal Data Questionnaire and any other materials thought relevant by the circuit member. After studying the formal report and its enclosures, each member sends a vote to the Chairman. If questions are raised, the Committee may discuss the prospective nominee by telephone conference call or at a meeting.

The Chairman confidentially reports the Committee's rating to the office of the Attorney General. If the Committee has been unanimous in its rating, the report so states. Otherwise the report reflects the rating given by a majority or substantial majority of the Committee. If questions concerning the health of the prospective nominee have been raised during the investigation, the Committee's rating may be conditioned upon the prospective nominee's undergoing an independent medical examination.

If the President nominates the prospective nominee, a public hearing is held by the Senate Judiciary Committee as the beginning of the confirmation process. At the request of the Senate Judiciary Committee, the ABA Committee submits its rating for the public record and at the same time notifies the nominee of its rating. Until this stage of the process, the Committee does not make its rating public unless authorized to do so by the Attorney General.

If the Committee has found a prospective nominee "Not Qualified," the question arises whether the President will nominate the prospective nominee. Only in rare instances—less than 1 percent of the nominations—has a President decided to nominate a person found "Not Qualified" by the Committee. In those circumstances, the Committee will oppose the nomination in such ways as may be appropriate under the circumstances.

II. APPOINTMENTS TO THE SUPREME COURT

It is extremely important to the Committee's effective evaluation of prospective Supreme Court nominees that it be given sufficient time to evaluate them in depth. The procedures described below have been followed recently and have allowed the Committee to afford significant assistance to the President in selecting a well-qualified appointee.

A. Evaluation Criteria and Ratings

The Committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications—their professional competence, judicial temperament and integrity. While the same factors considered with respect to the lower federal courts are relevant to an appointment to the Supreme Court, the Committee's investigation is based on the premise that the

Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice, it is not enough that one be a fine person or a good lawyer.

The Committee's highest evaluation of a prospective nominee to the Supreme Court — *Well Qualified* — is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment to the Supreme Court.

The second category consists of those persons who are *Not Opposed* by the Committee. Such a person, while minimally qualified, is not among the best available for the appointment and is not endorsed by the Committee.

The third category consists of those who are *Not Qualified* with respect to professional qualifications for appointment to the Supreme Court.

B. The Investigation

The Committee's procedures in evaluating a prospective nominee are described below.

1. Members of the Committee across the nation interview those likely to have information regarding the professional competence, integrity and temperament of the person under consideration. Those interviewed include federal and state court judges and their law clerks, a cross-section of practicing lawyers, government lawyers, legal services and public interest lawyers, law school professors and deans, officials of professional organizations and spokespersons representing women, minorities, the indigent, ethnic groups and other interest groups.

2. A team of law school professors examines the legal writing (opinions, briefs and articles) of the prospective nominee. Customarily, this task is accomplished by dividing the material into subject matter categories and having it read by professors who are expert in those areas. The law school teams are usually under the direction of a senior professor who reports the findings to the Committee. This aspect of the investigation, like the investigation as a whole, is intended to weigh professional competence, not to assess the ideology of the prospective nominee.

3. A team of practicing lawyers (which may include former Supreme Court law clerks) also examines the legal writings of the

prospective nominee as a valuable cross-check on the academic evaluation.

4. Committee members discuss the prospective nominee with a number of the most highly respected law school deans and with the Chief Judges of the Circuits and other judges.

The results of the foregoing inquiries, together with the results of comparable investigations of other prospective nominees, are reported to the full Committee for discussion and evaluation. These sessions are lengthy and searching and frequently result in additional investigation.

The Committee's ratings of prospective nominees are reported in confidence to the Attorney General. Further evaluation and reports may be provided as the President approaches a choice.

Once the President has made a nomination, the Senate Judiciary Committee holds confirmation hearings. At the Senate Judiciary Committee's hearings, a spokesperson for the ABA Committee appears and makes an extensive report on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources. The Committee may submit a follow-up report to the Senate Judiciary Committee or to the Senate as a whole if new information is developed during the course of the hearing which warrants comment or evaluation by the ABA Committee.

III. CONFIDENTIALITY

A persistent concern of the Committee in connection with its investigation of prospective nominees is confidentiality. This is particularly true with respect to Supreme Court appointments. A Supreme Court nomination is an event of substantial national interest, and from the moment the vacancy occurs, many of the nation's most able reporters are assigned to it.

The Committee seeks information on a confidential basis. No member of the Committee discloses the name of anyone under investigation except to those being interviewed or assisting in the investigation, who are asked to keep the information confidential. It is, however, inevitable that an extensive investigation will result in public identification of the prospective nominee. Such public knowledge is usually not harmful and may be beneficial in some circumstances in that it encourages investigation into the background and personal history of the prospective nominee by other persons. It is in the public interest to avoid an appointment without full information about the appointee.

Public disclosure of the Committee's evaluation prior to its report to the Senate Judiciary Committee after the nomination has been made is more serious. The nomination process is a Presidential function, and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination. Moreover, prospective nominees not ultimately nominated should be spared any embarrassment resulting from the Committee's evaluations.

In investigations involving both the Supreme Court and the other federal courts, it is essential that the Committee assure its sources that their identities will not be revealed outside of the Committee. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information.

IV. CONCLUSION

Through the cooperation of the executive and legislative branches of our government, the ABA's Standing Committee on Federal Judiciary has been able to play a useful role in helping to promote a better federal judiciary. The Committee constantly seeks to learn from its experiences and to refine and improve its standards and procedures. To this end, the Committee welcomes suggestions from members of the bar and the public.

The CHAIRMAN. And I will say in conclusion of tonight's hearing—if I can steal a phrase from my friend from Wyoming. Go ahead.

Senator THURMOND. Judge, there seems to be a widespread misconception that the ABA speaks for most of the practicing lawyers in the United States.

You understand I am a member of the ABA and I am proud of it, and I have been a member I guess for—would you tell the committee what percentage of the nation's attorneys belong to the ABA.

Judge TYLER. If I understand you, your question is does this committee speak for every one of the members of the ABA. Is that your question?

Senator THURMOND. Yes. I asked does ABA speak for most of the practicing lawyers in the United States. How many members of the ABA are there and how many lawyers are there in the United States?

Judge TYLER. I do not think that all the lawyers we have in the United States are members of the ABA. As I understand it, there are now some 300,000 ABA members. I will get it to you from somebody over here who knows.

There are 650,000 lawyers now in the United States of America.

Senator THURMOND. And how many ABA members?

Judge TYLER. 330,000 of those men and women are members of the ABA.

Senator THURMOND. That is about half of them, then, isn't it?

Judge TYLER. I must say I am surprised, but this lady, this gentleman know, and these are good figures, as I understand.

Senator THURMOND. Thank you.

The CHAIRMAN. If I can finish. A member of the committee, during the Scalia hearing said: "The fact of the matter is, you, the members of the standing committee and the federal judiciary have a particular responsibility. You do it voluntarily. You take time from your business and your office, and it costs you money, and what you are doing you are doing because of the love of the law, love of the bar association, love of integrity of justice in this country. It is a loss for you and your business to do it. You deserve commendation", et cetera.

To paraphrase my friend from Wyoming, this is one of those things when you like the outcome, the ABA is great, it is wonderful. When you disagree with the outcome, the ABA made a mistake.

The fact of the matter is that I do not know how anyone—I think we are splitting hairs a bit here—when the rules and the ratings here, we all know what they are and what they are not.

How anyone could say, that in investigating temperament, the committee looks to a prospective nominee's compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice, among other factors?

It seems to me to be what it always has been. This is a process whereby people look, all the members look in and determine whether or not they believe, in a general, broad way, this person should or should not be on the Court, and everybody brings to that committee certain biases, but all of you are honorable women and men, who in fact, based on everything I know—and I do not know many of the members—are people—and based on my question to you, you do not doubt that they arrived at the table with an open mind, without any political agenda, but in fact trying to determine what judicial temperament meant.

That seemed a pretty broad cut. And so I understand full well and I respect those who are for all that has been said about those who voted against.

The opposite could be said about those who voted for. Those who voted for, what organizations do they belong to? Were they Republicans? Did they ever contribute to the President? Did they support anybody? I do not know the answer to any of those questions.

But the fact of the matter is everybody understands what is going on here, and when you like the result, obviously, those who oppose Judge Bork, they think the four who voted against and the five who voted not—whatever the middle category is—were brilliant people.

And those who are for think those ten who voted for—And one last point I make. Judge, you and I should disclose—I have talked to you I think on three occasions, maybe four—because I, quote, "warned you," that members both opposed and for the nominee would want very much to go into detail about the minority views here—for different reasons—but they both wanted to go in great detail.

You said something to me then, I believe, which you did not say tonight. When I was pressing you to have someone—and for all I know, one of you two were in the minority. I do not know for a fact who was in the majority and minority. You have never told me that. I know what I have read in the paper.

I have not spoken to anybody on the committee, so I do not know for certain. But when I said bring someone who is in the minority to speak, you made the following point to me, I believe.

You said that once that is done, then from that point on, the notion that anyone who votes in the minority, in any future nomination, will know full well that they are going to be the target of the affection of those who are for or against the nominee.

And that is when I backed off my insistence that the minority of you be represented, or at least for you to assure me, if you were a minority—and I am not asking you how you voted—but if you were a minority, for you to say so, so there was a minority review represented.

I have been at least temporarily persuaded, that for us to insist on the names of all the people and how they voted, and to have a minority view represented, is something we should tread very lightly on as a committee, and I think it is something the ranking member and I should take up.

He leaned over to me a moment ago, and said that he generally thought that maybe we should not go into this. It is something we are going to have to decide as a committee.

The Senator says he does not think they have to disclose their votes, but that is a question we are going to have to decide here, and then if we to seek that, we will call you back, and you will have to decide then whether or not you will disclose.

But I have a half a dozen questions that I would like to submit in writing for you.

Senator THURMOND. I would like to say this, though.

The CHAIRMAN. Yes?

Senator THURMOND. Although I do not think you have to disclose your votes—I can see a situation could arise there, it would be uncomfortable—yet your rules say you do not consider ideology. If you do not consider it, then it seems to me your members of this committee ought to follow the rules, because you evidently do not follow the rules when you discuss ideology.

I know you have tried to explain it, but I do not think you have explained it away on that point.

The CHAIRMAN. If you would like to——

Senator THURMOND. If you do not consider ideology, then do not bring it up, and tell your members they cannot consider it.

Judge TYLER. Well, you see, that was my point in telling you and the others that I welcomed Senator Metzenbaum's letter, to remind ourselves whether we were going to vote one way, or another, that we should not consider this.

At the same time, though, we cannot control what people we interview say in response to our questions. So bear in mind that just because we reported that people talked about ideology does not necessarily mean that we were overborne sufficiently to go off and rule only on ideology. I do not think that follows. Just keep that in mind, sir, if you would.

The CHAIRMAN. I ask unanimous consent that the submission on the minutes of a meeting with Judge Bork—I am not sure if it is in the record, but if they are not, it should be put in the record—given to us by the ABA. Only about 10 pages, Senator.

[Material follows:]

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE
1800 M Street, N.W.
Washington, D.C. 20036-5886
(202) 331-2210

We asked him about the firing of Archibald Cox. He explained, as he had in Bill Coleman's interview five years ago, that he first learned of the situation on that famous Saturday afternoon, when the Attorney General asked to see him. He went into the Attorney General's Office and Elliot L. Richardson and William D. Ruckelshaus were talking about whether they could fire Cox. Judge Bork said that he did not immediately understand what they were talking about and they explained that the President had ordered Richardson to fire Cox because of his efforts to obtain the tapes. He said that Richardson and Ruckelhaus had agreed between them that neither of them could fire Cox because of personal commitments that they had made to Congress. They asked Judge Bork whether he felt he could fire Cox. After reflecting on it in the fairly short period of time in which he had to make this decision, he concluded that he could, but said that he would then resign. He said that both Richardson and Ruckelhaus urged him not to do that - that the Department needed continuity. Judge Bork then explained his reasoning process to us in a little more detail. He said that the statutory line of succession ended with him and that if he were to resign then the President would appoint a new Attorney General. He expected that that would have been Fred Buzhardt of the White House staff. Judge Bork said that he was positive that if that had happened, the entire top level of the Justice Department would have resigned and the place would have been in a shambles. Also it was by no means clear to him that Buzhardt would have been committed to the continuance of the investigation. Accordingly, Judge Bork decided the best thing for him do do was to carry out the President's order, but then make clear to the Watergate special prosecution staff that he would fully support their investigation. He said that after firing Cox, he met with Phil Lacovara and

Hank Ruth, his two deputies, to insure them of his support and the next day met with the entire staff to reiterate that support. He told us that he also appeared in a press conference in which he stated publicly that he would support the efforts by the Watergate special prosecution staff to press for the tapes.

Saturday Night Massacre

With respect to the legality of the President's order to fire Cox, Judge Bork reiterated that he had felt at the time that the President did have the authority. He said that in the emotion of those tension packed few hours, he had not focused on the regulation itself. He said that in the discussions with Richardson and Ruckleshaus, the subject of the regulation never was mentioned by anyone. He said that he had revoked the regulation approximately 36 hours later and felt at the time that he, upon the President's order, clearly had authority to do that. He commented that it simply could not be that a regulation once promulgated by the attorney general could not subsequently be revoked by him. (In this respect he obviously disagreed with the conclusion by Judge Gezell.)

We called his attention to the exerpt from Elliot Richardson's book which said that the President had issued an order disbanding the Watergate special prosecutor's staff and directing the FBI to seal off access by the staff to their offices.

Judge Bork said that to the best of his recollection there were no such orders. Judge Bork said that not only was there no order disbanding this staff but that he, Judge Bork, had gone to great lengths to assure that none of the staff resigned. He said that he had met with Henry Peterson on Sunday, just previous to meeting with Lacovara and Ruth. He told Peterson that they had to press forward with the investigation; that Bork's professional career depended on the investigation going forward with full force; and expressed his concern to Peterson that Lacovara and Ruth might resign. He said that he then met with Laccvara and Ruth, urged them to stay and urged them to go ahead with the investigation as they had been before. He said that he thought the subject of the tapes had come up and that he said "yes". He recalls Lacovara expressing concern that the White House might not let the investigation go on and that he (Bork) replied that the investigation had to go on. He said that on Tuesday he went with Peterson to meet the heads of staff--a group of approximately 12 to 14 people. He and Peterson assured them that no one would fire them and that they owed it to themselves to go on with the investigation. (Judge Bork said that at one point Haig had asked him to fire certain individuals on the Watergate special prosecutor's staff and that he had refused.) He believes he was asked the question as to whether they would be authorized to go for the tapes and he said yes.

Judge Bork said that on Wednesday he had a press conference at which he was asked whether he would go for the tapes and he said yes. He said that later that day he received a call from Haig, who said "the President wants to know what the firing of Cox was all about".

With respect to the other comment in Richardson's book--that there was an order blocking the staff from their offices--Judge Bork said that he recollects that the order did not do that but rather prevented the staff from removing documents from the offices. He said that on Saturday night while he was at the White House, Haig had expressed concern that members of this staff might take documents out of the office and had asked Bork whether he (Haig) could call Clarence Kelly and direct the FBI to prevent any such removal. Judge Bork said that he said yes to that request. We asked him why he thought such an order was necessary and he said that it was a highly emotional, tension-packed situation and no one was quite sure what anyone would do. He said that the order only stayed into effect until the following day.

With respect to the question of how quickly he sought a new prosecutor, he said that there was a delay in taking that step. He explained that he had no staff--all of Richardson's and Ruckelshaus' staff had resigned--and that it took several days for him to evolve a program as to what he would do next.

By reference to the Nina Totenberg program, Judge Bork was also asked whether he had told Bill Coleman in 1982 that after the Cox firing he "immediately began searching for another special prosecutor". Judge Bork said that he did not recall saying that; that he did not think he would have said it because several days had elapsed before he began such a search; and that if he had said it, he must have meant it in the sense of within several days rather than on Saturday or Sunday.

The CHAIRMAN. The Senator is worried about how much it is going to cost.

And a letter to Senator Metzenbaum from Judge Tyler, and a letter to Judge Tyler from Senator Metzenbaum.

[Information follows:]

87 SEP -8 PM 12:27

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

September 4, 1987

Honorable Howard M. Metzenbaum
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Metzenbaum:

In response to your letter of August 26, permit me to report that the position of this Committee for many years has been and continues to be essentially as set forth in the last two paragraphs of page 1 of your letter and running over to the top of page 2.

In reviewing the history of the reports to the Senate Judiciary Committee in connection with nominees for the Supreme Court of the United States, it seems clear that in order to best serve the interests of the Senate, this committee has sought, as it should, to focus its reports and findings on the professional qualifications, judicial temperament and integrity of the candidates. Thus, this committee should not address the nominees' political, ideological or philosophical views on specific issues, except to the extent that such matters might bear on the aforesaid questions of judicial temperament or integrity.

Further, it would seem to follow that this committee should not specifically recommend to the Senate how it should vote on confirmation of a given nominee. Parenthetically, I recognize that a report of the committee finding a nominee Well Qualified might be construed by some as equivalent to a firm recommendation to the Senate. Yet, upon sober analysis, since the committee expressly disclaims any opinion upon issues which we assume that the Senate can and does consider, such a broad construction of any finding we might make would not be justified.

I trust this answers the questions posed in your letter of August 26. If not, please let me know.

Very truly yours,

Harold R. Tyler, Jr.

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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EDDIE CORREIA, CHIEF COUNSEL AND STAFF DIRECTOR
KENNETH R. STARLING, MINORITY CHIEF COUNSEL

August 26, 1987

Harold R. Tyler, Jr.
Chairman, Standing Committee on Federal Judiciary
  of the American Bar Association
Patterson, Belknap, Webb and Tyler
30 Rockefeller Plaza
New York, New York 10112

Dear Mr. Tyler:

The Senate Committee on the Judiciary will soon consider the nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court. Because of the importance of the nomination, I believe it is useful to clarify the role of the American Bar Association in reviewing this nomination and in submitting a report to the Committee.

Traditionally, the ABA's Standing Committee on Federal Judiciary has submitted a report on the qualifications of a judicial nominee to the Committee. For example, in the case of the nomination of William Rehnquist to be Chief Justice, the ABA sent a letter dated July 29, 1986, to the Committee and represenatives of the ABA testified before the Committee.

The July 29 letter contains this statement: "Consistent with its long standing tradition, the Committee has not concerned itself with Justice Rehnquist's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament and integrity." The identical statement was included in the August 5, 1986, letter to the Committee regarding the nomination of Judge Antonin Scalia to be Associate Justice. Both these letters concluded with the statement that the nominees met the ABA standards for "professional competence, judicial temperament and integrity" and were well qualified.

In testifying before the Committee regarding the nomination of Judge Scalia, the representative of the ABA stated: "I think we make it very clear in the second paragraph of our letter that the committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament, and integrity. We go on to say consistent with its long standing tradition, the committee's investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity." (Hearings before the Judiciary Committee regarding the nomination of Judge Scalia, August 5-6, 1987, pp. 125-6.)

These statements indicate that the ABA Committee's report and findings in the case of judicial nominees, including nominees to the Supreme Court, are limited to issues of professional qualifications, judicial temperament and integrity. The ABA's findings necessarily do not include all issues possibly relevant to confirmation. Thus, the committee does not and could not take a position on the ultimate issue of whether the nominee should be confirmed. Nevertheless, the representative of the American Bar Association in testifying about the nomination of Justice Rehnquist stated that the Committee recommended that the nominee be confirmed. Senator Thurmond asked: "Do you gentlemen of the Committee recommend him to the Senate Judiciary Committee to be approved by this Committee and the Senate?" Mr. Lafitte on behalf of the ABA replied: "That is our recommendation, sir." (See Hearings regarding the nomination of Justice Rehnquist, July 29-August 1, 1987, p. 129.)

Please clarify the position of the American Bar Association as to whether its report and findings are limited to qualifications, judicial temperament and integrity or whether they encompass other issues that may be relevant to confirmation, including the views the nominee holds on basic questions of Constitutional interpretation. Also, please state whether the American Bar Association nevertheless takes a position on the ultimate issue of confirmation.

I would appreciate your reply at your earliest convenience. Thank you for your assistance and cooperation.

Sincerely,

Howard M. Metzenbaum
United States Senator

EXCERPT FROM WILLIAM COLEMAN'S MEMORANDUM ON ROBERT BORK FOR THE 1982 A.B.A. REPORT

Since Mr. Bork had played a significant part in the Saturday Night Massacre and both Elliot Richardson and Bill Ruckelshaus had talked about it in their interviews, I asked him about the Saturday Night Massacre.

He said that he came into his office at the Department of Justice on that Saturday to work or a brief in a completely unrelated matter. He knew that there had been attempts by Archibald Cox to get certain material from the White House but he had no idea that the resulting dispute had reached an intensity that might lead to the firing of Archibald Cox on the order of President Nixon. He said he saw a press conference on TV in which Mr. Cox had laid out the issues and problems. At the end of the press conference, Mr. Richardson asked Mr. Bork to come in to see him. Mr. Richardson told Mr. Bork for the first time that Mr. Cox was insisting that President Nixon turn over certain papers and that President Nixon was resisting. It had reached the point where President Nixon had indicated that he was going to ask Elliot Richardson, as Attorney General, to fire Mr. Cox if Mr. Cox persisted in his demand. Mr. Bork said that Mr. Richardson indicated he would have to resign since he felt that during his confirmation as Attorney General he had made a commitment not to discharge Mr. Cox except for good cause. Mr. Bork said Bill Ruckelshaus, who was present, indicated that he would have to resign rather than fire Mr. Cox as he had made a similar commitment to the Senate. After thinking about the problem, Mr. Bork concluded that President Nixon had the constitutional right to fire any person in the Executive Branch of the government [1] and that he (Bork) had not made any special commitment to the Senate. Mr. Bork said that there was some discussion about whether the commitment to the Senate made by Mr. Richardson and Mr. Ruckelshaus had anything to do with their decision to resign and that they did not agree with Mr. Bork's decision to fire Mr. Cox, but they agreed that if Mr. Bork believed that he should carry out President Nixon's order, there would at least be some continuity for the Department of Justice. Mr. Bork said that he would fire Mr. Cox if ordered to do so by the President, but that he would then immediately resign as he did not wish to give the public the impression that he was carrying out the President's order only because he wished to keep his job. He said that Mr. Richardson and Mr. Ruckelshaus said that once Mr. Bork carried out the President's order, it would be better for the Department if Mr. Bork stayed on. Otherwise, President Nixon could put in as Acting Attorney General someone who could squelch the whole investigation. Mr. Bork said that, after the firing, he saw President Nixon and the President said that he did not wish to have the investigation stopped, that all he wanted was a fair investigation and that if there had to be prosecution, he wanted a fair one, not a "persecution." Mr. Bork said that after the firing of Mr. Cox he met with the Assistant Attorney General of the Criminal Division and instructed him to carry on the investigation. He also said that he immediately started the search for a new Special Prosecutor.

Mr. Bork did remind me that his actions were challenged in litigation by Elizabeth Holtzman and some other members of the House Judiciary Committee. Judge Gesell held that Mr. Cox was improperly fired. He said that the Judge stated that the regulations adopted by Mr. Richardson were binding on the Department so long as they were still outstanding, that Mr. Bork should first have revoked the regulations and then he could have fired Mr. Cox. But since he fired Mr. Cox first and thereafter revoked the regulations, Mr. Bork violated the regulations (since the regulations provided that such removal could be only for cause and there was no cause). Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973). On appeal to the D.C. Circuit, it was held that the matter was moot and therefore no decision was rendered by the Circuit Court.

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[1] Mr. Bork pointed out that Alexander Bickel, in an article in The New Republic, November 3, 1973, pp. 13-14, agreed that President Nixon had the constitutional right to fire Mr. Cox.

The CHAIRMAN. And on an unrelated subject—not an unrelated subject. Unrelated to those two matters, the text of a telegram from the Honorable Herbert Brownell, former Attorney General of the United States, to me, dated September 20, 1987, requesting that he have an opportunity to have his statement in support of the nominee submitted to the record. That will be done.

[Submissions of Mr. Brownell follow:]

TEXT OF A TELEGRAM FROM THE HONORABLE HERBERT BROWNELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES, TO SENATOR JOSEPH BIDEN

September 20, 1987

Senator Joseph Biden
Chairman
Senate Judiciary Committee
Washington, D.C.

I have requested the opportunity to testify for Judge Bork and am scheduled to appear before your Committee on Monday, September 21st, along with other former Attorneys General. Unfortunately, I must be in Geneva, Switzerland, on that date on private legal business, and am arranging to have my written statement submitted to you and the Committee. I will appreciate it if you would have the statement read and filed with the record of the Committee's confirmation hearings.

Herbert Brownell

STATEMENT BY
THE HONORABLE HERBERT BROWNELL
FORMER ATTORNEY GENERAL OF THE UNITED STATES
IN SUPPORT OF THE NOMINATION OF
JUDGE ROBERT BORK
TO BE AN ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES

I appreciate the opportunity to testify before the Senate Judiciary Committee in favor of the confirmation of the appointment of Judge Bork as Associate Justice of the United States Supreme Court.

Judge Bork, in my opinion, is highly qualified to hold the position for which he has been nominated by President Reagan. He possesses in full measure the high standards of personal integrity and character, of judicial temperament, and of broad professional, legal and judicial competence. These essential qualifications appear to be conceded by all--both proponents and opponents of confirmation.

The sole objection to Judge Bork's confirmation, so far as I am aware, is to his ideology.

While I was Attorney General under President Eisenhower, four persons were nominated to the Supreme Court by the President on my recommendation, among others. They were confirmed after favorable vote by this Committee. They were: Earl Warren, John Marshall Harlan, William Brennan, and Charles Whittaker.

Members of this Committee will readily recognize that these persons represented great diversity of ideology. President Eisenhower believed, and acted upon the belief, that the Court's membership should represent diverse ideological points of view. In order to maintain public confidence in the Court--an unelected body--it is of great importance to have diverse points of view represented. If the Senate should confirm only nominees with an ideology that conforms to the Senate's prevailing ideology, it would be a signal that the Senate wanted the Court to decide Constitutional issues, not on an independent, judicial basis, but on a political, ideological basis.

Such action by the Senate, carried to a logical conclusion, would in my opinion violate the separation of powers doctrine imbedded in the Constitution. Your predecessors on this Committee led the Nation in rejecting the "Court packing" plan of yesteryear which was aimed at requiring ideological conformity on the Court. The Committee should not now do indirectly what it then refused to do directly.

Since Judge Bork meets the basic qualifications of Court membership--character, judicial temperament, and legal and judicial skills and experience--I urge this Committee to act favorably on his nomination.

Herbert Brownell

The CHAIRMAN. Gentlemen, it is not a happy task you have. You do it, as I understand, without remuneration. You do it because you are devoted to the law. Sometimes I have liked what you have done in the past—you, in an editorial sense—sometimes I have disagreed with it. We will all just have to make our own judgments, and with all due respect to the ABA, which I am a member, I do weigh its considerations. As a matter of fact, if I understand it, you do not formally recommend how we vote.

You do not say, "To the best of my knowledge, we recommend you vote for or against," no matter what it is. You say just what you say: well-qualified, no opinion, or not qualified, and, "It's up to you folks to decide how you're going to vote."

That is how I view it, that is how we have viewed it for a longtime. We appreciate the testimony and thank goodness, this hearing is adjourned until tomorrow morning.

[Whereupon, at 10:54 p.m., the hearing was adjourned, subject to the call of the chair.]